

(2005) 07 CAL CK 0018

In the Calcutta High Court

Case No : AST No. 135 of 2005 and W.P. No. 8027 (W) of 2005

Rabindra Nath Mahata

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 07-07-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 16, 226
Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 — Section 4, 4(1), 4(4)
West Bengal Board of Secondary Education Act, 1963 — Section 27, 45
West Bengal Recruitment and Leave of Teachers in Primary Schools Rules, 1991 — Rule 8

Citation : (2005) 3 CHN 337 : (2005) 5 CTC 161

Hon'ble Judges : S.K. Gupta, J;Prabir Kumar Samanta, J;Ganguly, J;Dilip Kumar Seth, J;Aloke Chakrabarti, J

Bench : Full Bench

Advocate : Ashoke Maity, G.S. Dey, Rudranil Dey and S.K. Bhaumick, for the Appellant; Rabilal Moitra, Government Pleader and Tapabrata Chakraborty, T.P. Halder, Gautam Ray and Keshab Debnath, for the Respondent

Judgement

Aloke Chakrabarti, J.—This writ petition was filed by the petitioner praying for a mandamus directing the respondents to allow him to participate in selection process initiated by the school for recruitment and selection of Clerk-cum-Typist. When writ petition was considered by the learned Single Judge by order dated January 31, 2005, contentions of the respective parties and the subject-matter involved in the writ petition were considered. Notice was taken of the submission of the petitioner that in view of the decision of the Supreme Court dated February 12, 2002 in *Abu Taker v. Abdul Wahab and Ors.* (Civil Appeal No. 1203 of 2001) and the decision of this Court by another learned Single Judge in *Sanjoy Kr. Roy Vs. State and Others*, , the petitioner had a right to offer his candidature in the selection process in question provided he possessed the requisite qualifications prescribed for the post.

2. As the learned Single Judge considering the present writ petition expressed his

disagreement with the view taken by the other learned Single Judge in the case of Sanjay Kumar Ray (supra) and was of the view that Special Bench decision in the case of Debasis Dutta v. State of West Bengal 1998(2) CLJ 1, still holds good and no law was laid down by the Supreme Court in the case of Abu Taker (supra) that a person will be entitled to offer his candidature in any recruitment process even though his name is not sponsored by the Employment Exchange for the said purpose, when relevant rules make such exercise a mandatory requirement and in view of the above opinion as the learned Judge was not in agreement with the other view for getting the question decided by a larger Bench, a direction was given to place the file before the Hon"ble Chief Justice recording the question involved as follows:

"The question is : whether the Supreme Court decision dated February 12th, 2002 given in Abu Taker v. Abdul Wahab and Ors. (Civil Appeal No. 1203 of 2001) has in any manner overruled the Special Bench decision of this Court in Debasis Dutta v. State of West Bengal and Ors., reported at 1998(2) CLJ 1, and whether as a result a person whose name is not sponsored by the Employment Exchange has a right of any nature to participate, as a candidate, in a selection process initiated by a school governed by the 1969 Management Rules (framed under the West Bengal Board of Secondary Education Act, 1963) for recruiting and selecting a person for appointment as a member of the non-teaching staff."

3. The same learned Judge also referred to another writ petition being W.P. No. 214 (W) of 2005 on 1st February, 2005 to a larger Bench wherein by order dated February 3, 2005 the then Hon"ble Acting Chief Justice was pleased to constitute this Full Bench as a larger Bench to consider and decide the said question. Several other matters involving same question were referred to larger Bench and hence these matters were placed before the present Bench for a decision. Affidavit-in-opposition has been filed in the present writ petition and the petitioner agreed to proceed with the final hearing without filing any affidavit-in-reply. All the matters were heard together by this Bench in presence of and as agreed to by the respective learned Advocates for the respective parties.

4. On behalf of the petitioners main argument was advanced by Mr. Ashoke Kumar Maity, Mr. Sumit Kumar Panja and Mr. Gouri Shankar Dey and on behalf of the respondents argument was advanced by Mr. Rabilal Moitra, learned Government Pleader.

5. In support of the contentions of the petitioners and for arguing on the scope of the two relevant judgments, the judgment in the case of Debasis Dutta v. State of West Bengal decided by a three-member Special Bench of this Court and reported in 1998(2) CLJ 1 and the judgment of the Apex Court in the case of Abu Taker v. Abdul Wahab (supra) were placed in substantial detail.

