

(2008) 08 CAL CK 0011

Calcutta High Court

Case No: A.P.O. No. 115 of 2006, W.P. No. 2481 of 2001

State of West Bengal and Others

APPELLANT

Vs

Bahar Alam and Others

RESPONDENT

Date of Decision: Aug. 11, 2008**Acts Referred:**

- Constitution of India, 1950 - Article 162, 166, 30(1), 309

Hon'ble Judges: Sankar Prasad Mitra, J; Pratap Kumar Ray, J**Bench:** Division Bench**Advocate:** Ashim Kumar Haldar Indrani Pal, for the Appellant; Sourav Banerjee, for the Respondent**Final Decision:** Allowed

Judgement

Pratap Kumar Ray, J.

The Judgment of the Court was delivered by:

Challenging the judgment and order dated 22nd January, 2004 passed by learned trial Judge in the writ petition No. 2481 of 2001, this appeal has been preferred by the State of West Bengal through its Secretary, Education Department; Director of School Education, West Bengal and the District Inspector of Schools (SE) Malda, as appellants. By the impugned order under appeal, learned trial Judge directed to accord approval of the panel for appointment of M.M. Teacher in Batna J.M.O. Senior Madrasah, hereinafter for brevity referred to as "concerned Madrasah", by holding that Reservation Rule in terms of The West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1976, hereinafter referred to as "Reservation Act, 1976", had no applicability for appointment of candidate in a teaching post in a Senior Madrasah in view of the decision of this Court passed in W.P. No. 29402 (W) of 1997, being a decision dated 16th November, 1999 passed by Amitava Lala, J. (as His Lordship then was) in the said writ. The impugned judgment under appeal reads such:-

The writ petitioner, being the Secretary of Batna J.M.O. Senior Madrasah, P.O. Batna, District - Malda, hereinafter referred to the said Madrasah, has moved the writ petition for not granting approval to the panel for appointment of M.M. Teacher in the said Madrasah, it is submitted.

The said panel was prepared by following the recruitment procedure that even in a senior Madrasah no reservation rule would be followed and the said point was decided by this Court in W.P. No. 29402 (W) of 1997, being Annexure "P4" to this writ application, it is submitted further.

Mr. Ghosh, the learned Advocate for the petitioner who submits that the panel was prepared by holding interview of the sponsored candidates from the general category and by following relevant recruitment procedure.

No Affidavit has been used by the State Respondents, even today no one appears to oppose this application either.

Thus, having regard to the facts and circumstances of the case, the fourth respondent herein, is directed to approve the pending panel for appoint of M.M. Teacher in the said Madrasah within a period of 4 weeks from the communication of this order.

The above direction is to be treated to be mandatory by the concerned respondent herein.

Thus the writ application is disposed of in terms of the above order.

There will be no order as to costs. All parties are to act on a xerox signed copy of this Dictated Order on the usual undertaking.

2. This appeal has been opposed by the writ petitioner-respondent by taking the same point that Reservation Rule has no applicability whereby the post was reserved for Scheduled Tribes candidate following the 100 point Roster as framed in terms of the said Reservation Act, 1976.

3. It is the case of the appellant that the Reservation Act, 1976 has full applicability to the educational establishment getting government grant to maintain the school/institution by way of payments of salary, allowances and service benefits of the teaching and non-teaching staff therein and as such, they cannot by-pass the 100 point Roster of Reservation Act, 1976.

4. Learned trial Judge, however, did not discuss the issue as to whether the Reservation Act, 1976 has applicability, so far as the Madrasahs are concerned, but disposed the writ by directing a mandatory order to approve the panel prepared for the said teaching post of Senior Madrasah interviewing the candidates of general category as referred to by the Employment Exchange though in the prior permission order issued by the District Inspector of Schools concerned in terms of the directions issued by the Director of School Education, West Bengal, laying down the

procedures for recruitment of teaching and nonteaching staff of Madrasah, Senior Madrasah as well as Secondary Schools receiving aid of the government, the post was reserved for a Scheduled Tribe candidate. Learned trial Judge simply held that the point was decided in another writ application being W.P. No. 29402 (W) of 1997. Before advertizing to the point whether Reservation Act, 1976 has applicability so far as the institutions run by minority community getting full government grant to run the institution, we are considering the point whether learned trial Judge was right to rely upon the views expressed in another writ application as referred to in the judgment to pass the impugned order under appeal.

