

(2019) 07 CAL CK 0079
In the Calcutta High Court

Case No : Tender Of Mand Application (MAT) No. 1187, 1188 Of 2016

State Of West Bengal & Ors

APPELLANT

Vs

Kailashpati Jha & Ors

RESPONDENT

Date of Decision : 25-07-2019

Acts Referred:

Bengal General Clauses Act, 1899 — Section 8, 22
West Bengal School Service Commission Act, 1997 — Section 92(5)
General Clauses Act, 1897 — Section 6, 6(c), 6(d), 6(e)
West Bengal School Service Commission (Selection Of Persons For Appointment To The Post Of Non-Teaching Staff) Rules, 2009 — Rule 24(2)
Constitution Of India, 1950 — Article 14, 21

Citation : (2019) 07 CAL CK 0079

Hon'ble Judges : I. P. Mukerji, J;Md. Nizamuddi, J

Bench : Division Bench

Advocate : Tapan Kumar Mukherjee, Shamim Ul Bari, Subir Sanyal, Amitava Chaudhuri, N. Roy

Final Decision : Dismissed

Judgement

Md. Nizamuddin, J

Heard both sides.

These appeals filed by the appellants/State Authorities concerned, arise out of a common judgment and order dated 4th December, 2015 passed in

writ petitions being W.P No. 27464 (W) of 2013 (Kailashpati Jha & Ors. Vs. The State of West Bengal & Ors) and W.P No. 19811 (W) 2013 (Sk.

Mainul Islam & Ors. Vs. The State of West Bengal & Ors.) allowing the writ petitions and quashing the impugned order dated 26th March, 2010

passed by the Director of School Education, West Bengal, and directing him to take decision on the question of approval of appointment of the writ

petitioners empanelled under non-teaching staff for the post of Laboratory Assistant and clerk respectively.

We were inclined to hear both the aforesaid appeals arising out of the aforesaid common judgment and order for the reasons of involvement of similar

facts, questions of law, and reliefs claimed in both the writ petitions.

In order to appreciate the issues involved in these appeals it is necessary to set out the relevant facts in brief hereunder as appears on perusal of relevant records.

District Inspector of School (SE), Burdwan, on 23.07.2008 granted prior permission to fill up the two posts of Laboratory Attendant, one post of clerk and one post of peon in Burdwan Nehru Vidya Mandir High School by relying on G.O. No. 311/SE (H.S.) dated 30.05.2007 which was already cancelled earlier by the State government by G.O No. 333-SE (Appt)/10M dated 08.06.2007.

The School Authority on the basis of the aforesaid prior permission dated 23.07.2008 granted by the said District Inspector of School, , published an

advertisement in daily newspaper "The Statesman" dated 13th January, 2009 for recruitment to the post of Laboratory Attendant and clerk

in Nehru Vidya Mandir High School (Higher Secondary School). The respondent/writ petitioners, pursuant to the said advertisement, appeared in

interview, before the Selection Committee on 30th January, 2009. It is the case of the writ petitioners that their names were recommended by the

Selection Committee and subsequently, it was approved by the Managing Committee of the said school and their position were number one in order to

merit in the said panel of Laboratory Attendant and Clerk prepared by the Selection Committee.

In the meantime, The West Bengal School Service Commission (Amendment) Act, 2008 came into existence by notification dated 1st January, 2009

with effect from 14th January, 2009 making amendment to various Sections of the West Bengal Service Commission Act, 1997.

The Managing Committee of the school forwarded the said panel prepared on 30.01.2009 to the District Inspector of School (Secondary Education)

Burdwan, on 26th February, 2009 for its approval.

In the meantime during pendency of the said panel for approval, West Bengal School Service Commission (Selection of Persons for Appointment to

the Post of Non-Teaching Staff) Rules, 2009, came into effect from 9th July, 2009.

The Managing Committee of the School filed a writ petition being WP No. 13924 (W) of 2009 against the inaction on the part of the District Inspector of School, Burdwan, in giving approval to the said Panel. The said writ petition was disposed of on 11th August, 2009, by directing the said District Inspector of Schools to pass a reasoned order on the issue of approval of the said panel. The District Inspector of Schools (SE) Burdwan, in compliance of the aforesaid order of the writ Court, dated 11th August, 2009, intimated the School Authority, by memo dated 1st October, 2009 that he was not in a position to take any decision in the matter of approval on the said panel since he had sent all the relevant papers in that regard to the Director of School Education, West Bengal, for necessary instructions.