6. On the said question as to whether candidates not sponsored by the Employment Exchange can also be considered for selection, the judgment of the Apex Court in the case of Excise Superintendent Malkapatnam, Krishna District,

A.P. Vs. K.B.N. Visweshwara Rao and Others, , was placed.

7. The provisions of the statute the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 and particularly Sub-sections (1) and (4) of Section 4 thereof were placed for the purpose of showing that requirement of the said statute is only for sending intimation to the Employment Exchange before a selection and there is no compulsion for restricting the selection from the candidates sponsored by the Employment Exchange in response to such intimation.

8. Reference was also made to the judgment in the case of Raj Kumar and Others Vs. Shakti Raj and Others, for showing that law has been settled by the Apex Court holding that besides advertising vacancies the selecting authority should call for the names from the Employment Exchanges and other media and conduct the examination for selection.

9. Next reference was made to the judgment of the Division Bench of this Court in the case of Bhaskar Ranjan Ghosh v. Kamal Sen, reported in 2000(2) CHN 246, wherein it was held that over and above the names sponsored by the Employment Exchange the concerned authority should call for names by publication in newspapers having wide circulation and also display in their office notice board or announce on radio, television and employment news bulletin and then should consider the cases of all candidates who apply.

10. The judgments in the cases of Abani Mahato Vs. Kanchan K. Sinha and Others, and Basavaraj R. Patil and Ors. v. The State of Karnataka, 2001 SCC 87. , have been referred to by the petitioners.

11. Argument has been advanced relying on the provisions of law as contained in Sections 27 and 45 of the West Bengal Board of Secondary Education Act, 1963 pointing out that the said law and the procedure framed thereunder in the year 1995 dealt with both teaching and non-teaching staff whereas by the procedure introduced in the year 1999 the provisions have been made only for non-teaching staff of the educational institutions as in respect of teaching staff the School Service Commission was established by appropriate statute in the meantime. References were also made to the procedure of 1995 for showing that only requirement thereunder is of getting names of candidates sponsored by Employment Exchange. Reference was also made to a Division Bench judgment of this Court in the case of Nadia District Primary School Council v. Sristidhar Biswas, reported in 2005(1) CLJ 193.

12. A contention was also advanced that employment problem prevailing today in the country cannot be brushed aside and in this connection reliance was placed on the judgment in the case of Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., and Malpe Vishwanath Acharya and Others Vs. State of Maharashtra and Another, .

13. Further reference was made to the judgment in the case of Suganthi Suresh

14. On behalf of the respondents, contentions have been made relying on the Sub-rule (4) of Rule 28 and also the Sub-rule (1) of Rule 28 of the Management of Recognised Non-Government Institutions (Aided and Unaided) Rules, 1969 (in short rules of 1969] and reliance was placed on the judgment in the case of Union of India (UOI) and Others Vs. N. Hargopal and Others, ;Malda District Primary School Council v. Md. Faridur Rahaman and Ors., reported in 2001(1) CHN 204 and Arnit Das Vs. State of Bihar, .

15. Main contention of the respondents is that judgment of the Apex Court in Abu Taker's case has not in any way overruled the law decided by the Special Bench of this Court in the case of Debasis Dutta (supra). It is strongly contended that Rules regarding selection and appointment of non-teaching staff in such schools being statutory rules are required to be followed and the rights of parties either for their consideration or for omitting others from such consideration, cannot be taken away by giving directions for consideration of any candidate who has not been placed for consideration according to the said rules.

16. Considering the above contentions of the respective contesting parties, we find that in the case of Debasis Dutta (supra) the Special Bench deciding the matter considered the question of appointment of non-teaching staff in a high school wherein the writ petitioner was a candidate seeking appointment without being sponsored by the Employment Exchange. In the said judgment it has been held that the managing committee having been constituted in terms of the provisions of the rules of 1969 are bound by four corners of the said rules and has no power to go beyond the said recruitment rules unless there exists a direction, order or guidelines issued by the State Government or the director as the case may be. The Bench also took into consideration that as regards recruitment in such a post direction issued by the Director of School Education though have been levelled as rules, the same actually contained merely guidelines and such guidelines are directory in nature and not mandatory.