5. It appears from the annexure of Paper Book, which was also annexure of the writ application being page 30 of the Paper Book that the particulars of writ petition No. 29402 (W) of 1997 was mentioned, wherefrom it appears that it was a case against the District Inspector of Schools (SE) Howrah relating to the change of Reservation Roster by issuing a notification under memo No. 539/M dated 4th August, 1992 whereby the District Inspector of Schools concerned issued a memo reserving a teaching post of one Senior Madrasah at Howrah. The Managing Committee of the Institution who were the writ petitioners therein, admittedly not related to the present school in question. In that case, Amitava Lala, J. (as His Lordship then was) passed an order on 16th November, 1999 by holding that Reservation Rule was not applicable to Senior Madrasah relying upon a memo No. 281/AD/Gen.(800) dated 20th June, 1992 issued by District Inspector of Schools (SE) South 24-Parganas. The judgment dated 16th November, 1999 passed by Amitava Lala, J. (as His Lordship then was) in the said writ W.P. No. 29402 (W) of 1997 reads such:-

In respect of filling up the vacancy of the post in a Senior Madrasah a prior permission was given by the appropriate authority under Memo No. 539/M, dated 4.8.92. Surprising by a further memo No. 83/M, dated 19.5.95 prior permission was modified by incorporating the first post reserved for Scheduled Caste and remaining two posts reserved for Scheduled Tribe candidates. It appears that such modification was made de hors the rules at least it is apparent from the Memo No. 281/AD/Gen.(800) dated 20.6.92 where it is categorically stated that the reserved list is not applicable to senior madrasah. Under such circumstances let the school authority call for the interviews from the general candidates as per prior permission dated 4.8.92 including the petitioners and proceed accordingly for filling up the vacancy preferably within a period of six weeks from the date of communication of this order.

This writ petition is, thus, disposed of. No order as passed as to costs.

Xerox certified copy of this order be supplied within 7 days from the date of putting requisition.

6. From the present writ application, however, it appears that it was moved seeking a writ of mandamus directing to consider the panel prepared from general category

candidates with reference to a teaching post, which was earmarked as a reserved post for Scheduled Tribe candidate in the prior permission order issued by the District Inspector of Schools concerned by considering the said panel as a right panel prepared relying upon the said memo No. 281/AD/Gen.(800) dated 20th June, 1992 issued by one District Inspector of Schools (SE) South 24-Parganas district to advance the argument that Reservation Rule in terms of said Reservation Act, 1976 had no applicability. In this writ application it is contended that though two teaching posts of this institution were reserved, one for Scheduled Caste, another for Scheduled Tribe by the District Inspector of Schools concerned in the prior permission dated 30th April, 1997 but same was not implemented on alleged ground of that due to existence of School Service Commission, no steps could be followed by Madrasah. So W.P. No. 126 of 2000 through one Sri Bahar Alam as writ petitioner was moved praying implementation of it. This writ application was disposed on 14th January, 2000 directing that in terms of the prior permission issued on 30th April, 1997, the post should be filled up and School Service Commission, which was set up subsequently by the School Service Commission Act, would not be entitled to recommend any candidate. The said order of 14th January, 2000 as relied upon in the present writ application passed in W.P. No. 126 of 2000, reads such:-

The writ petition is disposed of upon hereafter the same as on day's list as Motion Adjourned.

Affidavit of service filed on Court today be kept with the records. It appears to this Court that the prior permission was given by the authority to fill up the vacancies of two posts of Assistant Teachers by prescribing the qualification of M.M. as far back as on 30th April, 1997, therefore, all happenings were prior to School Service Commission came into effect either on the date as given under the notification being 1st November, 1997 or pursuant to an order of this Court reported in 1999 (1) CHN 601 (Abdul Karim vs. State of W.B. & Ors.) being 15th January, 1998.

Under such circumstances, in filling up the vacancies of two posts, the School Service Commission having come into effect cannot be very embargo but the rule prevailing at the material point of time will be applicable in the case of the petitioner.

There will be an order in terms of prayer (a) to the writ application.

There will be no order as to costs.

All parties are to act on a Xeroxed signed copy of this dictated order come usual undertakings.