The Managing Committee of the said school filed another writ petition being WP No. 254 (W) of 2010 against the aforesaid memo/order dated 1st October, 2009, passed by the said District Inspector of School expressing his inability to take any decision on the matter of approval of the panel in question. The aforesaid writ petition was disposed of by this Court by order dated 25th February, 2010, setting aside the said impugned memo dated 1st October, 2009, passed by the District Inspector of Schools and directed the Director of School Education, West Bengal, to dispose the case of approval of the said panel by passing a reasoned order. Relevant portion of the said order of the writ Court dated 25th February, 2010, in W.P. No. 254 (W) of 2010 is as follows:

â??.....For reasons stated above, the impugned order dated 1st October, 2009, is liable to be set aside and is hereby set aside. The instant writ petition stands disposed of with a direction upon the Director of School Education, West Bengal, to pass an appropriate decision supported with cogent reasons concerning the question of approval to the list of selected candidates submitted by the concerned school on 26th February, 2009, which has been stated in details in the earlier petition being W.P. No. 13924 (W) of 2009. This decision shall be rendered by the Director of School Education, West Bengal within a fortnight from date of communication of a photostate copy of this order and shall be communicated to the concerned school, immediately thereafter. Needless to mention, the Director of School Education, West Bengal, shall afford adequate opportunity of hearing to the writ

petitioner to represent his case.....â??

Pursuant to the aforesaid direction of the Writ Court dated 25th February, 2010, passed in W.P No. 254 (W) of 2010, Director of School Education,

West Bengal, after hearing the secretary and the teacher-in-charge of the said School and the representative of the District Inspector of Schools and

also the Ex-District Inspector of Schools, Burdwan, giving cogent reason in detail, passed the order dated 26th March, 2010, refusing to grant any

approval to the said panel prepared by the Managing Committee of the said school and for withdrawal of the prior permission dated 23rd July, 2008,

granted to the said school by the Ex-District Inspector of School Education, Burdwan, and also forwarded the matter to the School Education

Department for taking appropriate action against the said District Inspector of School (SE). Relevant portion of the said order dated 26th March, 2010

is hereunder:

â??.....At the time of according prior permission for the post of one Group-â??Dâ?? and two Lab Attendants, the said District Inspector of

Schools (SE) mentioned G.O. No. 311 SE (HS) dt. 30.5.2007. but there was no existence of G.O. No. 311 Se (HS) dt. 30.5.2007 rather it would be

G.O. No. 311 SE (Apptt) dt. 30.5.2007 which was issued for filling up of vacancies of non-teaching staff and Group-â??Dâ?? staff in different

sponsord / Govt. Aided Jr. High; High/Higher Secondary Schools to the extent necessary to achieve the minimum strength. In H.S. School bare

minimum strength of Group â?" â??Dâ?? is 2+2 Lab Attendants. In the said school two posts of Group- â??Dâ?? staff have already been filled up.

So, there is no provision to create a third post of Group â?" â??Dâ?? as per provision of G.O. No. 311 SE (Apptt) dt. 30.5.2007 and the said G.O. did

not allow the District Inspector of Schools (SE), Burdwan to create third post of Group â?" â??Dâ?? by his own. Rather in the said G.O. it was

clearly instructed that needless to say the actual number of school-wise vacancies have to be ascertained by the Directorate for application of the

above norms. It is also pertinent to mention here that G.O. 333 SE (Apptt) dated 08.06.07 was issued in cancellation of G.O. No. 311 SE (Apptt) dt.

30.5.2007. And when the prior permission was issued by the District Inspector of Schools (SE), Burdwan on 23.7. 2008, G.O. No. 311 SE (Apptt) dt.

30.5.2007 was already cancelled.

(a) As the prior permission issued by the District Inspector of Schools (SE), Burdwan, vide his Memo no. 1425 (A) dated 23.07.08 seems faulty in all

respect, the District Inspector of Schools (SE), Burdwan, is directed to withdraw the said prior permission accorded by him within 3 days after

receiving communication of this reasoned order.