17. Considering the said guidelines providing for procedure for recruitment of teaching and non-teaching staff of secondary schools including Madrasha issued by the Director of School Education, West Bengal vide memo No. 2066- G.A. dated 27th October, 1995 effective from 1st December, 1995, it appears that in exercise of power conferred on the Director of School Education, West Bengal by clauses (i) and (ii) of Sub-rule (1) and by clause (i) of Sub-rule (4) of Rule 28 of the Management of Recognised Non-Government Institutions (Aided and Unaided) Rules, 1969, the said directions were issued. It, therefore, appears that the aforesaid are mere directions/guidelines issued in exercise of the aforesaid power but are neither statutory provisions nor statutory rules. In such circumstances, it is not possible to uphold that the said procedure enjoys the status of statutory rules according to which the managing committee is bound to act and that the same having been held as directory in nature any deviation therefrom by the managing committee cannot be held to be an illegal action. It is

also apparent the said rules of 1969 do not contain any provision for selection through Employment Exchange. Therefore, in my opinion, the aforesaid procedure for recruitment not being statutory rules, cannot be held as of such nature that managing committee of the schools are bound to follow the provisions of the said recruitment procedure and no direction can be issued even by the Court upon the managing committees of the schools to allow any and every person to appear for the interviews though their names have not been sponsored by the Employment Exchange, in view of the law settled by the Apex Court to the aforesaid effect. Moreover, the relevant statutory provision contained in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 only require intimation of vacancies to Employment Exchanges and no obligation was prescribed for recruiting only the candidates sponsored by Employment Exchange. Therefore, the directions given in paragraph 33 of the judgment in the case of Debasis Dutta (supra) cannot be held to be valid and proper.

18. In the case of KBN Visweshwara Rao, the Apex Court considered the fairness in selection process and came to the following findings:

"Having regard to the respective contentions, we are of the view that contention of the respondents is more acceptable which would be consistent with the principles of fairplay, justice and equal opportunity. It is common knowledge that many a candidate is unable to have the names sponsored, though their names are either registered or are waiting to be registered in the Employment Exchange, with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the Employment Exchange. Under these circumstances, many a deserving candidate is deprived of the right to be considered for appointment to a post under the State. Better view appears to be that it should be mandatory for the requisitioning authority/ establishment to intimate the Employment Exchange, and Employment Exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news bulletins; and then consider the cases of all the candidates who have applied. If this procedure is adopted, fairplay would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."

19. Similar observation was made in the case of Raj Kumar (supra) reiterating the findings in the case of KBN Visweshwara Rao (supra). While considering the said judgment in the case of Raj Kumar (supra) it is noticed that facts narrated in the judgment considered the rules relevant for the said selection not providing for any advertisement or other modes of publication and still then the view in the case of KBN Visweshwara Rao (supra) was reiterated by the Apex Court by a

three-member Bench.

20. In the case of Kishore K. Pati (supra), the question under consideration before the Apex Court was whether the Division Bench of the High Court was justified in annulling the recruitment in favour of the appellant on the sole ground that in absence of any sponsoring by the Employment Exchange, petitioner could not have at all been considered for the post in question. But as the interview had already taken place and was not assailed and thus became final, in the second round of litigation that aspect was not found fit for consideration. Therefore, this judgment does not throw light on the question presently involved. Same is the position in the case of Abani Mahato (supra).

21. Therefore, above being the legal position settled by the Apex Court particularly in the case of KBN Visweshwara Rao (supra) and Raj Kumar (supra), the same was followed in the case of Abu Taker (supra) especially mentioning the said two judgments. It is noticed that in the judgment of the Supreme Court, in the case of Abu Taker (supra) the contention of the appellant was considered that conclusion of the Division Bench of the High Court holding a candidate ineligible for consideration being not sponsored by the Employment Exchange, was erroneous, in view of the aforesaid two decisions of the Apex Court and the Bench of the Apex Court in the case of Abu Taker (supra) held categorically "we find sufficient force in the aforesaid contention and as such the name of the appellant cannot be excluded for consideration merely because his name had not been sponsored by the Employment Exchange."

22. After holding as aforesaid, the Supreme Court considered that Division Bench of the High Court did not apply its mind to the merits of the case and was pleased to direct the High Court to decide the case on merits. Such observations in the case of Abu "Taker (supra) apparently were following the law settled by the Supreme Court in the case of KBN Visweshwara Rao (supra) and Raj Kumar (supra),

23. In the case of Abu Taker before the Supreme Court the judgment under challenge by a Division Bench of this Court was as follows:

"Having regard the learned Counsel, we are of the opinion that this appeal cannot be entertained solely on the ground that the name of the appellant had not been sponsored by the Employment Exchange, and thus, he is not eligible for being interviewed in view of the Special Bench decision of this Court in Debasis Dutta v. State of West Bengal, reported in 1998 (2) CLJ 1 and Muktipada Maiti v State of West Bengal, reported in 1999 West Bengal Law Reporter 252. The appeal and the application were dismissed."