7. It has been further contended in the present writ application that a contempt application was moved being C.C. No. 44 of 2001 for non-compliance of the said order dated 14th January, 2000, which was disposed of on 10th July, 2001 by

Amitava Lala, J. (as His Lordship then was) by holding that as the alleged contemnors already modified the Reservation Rule, so far as the teaching post earmarked for Scheduled Caste candidate to a general candidate the contempt application should be deemed as disposed of and so far as the second post of Theology Group of the said Madrasah as was reserved for Scheduled Tribe candidate in terms of prior permission dated 30th April, 1997, contempt application stand dismissed. His Lordship while deciding the said contempt rule, was of the view that applicability of Reservation Act, 1976, whether could be nullified by issuing a memo by the District Inspector of Schools concerned being memo No. 281/AD/Gen.(800) dated 20th June, 1992, requires an interpretation and as such, the same could not be considered as willful disobedience of the order and thereby kept the matter open for decision in a fresh writ application granting liberty to the writ petitioners, namely, the present Managing Committee of the Madrasah to move the issue. The judgment delivered in the contempt proceeding aforesaid relating to the present post in question on 10th July, 2001, reads such:-

The contempt Application is made for violation of the order dated 14.1.2000 passed by this Court. The question arose in this connection is that in spite of giving directions for approving the panel, the concerned District Inspector of Schools failed to approve the panel in respect of the Theology Group in a Senior Madrasah as per the prior permission dated 30.4.1997. After taking out the issuance of rule of contempt the compliance has been given effect in respect of first post of Theology Group which was fixed for general candidate. In that way the petitioner was aggrieved because of non-compliance within time. However, an excuse in the form of unconditional apology has been tendered by the learned Counsel for the appeged contemnor which was accepted by this Court to avoid the complicated situation and to give effect of the order. Therefore, to that extent contempt matter is treated to be disposed of. The contempt rule is also disposed of. So far as the second post of Theology Group which was fixed for the reserved candidate as per the prior permission dated 30.4.1997 at the time of approving the panel pursuant to the order of this Court is concerned, the contemnor found that no reserved candidates were forwarded for the purpose of giving approval as a result whereof he was not in a position to comply with the same.

The learned Counsel appearing for the petitioner contended that as per the Memo No. 281/AD/Gen(800) dated 20.6.92 reservation rule is not application to senior Madrasah.

According to me, it is a matter of interpretation and not a matter of willful disobedience so that the Court can give effect by directing the alleged contemnor to comply with the same ignoring the prior permission under which reservation has been provided. Therefore, to that extent contempt rule cannot be sustainable. Accordingly, the same is discharged, personal presence of the contemnor is permanently dispensed with. No order as to costs. Since it is a matter of

interpretation of the prior permission dated 30.4.1997, the petitioner is at liberty to take the point afresh by making writ petition and in such circumstances principles of res-judicata or analogous thereto or question of delay will not be applicable.

Thus, the contempt matter is treated as disposed of in respect of general candidate and treated as dismissed so far as the purported reserved candidate under the prior permission dated 30.4.1997 is concerned.

Let xeroxed certified copy of this Dictated Order be supplied to the parties by the department within seven days from the date of putting in requisition for drawing up and completion of the order as well as the Certified copy thereof.

All parties are to act on a xeroxed signed copy of this Dictated order upon usual undertaking and as per the satisfaction of the officer of this Court as above.

8. On a bare reading of the judgment and order dated 10th July, 2001 passed in the said contempt proceeding it appears that so far as the second post is concerned, which is the subject matter of the present writ application of the concerned Madrasah, there was no adjudication made that the Reservation Rule in terms of the Reservation Act, 1976 had no applicability. On the other hand, Amitava Lala, J. (as His Lordship then was) kept all points open by holding even that the principle of res judicata or analogous thereto or question of delay would have no applicability to move a fresh writ petition.

9. Having regard to such, we are noticing an error/mistake by learned trial Judge in adjudicating the writ application on 22nd January, 2004, which is now before us under appeal due to the finding that the point already decided. Learned trial Judge did not decide the issue, namely, whether a provision of any Act being the Reservation Act, 1976, whether has applicability in all Madrasah, Senior Madrasah as well as in the other schools and educational establishments getting government aid and grant fully and whether its effect could be restricted and curtailed by an executive decision and that too, by an officer of the Education Department holding a post in the lowest rank, namely, the post of District Inspector of Schools of a District by issuing the memo No. 281/AD/Gen.(800) dated 20th June, 1992. It appears that learned trial Judge relied upon a decision passed by Amitava Lala, J. (as His Lordship then was) on 16th November, 1999 in W.P. No. 29402 (W) of 1997 to deal with a case of Howrah district but His Lordship, Amitava Lala, J. (as His Lordship then was), did not follow the said view of His Lordship while disposing of the contempt application subsequently with reference to the present school in question and the concerned post for which we are concerned herein in the appeal while passing the judgment on 10th July, 2001 in C.C. No. 44 of 2001 and kept the point open for adjudication. Those documents were annexed in the writ application and those were the pleading in the writ application. Despite such without deciding in the perspective as observed by Amitava Lala, J. (as His Lordship then was) in contempt matter, learned trial Judge passed the impugned judgment under appeal, which in our view is not legally