(b) The school authority has already got the bare minimum strength of clerk and Group- â??Dâ?? as per provision of G.O. No. 333 SE (Apptt) dated

08.06.07. So, they are not at all entitled to get any more clerk or Group â?" â?? Dâ?? at this stage without taking permission from the School

Education Deptt.

(c) In terms of Section 5, Sub-section 92) of the West Bengal School Service Commission Act, 1997, (as amended) no such post of non-teaching staff

in the Govt. Aided school can be filled up after 14.1.2009 without the recommendation of the concerned Regional School Service Commission. Hence

the District Inspector of Schools (SE), Burdwan, was directed to allow two post of Lab. Attendants in favour of the concerned school as per provision

of G.O. No. 333 SE (Apptt) dated 08.06.07 read with the explanation 2356 GA dated 03.10.07 and notify the said vacancy to the concerned Regional

School Service Commission immediately thereafter.

(d) The illegal action of the then District Inspector of Schools (SE), Burdwan, as observed above is highly regrettable. The matter is forwarded to

School Education Deptt. For taking appropriate action against the Ex. District Inspect of Schools (SE), Burdwan, Sri Prabir Pattanayak.....â??

Challenging the aforesaid impugned order dated 26th March, 2010 passed by the Director of School Education, West Bengal, withdrawing the said

prior permission and refusal to grant approval to the aforesaid Panel, writ petitions being WP No. 27464 (W) of 2013 and WP No. 19811 (W) of 2013

were filed by the candidates/writ petitioners. Both the aforesaid writ petitions were disposed of by the learned Trial Court by allowing the same by a

common order dated 4th December, 2015 out of which the present appeals arise.

The learned writ Court while disposing the aforesaid writ petitions held inter alia that the Director of School Education of West Bengal, had no

jurisdiction to reopen the issue of prior permission granted by the concerned District Inspector of School (SE) Burdwan on 23rd July, 2018 on the basis

of old Act of 2005 and the learned Trial Court quashed the aforesaid impugned

order dated 26th March, 2010 passed by the Director of School Education, West Bengal, and by directing him to take decision afresh in respect of the panel in question within eight weeks and to communicate the same to the petitioners by holding inter alia as follows:

â??.....Therefore, it is evident that the selection of the said post in question was commenced prior to 9th July, 2009 when the new act came into

force. Therefore, in my considered view the refusal to grant approval to the said panel on the basis of the prior permission is arbitrarily illegal and very

much violative to Article 14 and 21 of the Constitution of Indiaâ??.

â??..... In my view the Director of the School Education erred in law by withdrawing the prior permission which has been granted on 23rd July,

2008 and process has already been completed on the basis of the prior permission. Therefore, at this stage when admittedly the Honâ??ble Court

vide order dated 25th February, 2010 directed the Director of School Education to take decision in respect of the said panel then it was the duty of the

Director of School Education to examine the said panel from the stage of prior permission granted by the concerned District Inspector of

school.....â??

Aggrieved by the aforesaid order of the learned Trial Court, dated 4th December, 2015, appellants State Education Authorities have filed the present

appeals mainly on the ground that the impugned order dated 26th March, 2010 passed by the Director of School Education, West Bengal, pursuant to

the order of this Court dated 25th February, 2010 passed in WP No. 254 (W) of 2010 is a reasoned and speaking order after giving opportunity of

hearing to the School Authorities and considering the materials available on record.

Mr. Mukherjee learned Senior Advocate appearing for the appellants supports the aforesaid order dated 26th March, 2010, passed by the Director of

School Education, West Bengal, and challenges the order passed by learned Trial Court dated 4th December, 2015 by contending crux of which is

hereunder:

i) Prior permission granted on 23rd July, 2008, by the District Inspector of School (SE), Burdwan, for filling up the posts in question was not legal and

valid and not in accordance with law and it was in violation of and contrary to relevant rules regulations/circular/notification issued by the

Government/Authority from time to time as referred by the Director of School Education, West Bengal, in his reasoned order dated 26th March, 2010.