24. This shows that the Division Bench did not decide the matter on merit and refused to intervene in the appeal only on one ground that name of the appellant had not been sponsored by the Employment Exchange and thus he is not eligible for being interviewed in view of the Special Bench decided in the case of Debasis Dutta (supra).

25. Position in law is, therefore, clear that law already settled by the Apex Court in the case of KBN Visweshwara Rao (supra) and Raj Kumar (supra) having not been followed by the Division Bench of the High Court, clear observations were made by the Apex Court again in the case of Abu Taker (supra). But as the High Court did not decide the matter on merit, the Supreme Court directed the High Court to decide the same on merit after setting aside the finding of the Division Bench of High Court upholding categorically the argument of the respondent and holding that name of the appellant cannot be excluded from consideration merely because his name had not been sponsored by Employment Exchange. Had the position been otherwise there could not have been direction for consideration on merits when the candidate was admittedly not sponsored by Employment Exchange. The law settled by the Apex Court is binding on all Courts under Article 141 of the Constitution of India and the several judgments cited by the parties in this respect at the time of hearing conclusively supports the said proposition and so those judgments do not require separate reference as the proposition itself has not been disputed by the respondent.

26. In above view of the matter the reference is answered by holding that following the law laid down by Supreme Court in the case of K.B.N. Visweshwara Rao (supra) and Raj Kumar (supra) by its Judgment dated February 12, 2002 given in Abu Taker v. Abdul Wahab (Civil Appeal No. 1203 of 2001) has impliedly overruled the Special Division Bench decision of this Court in Debasis Dutta v. State of West Bengal, reported in 1998(2) CLJ 1 and as a result a person whose name is not sponsored by the Employment Exchange has a right to participate as a candidate in a selection process initiated by a school governed by 1969 Management Rules (framed under the West Bengal Board of Secondary Education Act, 1963) for recruiting and selecting a person for appointment as a member of the non-teaching staff. The attention of the Bench has not been drawn by either of the parties to any statutory rule which compels it to take a different view.

27. Individual matters may be sent back to the respective Courts having jurisdiction for decision on merit on respective facts involved therein.

D.K. Seth, J.

28. I have the privilege of going through the judgment delivered by Hon''ble Aloke Chakrabarti, J. I fully agree with the same and endorse the view taken by His Lordship.

The Question :

29. The question whether a person without being sponsored by the Employment Exchange has a right to be considered for appoint in course of recruitment in the post of a Clerk/Non-Teaching Staff in view of the directions or guidelines issued by the Director of School Education prescribing procedure for recruitment of teaching and non-teaching staff of Secondary Schools including Madrasah dated 27th October, 1995 (Memo No. 2066-G.A.) and the Guidelines for Recruitment of

Non-Teaching Staff (Librarian, Clerk, Group "D" Staff) of Non-Govt. Aided Secondary Schools, Higher Secondary Schools, Govt. Sponsored Schools, D.A. getting school and all types of Aided Madrasahs including Senior Madrasahs and newly set up Educational Institutions at Secondary Level in West Bengal contained in Memo No. 1736(21) G.A. dated 1st November, 1999 issued by the Director of School Education.

The background :

30. It may be noted that after the enactment of West Bengal School Service Commission Act and the establishment of School Service Commission, recruitments of teaching and non-teaching staff have since been segregated and are to be treated differently. We are concerned with the recruitment of non-teaching staff within the scope of which we would like to confine ourselves.

31. The divergence of opinion in relation to the question of consideration of candidates without being sponsored by the Employment Exchange for appointment in the post of clerk was set at rest by the decision in *Debasis Dutta v. State of West Bengal* 1998(2) CLJ 1, by a three-Judges Special Bench. This decision was holding the field. In view of an unreported decision in *Abu Taker v. Abdul Wahab and Ors.* (Civil Appeal No. 1203 of 2001) of the Apex Court, a question was formulated by one of the learned Single Judge that whether the decision of *Debasis Dutta* (supra) was overruled and a person without being sponsored by the Employment Exchange has a right to be considered for appointment in the post of non-teaching staff in the selection process initiated by a school governed by for the Management of Recognized Non-Government Institutions (Aided and Unaided) Rules, 1969 framed under the West Bengal Board of Secondary Education Act, 1963.