sustainable without addressing the point when with reference to the same-self post in the contempt matter, Amitava Lala, J. (as His Lordship then was) dismissed the contempt application by holding that the same requires an adjudication and interpretation in a fresh writ application to resolve the issue whether Reservation Act, 1976 and the Reservation Roster being the 100 point Roster have applicability to a Senior Madrasah receiving full government grant on account of pay and allowances of teaching and non-teaching staff as well as other development charges from the State Government.

10. Now the question whether the memo issued by the District Inspector of Schools concerned as referred to being memo No. 281/AD/Gen.(800) dated 20th June, 1992 can nullify/amend/modify a statutory provision under the said Reservation Act, 1976 and the Rule framed thereof by framing a 100 point roster for reservation identifying different posts as reserved for Scheduled Caste and Scheduled Tribe candidates, as the case may be.

11. To answer that point the relevant rules are required to be considered, namely, the reservation rule to reserve the posts for Scheduled Caste and Scheduled Tribe community. West Bengal Act XXVII of 1976 being the West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1976 was enacted with the object of adequate representation in the services and posts within the State of the members of the Scheduled Caste and Scheduled Tribe, who are backward classes of citizens. This Act hereinafter referred to for brevity as "Reservation Act, 1976". u/s 2 it was extended to the whole of West Bengal, the word "establishment" has been defined u/s 2(b) in the following language:-

2(b). "Establishment" means any office of the State Government, a local or statutory authority constituted under any State Act for the time being in force, or a corporation which not less than fifty-one per cent of the paid up share capital is held by the State Government, and includes universities and colleges affiliated to the universities, primary and secondary schools and also other educational institutions which are owned or aided by the State Government and also includes an establishment in public sector.

12. Section 4 mandates the reservation of the posts following a Roster and Section 6 is the provision whereby there is a scope of de-reservation of reserved vacancies in the event of non-availability of suitable candidates. Section 4 and Section 6 thereof, reads such:

4. (1) After the commencement of this Act all appointments to services and posts in an establishment which are to be filled up by direct recruitment shall be regulated in the following manner, namely:-

(a) subject to other provisions of the Act twenty two per cent of the vacancies shall be reserved for candidates belonging to Scheduled Castes and six per cent for candidates belonging to Scheduled Tribes, in the manner set out in the Schedule:

Provided that the State Government may, from time to time, by notification in the Official Gazette, increase the percentage so, however, that the reservation shall not exceed twenty five per cent in the case of Scheduled Castes the ten per cent in the case of Scheduled Tribes;

Provided further that different percentages may be fixed by the State Government for different districts in accordance with the percentages of population of Scheduled Castes and Scheduled Tribes in such districts:

Provided also that in respect of the West Bengal Civil Service (Judicial), the percentage shall be ten for Scheduled Castes and five for Scheduled Tribes:

(b) fees, if any, prescribed for any examination for selection to any service or post shall be reduced to one-fourth in the case of candidates belonging to the Scheduled Castes or the Scheduled Tribes;

(c) the member of the Scheduled Castes and the Scheduled Tribes shall be entitled to a concession of five years over the prescribed maximum age limit for appointment to any service or post.

(2) The member of any Scheduled Caste or Scheduled Tribe candidate qualifying on merit for appointment of any unreserved vacancy in a service or post in any establishment to be filled up by direct quota reserved in such service or post for such candidate under sub-section (1). 6. (1) There shall be no de-reservation of any reserved vacancy by any appointing authority in any post in an establishment which is required to be filled up by direct recruitment. In the absence of qualified Scheduled Caste or Scheduled Tribe candidate, as the case may be, to fill up such vacancy, such vacancy shall remain unfilled. (2) Notwithstanding anything contained in sub-section (1), if, in the public interest, it is necessary to fill up any vacancy as aforesaid remaining unfilled on account of non-availability of a qualified Scheduled Caste or Scheduled Tribe candidate, as the case may be, the appointing authority shall refer the vacancy to the State Government for de-reservation. Upon such reference the State Government may, if it is satisfied that it is necessary or expedient so to do, by order, de-reserve the vacancy, subject to the condition that the reservation against the vacancy so de-reserved shall be carried forward against the subsequent unreserved vacancy.