Mr. Mukherjee, learned Senior Advocate further contends that the said prior permission given by the District Inspector of Schools, Burdwan, for filling

up the posts in question was beyond sanctioned strength and at the time of the said prior permission no vacancy was existing in the posts in question in

the said school. Director of School Education in his order dated 26th March, 2010 has given very elaborate reason for withdrawal of prior permission

and refusal to grant approval to the said panel and for holding the selection process and the said panel faulty and defective.

ii) Mr. Mukherjee learned Senior Advocate supports the order of the Director of Schools (West Bengal) withdrawing the said prior permission and

refusal to grant approval to the said panel in question by further contending that the prior permission in question granted by the District Inspector of

School, Burdwan, on 23rd July, 2008 to fill up the posts of one clerk and one Laboratory Attendant and one class IV staff by relying on the GO No.

311/SE (HS dated 30.05.2007 was contrary to the GO No. 333-SE (Appt)/10M dated 08.06.2007 by which the said GO dated 30.05.2007 was already

cancelled.

Mr. Mukherjee, learned Senior Advocate further submits that mere empanelment of a candidate for a post does not confer upon him any legal right to

be appointed in the said post. He also submits that the learned writ Court should have taken into consideration that the West Bengal School

Service Commission (Amendment) Act, 2008 has already come into existence on 1st January, 2009 making several amendments to West Bengal

Service Commission Act, 1997 and the West Bengal Service Commission (Selection of persons for appointment to the post of Non-teaching Staff)

Rules, 2009 (in short 2009 Rules) were framed which came into effect from 9th July, 2009. By the said Act of 2008 and Rules of 2009 the earlier

Acts and Rules being West Bengal Schools (control of Expenditure) Act, 2005 (in short 2005 Act) and the West Bengal Schools

(Recruitment of Non-Teaching Staff) Rules, 2005 (in short, 2005 Rules) were superseded and the school authorities no longer enjoyed the statutory

power to conduct interview for recruitment of non-teaching staff and on 26.03.2010 i.e. the date of consideration for approval of the said panel by the

Director of School Education, West Bengal he was not bound to approve the said illegal and invalid panel prepared under the said old Act and Rules of 2005.

Mr. Mukherjee, learned Senior Advocate further contends that when the prior permission itself was bad from inception all the subsequent steps

thereto are also bad. He further submits that if any vacancy arises after the coming into effect of West Bengal School Service Commission

(Amendment) Act and Rules thereunder, selection procedure and appointment of non-teaching staff shall be strictly governed by the Act and Rules

in force and any act which is illegal and contrary to the said old Act and Rules of 2005 cannot be justified or defended under the saving clause of Rule

24(2) of the said new Rules of 2009. Mr. Mukherjee, learned senior Advocate relies on the following decisions in support of his contentions made in

the present appeals:

i. Order (unreported) dated 5th December, 2017 of the Supreme Court in Civil Appeal No. 20883 of 2017 (Special Leave Petition (Civil) No. 16779 of

2013 (State of West Bengal & Ors. Vs. The Managing Committee, Nirjharini S.B. Vidyalaya (H.S.) Etc.) which may be quoted as follows:

“Leave granted.

Heard learned counsel for the parties.

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.

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

Accordingly, we set aside the impugned order and allow these appeals.

ii. Unreported Special Bench decision of this court, dated 13th March, 2019 in W.P. 11254 (W) of 2010 (The Managing Committee, Kadamtala High Madrasah Vs. The State of West Bengal and Ors.) on the proposition of applicability of West Bengal School Service Commission (Amendment) Act, 2008, and West Bengal School Service Commission (Selection of Persons for appointment to the post of Non-teaching Staff) Rules, 2009 in cases where selection process was initiated and were prepared under the old Act and Rules of 2005 and panel was pending for approval and on the proposition that mere empanelment of a candidate does not create any right of appointment automatically in favour of a candidate. He relied on paragraphs 10, 16, 20, 22 and 37 of the said judgment in support of his contention.