32. Various decisions have been cited by the respective Counsel since dealt with by Hon'ble Chakrabarti, J. I need not deal with the same elaborately. The scope for consideration is confined to the question as to whether the decision in *Debasis Dutta* (supra) still holds good or is overruled by the decision in *Abu Taker* (supra).

Debasis Dutta (supra) : The ratio :

33. Before we deal with the said question, we may refer to the decision in *Debasis Dutta* (supra) in order to appreciate the ratio laid down therein. In paragraphs 11, 12 and 15 of the said decision, it was held that Rule 28 of the 1969 rules enumerates the power of the managing committee of an aided institution and such power is subject to, amongst other, any order or direction or guidelines issued by the State Government or the Director in connection therewith. Pursuant to or in furtherance of the power conferred by clauses 5(i) and (ii) of Sub-rule (1) and by Clause (1) of Sub-rule (4) of Rule 28 of the rules as amended from time to time, the Director of Schools has issued directions for compliance by Recognised Non-Government Secondary Schools in connection with the recruitment of teachers and non-teaching employees. The committee

being construed under the rules being a creature of statute are bound by the rules and the managing committee has no power to go beyond the said recruitment rules unless there exists direction, order or guideline issued by the State Government or the Director, as the case may be, and that the committee being the appointing authority in terms of the recruitment rules is bound to follow the provisions of the recruitment rules.

34. In paragraph 18, it has however, been clarified that:

"We, however, do not mean to say that the guidelines issued by the Director of School Education commonly known as provisions of the recruitment rules would be mandatory ones. They are directory in nature as the State as also the Director of School Education had the requisite jurisdiction to issue any direction or pass any order in consistence with the provisions of the said recruitment rules, if any exigency arises there for. Such rules should also be considered to be directory ones in view of the fact that the same do not envisage compliance of the provisions thereof in all situations."

35. After such clarification, on the principle that an appointment in violation of the recruitment rules is void (para 20), it was held that "No recruitment, therefore, can be made in violation of the guidelines issued by the Director of Schools Education or any order or direction made by the State Government or by the managing committee of the school" (para-22). After distinguishing the decision in *Excise Superintendent, Malkapatnam, Krishna District, A.P. v. KILN. Visweshwara Rao and Ors.* 1996(6) SCC 210 , 723 [paras 23, 24 & 27 of Debasis Dutta (supra) on the ground that the said decision was not considering the question relating to a recruitment rules providing for filling up of vacancies only from amongst candidates sponsored by the Employment Exchange and the decision in *Raj Kumar and Others Vs. Shakti Raj and Others*, as well as the decision in *Arun Tewari and Ors. v. Zila Mansavi Shikshak Sangh and Ors.* AIR 1998 SC 331 [paras 28, 29 of Debasis Dutta, (supra)], it was observed that "we are of the view that no law within the meaning of Article 141 of the Constitution of India has been laid down therein by the Apex Court."

36. There is no finding that the directions issued by the Director relating to recruitment of non-teaching staff had ever assumed any statutory character and/or it has any statutory force. Admittedly, these recruitment rules were held to be directory and guidelines issued by the Director in exercise of power conferred upon him under Rule 28 of the 1969 rules binds the committee since its powers are subject to such direction in terms of Rule 28 of the 1969 rules, and, therefore, it was held that the managing committee is statutorily bound under Rule 28 of the 1969 rules to follow the direction issued by the Director.

37. Then ultimately, in the said decision, it was held in paragraph 33 that:

"(1) The recruitment rules although contained directory provisions, the same are required to be substantially complied with. (2) Any deviation and departure from the directions issued by the Director of School Education by reason of the said

recruitment rules can only be made by the Director of Schools Education himself or by the State Government by issuing an order or a direction or guideline depending upon the facts and circumstances of each case. (3) The managing committee of the respondent school is bound to follow the provisions of the recruitment rules and the petitioners having not raised the question of constitutionality of the said rules in the writ application cannot be permitted to do so by way of argument. (4) No direction can be issued by the Court upon the managing committee of the school to allow any and every person to appear in the interviews although his name has not been sponsored by the Employment Exchange. The orders issued in this behalf by some of the Benches of this Court do not lay down the correct law and must be overruled. (5) The managing committee cannot act in contravention of the said provision unless the same is unconstitutional. The Court in exercise of its power under Article 226 of the Constitution of India cannot also issue a direction asking it to violate the provisions of statute."

Whether the decision Abu Taker (supra) has the effect of overruling Debasis Dutta (supra) :

38. The 1969 rules have since been framed by the State Government in exercise of power conferred upon it u/s 45 of the 1963 Act, whereas the guidelines were issued in terms of Rule 28 of the 1969 rules so framed by the Director. Rule 28 provides that the committee shall subject to the provisions of any grant-in-aid scheme or Pay Revision Scheme or any order or direction or guidelines issued by the State Government or the direction in connection therewith and in force for the time being may exercise the powers prescribed thereunder, which includes power to appoint under Sub-rule (4).

39. In such a situation in the decision in Abu Taher (supra), the Apex Court had held :

"On a writ petition being filed, the learned Single Judge disposed of the matter holding that for the appointment of a Teacher in Arabic, the candidate should possess B. A. with Arabic combination and not with B.A. Special Arabic. Appropriate direction was given to the District Inspector of Schools, Murshidabad to ignore the candidature of the present appellant, who was respondent No. 6, since he had the qualification of B.A. with Special Arabic and not B.A. Arabic combination. Against the judgment of the learned Single Judge, the appellant approached the Division Bench. The Division Bench without considering the ground on which the appellant is held to be disqualified for being appointed went into the question as to whether his name had been sponsored by the Employment Exchange and then following the earlier decision of the said Court [namely Debasis Dutta (supra)] came to hold that since appellant's name had not been sponsored by the Employment Exchange, he was ineligible for being considered for the post in question. It is this order of the Division Bench which is being assailed.

Mr. Krishnamani appearing for the appellant contended that the aforesaid conclusion of the Division Bench of the Calcutta High Court is erroneous in view of the decision in *Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao and Others*, and *Raj Kumar and Others Vs. Shakti Raj and Others*, . We find sufficient force in the aforesaid contention and as such the name of the appellant cannot be excluded from consideration merely because his name had not been sponsored by the Employment Exchange. In that view of the matter, the Division Bench of Calcutta High Court not having applied its mind to the merits, namely whether B.A. with Special Arabic can be said to be the same of B.A. with Arabic combination on which reasoning the learned Single Judge allowed the writ petition, it would meet [be fit] and proper to direct the Calcutta High Court to decide the case on merits. We, therefore, set aside the impugned judgment of the Calcutta High Court and remit the appeal to the Calcutta High Court for re-consideration on merits."

40. As already observed that the guidelines were never given the character of statute or of containing any statutory force in the decision in *Debasis Dutta* (supra). It may now be considered whether the compulsory requirement of consideration only of candidates sponsored by Employment Exchange can be derived from the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959. The answer would be simply no in view of the fact that the 1959 Act was related to compulsory notification of vacancies to the Employment Exchange. Apart from the title of the Act, Section 4 of the 1959 Act prescribes:

"(1) After the commencement of this Act in any State or area thereof, the employer in every establishment in public sector in that State or area shall before filling up any vacancy in any employment in that establishment, notify that vacancy to such Employment Exchange as may be prescribed.

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(4) Nothing in Sub-sections (1) and (2) shall be deemed to impose any obligation upon any employer to recruit any person through the Employment Exchange to fill any vacancy merely because the vacancy has been notified under any of those Sub-sections." .

41. The question whether the choice to be restricted only among the candidates sponsored by the Employment Exchange came up for consideration in *K.B.N. Visweshwara Rao* (supra) in which the Apex Court [Three-Judges" quorum] had held :

"We are of the view that contention of the respondents is more acceptable which would be consistent with the principle of fair play, justice and equal opportunity. It is common knowledge that many a candidate is unable to have the name sponsored, though their names are either registered or are waiting to be registered in the Employment Exchange, with the result of the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the Employment Exchange. Under these circumstances, many a deserving

candidate is deprived of the right to be considered for appointment to a post under the State. Better view appears to be that it should be mandatory for the requisitioning authority/ establishment to intimate the Employment Exchange, and Employment Exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to the seniority and reservation, as per requisition. In addition, the appropriate department or a undertaking or establishment should call for names by publication in newspapers having wide circulation and also display on their office notice boards or announce on radio, television and employment news bulletin and then consider the cases of all the candidates who have applied. If this procedure is adopted, fairplay would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."