Mr. Sanyal, learned Senior Advocate appearing for the writ petitioners supports the order of the learned Trial Court allowing the aforesaid petition and submits that a right has been accrued in favour of the writ petitioners on granting prior permission, dated 23.07.2008 by the District Inspector of School, Burdwan, under the said old Act and Rules of 2005 to fill up the posts in question and writ petitioners having been called to participate in the interview on 30.01.2009 and stood first in the said panels for the respective posts and such right stands saved by the provisions of Rule 24(2) of the said Rules 2009 which came into force on 9th July, 2009. The said new Amendment Acts and Rules of 2009 are not retrospective in nature and as such the selection must be regulated in accordance with the said old Rules and Orders which were in force on the date of issuance of the prior permission by the District Inspector of School, Burdwan. As the writ petitioners are eligible and are otherwise qualified in accordance with the relevant Rules referred to in the said prior permission they have acquired a vested right for being considered for selection and approval in accordance with the Rules as existed on the date of issuance of the prior permission and they cannot be deprived of that limited right of appointment on the basis of the said new Amendment Act and Rules, 2009.

He further contends that for the fault of the authorities?? writ petitioners cannot be made to suffer and the authorities should be directed to grant approval to the said panel of the writ petitioners. Mr. Sanyal, learned Senior Advocate in support of his contention relies on a Single Bench decision of

this Court dated 6th October, 2010 in the case of Subhankar Mandal Vs. State of West Bengal reported in (2011)1 WBLR (Cal) 847 on the

proposition that prior permission and selection process under the old Act of 2005 is protected under the saving clause of New Rule 24(2) of the

West Bengal School Service Commission (Selection of Persons for Appointment to the post of Non-Teaching Staff) Rules, 2009. Firstly this

judgment was delivered on 6th October, 2010 which is much prior to the aforesaid current decision of the Special Bench decision of the court dated

13th March, 2019 upon which Appellants have relied. Secondly in this judgment legality and validity of the prior permission was not disputed and

nowhere the said judgement holds that prior permission or panel or any action under the old Act and Rules even if it is invalid or illegal would be

protected under saving clause of Rule 24(2) of the West Bengal School Service Commission (Selection of Persons for Appointment to the post of

Non-Teaching Staff) Rules, 2009.

Considering the submission of the parties and facts as appear on perusal of relevant records and decisions cited by the parties, legal issues which

require adjudication in present appeals, according to me are as follows:

i. Whether at the relevant point of time i.e. on 26th March, 2010 Director of School Education, West Bengal, in the facts and circumstances of this

case was bound to grant approval to the panel in question pending before him by simply acting as a rubber stamp and had no jurisdiction to look into

legality and validity of the panel in question prepared on the basis of a prior permission dated 23rd July, 2008 granted by the District Inspector of

Schools, Burdwan, under the said old Act and Rules of 2005 and by relying on a circular which was already cancelled and no more in existence at the

time of granting prior permission for filling up the vacancy in the posts beyond sanctioned strength and that no vacancy was existing in the posts in

question at the time of granting such prior permission ?.

ii. Whether at the relevant point of time i.e. on 26th March, 2010, Director of School Education, West Bengal, while considering the case of approval

to the aforesaid panel in question prepared under the said old Act and Rules of 2005 on the basis of invalid and illegal prior permission dated 23rd July,

2008, had no jurisdiction to take into consideration legal impact of the West Bengal School Service Commission (Amendment) Act, 2008 which came

into existence on 1st January, 2009 and West Bengal School Service Commission (Selection of Persons for Appointment to the Post of Non-Teaching

Staff) Rules 2009 which came into effect from 9th July, 2009, during pendency of the case of approval of the panel in question ?.

iii. Whether earlier order of the writ Court, dated 25th February, 2010 passed in W.P. No. 254 (W) of 2010, directing the Director of School

Education, West Bengal, to take an appropriate decision with cogent reason concerning the question of approval to the panel in question of selected

candidates can be read in a manner as if granting of approval of the said panel by him was an empty formality and he had no jurisdiction to take into

consideration the factual and legal aspect as mentioned in question No. 1 & 2 above while considering the issue of approval to the panel in question ?.

iv. Whether case of the writ petitioner's appointment, in view of the facts involve should be governed by said old Act & Rules of 2005 or by

the said new Amendment Act of 2008 and Rules of 2009?