42. This decision was followed and its ratio was reiterated by the Apex Court in another three-Judges Bench of the Apex Court wherein the Apex Court observed:

"15. In view of this legal position, the necessary requirements should be that they should necessarily not only notify but also call the names from Employment Exchange; in addition they should give wide publicity in media inviting application from qualified persons for selection,...thereafter should strictly follow the procedure by not only calling the names from Employment Exchange, but also by publishing in the local and national newspapers and giving wide publicity in media...."

43. Reliance of this two decisions by the Apex Court in *Abu Taker* (supra) with the observation that there was force in the contention of Mr. Krishnamani appearing for the appellant and that the name of the appellant cannot be excluded from being considered merely because his name had not been sponsored by the Employment Exchange even though the decision of the Division Bench had followed the decision in *Debasis Dutta* (supra), clearly indicates that the decision in *Debasis Dutta* (supra) was overruled by *Abu Taker* (supra). We, therefore, hold that the decision in *Debasis Dutta* (supra) stands overruled in view of the decision in *Abu Taker* (supra).

44. Mr. Moitra relied on the decision in *Union of India (UOI) and Others Vs. N. Hargopal and Others*, , which, in my view, appears to be misplaced. On the other hand, it supports the view I have taken. Inasmuch as in paragraph 8, it has been held that the Government organizations are desirous of adhering to the rule that all vacancies should be notified in the Employment Exchanges and the vacancies should also be filled up by the candidates sponsored by the Employment Exchanges. It is only when no suitable candidates are available, that other source of recruitment may be considered. The Government is at liberty to issue such instructions without contravening any Constitutional provision or any statute. These instructions cannot bind other bodies, which are created by statute and which function under the authority of statute. In the absence of any statutory prescription, the statutory authority may, however, adopt and follow such instructions if it thinks fit. Otherwise, the Government may not compel

statutory bodies to make appointment of persons from among candidates sponsored by the Employment Exchanges only. Nonetheless, it was held that the instruction to consider the candidates sponsored by the Employment Exchanges only was held not to offend Articles 14 and 16 of the Constitution of India. It was not a case where it was held that the candidatures of the persons without being sponsored by the Employment Exchanges cannot at all be considered. In any event in this case the quorum was of two Judges and as such it is subject to the decision in *K.B.N. Visweshwara Rao (supra)* and *Raj Kumar (supra)*. Mr. Moitra then relied upon the decision in *Malda District Primary School Council and Anr. v. Md. Faridur Rahaman and Ors.* 2001(1) CHN 204. This decision has no manner of application in the present case in view of the fact that the question related to the said decision was in respect of a rule, which confined the recruitment from among the candidates sponsored by the Employment Exchange alone in view of Rule 8 of the West Bengal Recruitment and Leave of Teachers in Primary Schools Rules.

45. The reliance in *Arnit Das Vs. State of Bihar*, , placed by Mr. Moitra is equally misplaced. Inasmuch as relying on the said decision, Mr. Moitra sought to contend that a decision not expressed, not accompanied by reasons and no proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio 21. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined.

46. In the present case, the Apex Court had consciously determined the issue as to the right of a candidate to be considered for appointment without being sponsored by the Employment Exchange on the ground on which the right of Abu Taker (*supra*) was declined by the High Court relying on the decision in *Debasis Dutta (supra)*, which was found to be unacceptable to the Apex Court in view of the decisions in *K.B.N. Visweshwara Rao (supra)* and *Raj Kumar (supra)* which expressly indicate that the Apex Court had borrowed and reaffirmed the ratio decided in the said two decisions to disagree with the view taken by the Division Bench following the ratio decided in *Debasis Dutta (supra)* by the Special Bench. The disapproval of the decision by the Division Bench, which followed the Special Bench, is a disapproval of the decision by the Special Bench and as such not being an omission but being a conscious consideration without attracting the rule of sub silentio is binding under Article 141 and thus overrules the decision in *Debasis Dutta (supra)*.

Ganguly, J.

47. I have perused the judgment prepared by Alope Chakrabarti, J. and D.K, Seth, J. and I agree to the same.

Prabir Kumar Samanta, J.

48. I have perused the judgment prepared by Alope Chakrabarti, J. and D.K.

Seth, J. and I agree to the same.

S.K. Gupta, J.

49. I have perused the judgment prepared by Alope Chakrabarti, J. and D.K. Seth, J. and I agree to the same.