In my considered view order of the Director of School Education, West Bengal, dated 26th March, 2010, withdrawing the aforesaid prior permission

and refusal to grant approval to the panel in question in view of the facts and circumstances involve, is legal and valid, and the learned Trial Court

should not have interfered with the said impugned order dated 26th march, 2010 and we set aside the order of the Trial Court, dated 4th December,

2015, for the reasons hereunder.

The very basis of preparation of the panel in question for filling up the posts in question which was already filled up at the relevant time, is prior

permission by the District Inspector of School, Burdwan, under the said old Act and Rules of 2005 and by relying on a circular which was already

cancelled and not in existence at the relevant time and it was beyond the sanctioned strength and there was non-existence of vacancy in the post in

question at the relevant point of time. Such prior permission and subsequent panel on the basis of the said prior permission, is invalid and illegal and is

no panel in the eye of law and Director of School Education, West Bengal is not supposed to act simply as a rubber stamp at the time of consideration

of grant of approval to the panel in question and bound to grant approval even if the same is illegal and invalid.

On 26.03.2010 i.e., the date of consideration for granting approval to the said

illegal and invalid panel prepared under the old Act and Rules of 2005,
 Director of school Education, West Bengal cannot ignore the impact of West Bengal School Service Commission (Amendment) Act, 2008 and
 West Bengal School Service Commission (Selection of Persons for appointment to the post of Non-teaching Staff) Rules, 2009 was already in force
 and has superseded the said old Act and Rules of 2005 and if any vacancy is existing, selection and appointment procedure will be governed under the
 relevant provisions of West Bengal School Service Commission (Amendment) Act, 2008 and West Bengal School Service Commission (Selection of
 Persons for appointment to the post of Non-teaching Staff) Rules, 2009 and any illegal action/steps taken including prior permission, empanelment for
 the posts of non-teaching staff it cannot get protection under saving clause of Rule 24(2) of West Bengal School Service Commission (Selection of
 Persons for appointment to the post of Non-teaching Staff) Rules, 2009.

I am of the view that by no stretch of imagination earlier order of the writ court, dated 25th February, 2010 passed in W.P. No. 254 (w) of 2010
 directing the Director of School Education, West Bengal, to pass appropriate decision on the approval of panel in question can be read in a manner that
 he was bound to grant approval to the panel in question and that the writ court by the said order had restricted him to look into the legality and validity
 of the said prior permission and panel prepared subsequent thereto and to ignore the legal impact of the said new Amendment Act of 2008 and Rules
 of 2009 which was prevailing at the time of consideration of approval of the said panel.

I am supported in this view by the judgments of the Supreme Court relied upon by the appellants, dated 5th December, 2017 in special leave petition
 (Civil) no. 16779 of 2013 in the case of State of West Bengal & Ors. Vs. The Managing Committee, Nirjharini Sarkar Balika Vidyalaya (HS) and
 unreported special Bench decision of this Court, dated 13th march, 2019 in the case of Prabir Kumer Mitra & Anr. Vs. The State of West Bengal &
 Ors.

Considering the discussion made above I hold the said prior permission illegal and invalid and all subsequent steps taken by the School Authority on the
 basis of the said prior permission cannot legally sustained and all steps to be taken by the said School Authority for filling up the vacancy in the post of

non-teaching staff must be in conformity with the aforesaid West Bengal School Service Commission (Amendment) Act, 2008 and West Bengal

School Service Commission (Selection of Persons for appointment to the post of Non-teaching Staff) Rules, 2009.

Considering the discussion made above the present appeals succeed and order dated 4th December, 2015 passed by the Trial Court is set aside and

writ petitions are accordingly dismissed.

No order as to costs.

(Md. Nizamuddin, J.)

I. P. MUKERJI, J.

I am in full agreement with the judgment to be delivered by brother Md. Nizamuddin, J. However, I would add some observations of my own. Since,

the facts and the law involved in these appeals are identical they are disposed of by a common judgment.

The facts have been stated in detail in my brother's judgment.

Prior to the enactment of the West Bengal School Service Commission Act, 1997, the procedure for appointment of teachers was very different and

lenient. The managing committee of a school would make a request to the District Inspector of Schools for permission to recruit teaching and non-

teaching staff within the sanctioned strength of the institution. The number of posts was sanctioned by the District Inspector according to the

government policy and directions in the form of a memorandum. Usually, a requisition was made by the committee also through a memorandum

specifying the category or categories of posts and the nature of vacancy or vacancies and whether it was permanent or temporary, the prescribed

qualification etc. On its approval by the District Inspector of Schools, a recruitment or selection process was undertaken. The names of the selected

candidates in a panel was sent to him for approval. If approved, a candidate became a permanent employee if the recruitment was for a permanent

post.

All this changed with the enactment of the said Act of 1997 which related to teaching staff only. Under this Act, appointments could only be made

through a selection process carried out by the commission.

A further brake on managing committee powered appointments was put by the

West Bengal School (Control Expenditure) Act, 2005 which laid down that no school shall without the previous permission of the state government create any teaching or non-teaching post or appoint any teaching or non teaching staff.

In 2008, the West Bengal School Service Commission Act, 1997 was amended with effect from 14th January, 2009, extending the application of the 1997 Act to the non-teaching staff.

Section 6 of the General Clauses Act, 1897 enacts as follows:

“6. Effect of repeal. “Where this Act, or any 1 [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as

aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or

punishment may be imposed as if the repealing Act or Regulation had not been passed.”

Section 8 of the Bengal General Clauses Act, 1899 is in similar terms. It is applicable to enactments in West Bengal. The Section is reproduced below:

“8. Effect of repeal.- Where this Act, or any Bengal Act or West Bengal Act made after the commencement of this Act, repeals any enactment

hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly

done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy, in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as

aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may

be imposed, as if the repealing Act had not been passed.â??

The 1997 Act read with the above amending Act did not have any savings clause.

The law is well-settled. Where there is no savings clause, the General Clauses Act, 1897 or the Bengal General Clauses Act, 1899 would apply,

saving all actions taken prior to or coming into force of the said Act. In our state the latter Act would apply. However, in the rules entitled West

Bengal School Service Commission (Selection of persons for appointment of non-teaching staff) Rules, 2009 there was a savings clause, rule 24(2)

which saved acts done prior to the enactment of the said Act of 1997.

Applying this law any action including a selection process undertaken before coming into force of this Act would be saved.

The question is: would this savings clause save any action taken under the old law, superseded by the said Act of 1997?

The memorandum dated 30th May, 2007 was issued by the District Inspector to fill up the subject four posts. This was cancelled by the appellants on

8th June, 2007. The reason for cancellation of the memorandum was that there was no vacancy for the four posts. This meant that no prior permission

could have been given on the basis of the 30th May, 2007 memorandum. They had already been filled up by the appellants. Therefore, the prior

permission of 23rd July, 2008 was illegal and nonest in the eye of law. All the four posts were illegally approved by the District Inspector. So was the

panel prepared on or about 30th January, 2009. It was an illegal exercise of power by the District Inspector. Connivance of the managing committee,

the District Inspector of schools with the candidates in the panel cannot be ruled out. The whole recruitment process further to that nonest prior

permission was a nullity. The District Inspector of Schools was absolutely right in taking a decision on 1st October, 2009 not to approve this panel.

The argument that is made by Mr. Sanyal for the respondents/writ petitioners is that actions taken prior to the coming into force of the said

amending Act of 2008 are saved by the operation of the said above sections as a contrary intention is not expressed in the said Act. I agree with

this proposition of law.

Now, it has to be ascertained whether the cause of action made out by the said respondents was an action taken prior to the said Act.

The principle of law is that what is saved is a right which is vested or accrues giving rise to a corresponding liability, by virtue of an action taken prior

to the repeal or amendment of an Act. The right claimed must be a right in law capable of being enforced. The right must be crystallized. Any

inchoate right is not recognized.

Director of Public Works and Anr. Vs. HO PO Sang and Others reported in (1961) 2 All ER 721 was a Privy Council decision on an appeal from the

Supreme Court of Hong Kong in its Appellate division. The Landlord and Tenant Ordinance of 1950 permitted building and rebuilding work by the

lessee. An application was submitted by the lessee for this purpose ,which was under consideration when the Ordinance was repealed on 9th April

1957. A certificate was subsequently granted. The tenants and subtenants asked for a declaration that no such certificate could be granted. The terms

of the Interpretation Ordinance were identical to the said provision of our General Clauses Act. Lord Morris of Borth-y-Gest ruled that no right vested

or contingent existed in favour of the lessee corresponding to a liability on the date of repeal of the Ordinance. It followed the dictum of the leading

case of Abott Vs. Minister of Lands reported in (1895) A.C. 425.

In Ogden Industries Ltd Vs. Lucas reported in (1969) 1 All ER 121 the question was regarding compensation to the dependants of the deceased who

had died out of an injury. The Act which gave rise to this right and the corresponding liability was repealed a few days before the death of the

deceased. The Privy Council held that no right had accrued to the dependents on the date of repeal of the beneficent legislation.

In Gujral Singh vs State Transport Appellate authority reported in AIR 1997 SC 412 Mr. Justice K. Ramaswamy said;

23. Whenever an Act is repealed it must be considered, except as to transactions past and closed, as if it had never existed. The effect thereof is to obliterate the Act completely from the record of the Parliament as if it had never been passed it, it never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was existing law. Legal fiction is one which is not an actual reality and which the law recognizes and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances. Therefore, when Section 217(1) of the Act repealed Act 4 of 1939 in effect came to be non-existent except as regards the transactions, past and closed or saved.

26. On "Saving of rights acquired", in the Principles of Statutory Interpretation by G.P. Singh [(Sixth Edition) - 1996] at page 413, the learned author has stated that the effect of clauses (c) to (e) of Section 6 of GC Act is, speaking briefly, to prevent the obliteration of a statute in spite of its repeal to keep intact rights acquired or accrued and liabilities incurred during its operation and permit continuance of institution of any legal proceedings or recourse to any remedy which may have been available before the repeal for enforcement of such rights and liabilities. At page 418, the learned author has stated that the privilege to get an extension of a licence under an enactment is not an accrued right and no application can be filed after the repeal of the enactment for renewal of the licence. In Legislation and Interpretation by Jagdish Swarup (1974 Ed,) at page 539, it is stated that the power to take advantage of an enactment may without impropriety be termed as a "right", but the question is whether it is a "right accrued". A mere right (assuming it to be properly so called) existing in the members of the community or any of them to take advantage of an amendment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued".

In Subhankar Mandal Vs. State of West Bengal & Ors. and connected matters reported in (2011) 1WBLR (Cal) 847 this law has been restated by

this court. The candidates were held to be qualified for selection and appointment on the date of introduction of the new Act. Thus there was a

right accrued in their favour. I do not know how this decision relied upon by the respondents assists them.

It follows that an illegal act does not give rise to any right which could be saved by the West Bengal School Service Commission Act, 1997 as

amended in 2008 with effect from 14th January, 2009 read with the Bengal General Clauses Act, 1899. Right from the stage of issuance of the

memorandum by the District Inspector of Schools on 30th May, 2007, the action taken by the committee and the District Inspector of School was

illegal, to the point of being a nullity.

Mr. Sanyal tried to argue that vacancies now have arisen and that they should be filled up from the said panel.

From my analysis of the law it follows that the recruitment process prior to the enactment of the said Act of 1997 as amended in 2008, did not give

rise to any right in favour of the empanelled candidates. So any vacancy cannot be filled up from that nonest panel and has to be filled up by a

recruitment process conducted under the said Act.

On an overall assessment of the impugned judgment and order it appears that the ground on which the court allowed the writ application was that the

permission granted by the District Inspector of School (SE) Burdwan was infallible and that the Director of Schools had not the power to reverse that

decision.

Mr. Mukherjee is right when he submitted that under Section 22 of the Bengal General Clauses Act, 1899 the authorities had the right to withdraw the

permission on the legal premise that the authority has the right to issue an order as the right to withdraw it also. The Director of School Education

being a superior officer to the District Inspector of Schools had every authority to withdraw or cancel the prior permission dated 23rd July, 2007 and

the panel of 30th January, 2008 or so. This finding of the learned single judge is set aside. In view of my analysis about the decision of the Director on

merits was correct.

For all these reasons both the appeals are allowed. The impugned judgment and order dated 4th December, 2015 is set aside. The writ applications are

dismissed. All interim orders are vacated.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.