(3) Notwithstanding anything contained in the foregoing provisions of this section or elsewhere in this Act, if, in the public interest, it is necessary or expedient to fill up any vacancy in any post in any primary, secondary or higher secondary school in any district owned or aided by the State Government, caused by deputation or leave of the incumbent of that post for a period not exceeding ten months and remaining unfilled on account of non-availability of a qualified Scheduled Caste or Scheduled Tribe candidate, as the case may be, the appointing authority may refer the vacancy to the District Commissioner for Reservation, referred to in sub-section (1) or subsection (1A), as the case may be, or section 6B, for that district for

de-reservation. Upon such reference, the District Commissioner for Reservation as aforesaid may, if he is satisfied that it is necessary or expedient so to do, by order, de-reserve the vacancy, subject to the condition that the reservation against the vacancy, so de-reserved shall be carried forward against the subsequent unreserved vacancy in any such post caused by such deputation or leave for such period.

13. A schedule was annexed u/s 4 of the said Act providing 100 point Roster as to be maintained. This 100 point Roster, which is the part and parcel of the said Act subsequently was amended in view of making provision of reservation of 5 per cent vacancies for backward community, which earlier was not considered and the Hon"ble Governor issued an order being No. 261- TW/EC/MR-103/94 published in Calcutta Gazette on 6th April, 1995, whereby and where under the 100 point Roster was recasted by identifying the posts as would be reserved for different reserved category, namely, Scheduled Caste, Scheduled Tribe and backward community. Following the said 100 point Roster, the District Inspector of Schools (SE) Malda in terms of the direction issued by the Director of School Education, West Bengal, laying down the procedures to fill up a permanent vacancy of teaching and non-teaching post and on the basis of the requisition of such Roster records by the School Authority, namely, the Senior Madrasah Authority accorded permission to fill up the vacancy on 30th April, 1997 by reserving two vacancies, which includes one vacancy for Scheduled Tribe community by identifying the post. Madrasah Authority accordingly send a requisition in terms of the prior permission of the District Inspector of Schools concerned to the concerned Employment Exchange to sponsor the names from Scheduled Tribe category to the reserved post for which we are concerned in this appeal. The Employment Exchange did not refer the names of Scheduled Tribe candidates but send the names of 40 general category candidates with reference to the other one vacancy of general category. The School Authority out of their own accord divided those 40 candidates in two groups and held an interview of the general category candidates for the said reserved post of Scheduled Tribe category and thereby prepared a panel. As the District Inspector of Schools concerned did not accord approval of said panel for the reserved post of M.M. Teacher in the concerned Madrasah as no candidate from reserved category was selected, writ application was moved seeking approval of the panel. In terms of the recruitment procedure, appointment will follow after the approval of the panel. The person who from general category was selected for the post reserved for Scheduled Tribe community, was not the writ petitioner initially seeking any relief for approval of panel and thereby his appointment in the said Madrasah, but subsequently he filed an application to the appeal Court for being added as a party, which was allowed by the Court. This added respondent in the appeal had taken the same stand like the Madrasah Authority that Reservation Act, 1976, has no applicability to the teaching posts of Senior Madrasah relying upon the circular of District Inspector of Schools (SE) South 24-Parganas dated 20th June, 1992 as referred to above.

14. The circular letter of District Inspector of Schools concerned as relied upon as the basis that Reservation Act has no applicability being the circular No. 281/AD/Gen.(800) dated 20th June, 1992, reads such:

Government of West Bengal

Office of the District Inspector of Schools

(Secondary Education)

South 24-Parganas

No. 281/AD/Gen(800)

Dated, Calcutta, the 20th June, '92

To

The Heads of All Institutions of Secondary Type of South 24-Parganas District.

Sub: Instruction & guidance in respect of some important matters.

Ref: This office Memo No. 454(250)AD/Gen. dt. 3.11.90 & No. 199(1000) dt. 7.7.88.

The undersigned has to issue the following instruction and guidance in respect of some important matters for ready reference with the request to follow those as & when necessary. The matter relate to certain rules to be followed by the Non-Government Aided Institutions of Secondary type. It is also requested that the instruction given in this office Memo No. 454(750)AD/Gen dt. 3.11.90 should be followed strictly at the time of submission of papers of different matters.

1. Institutions should see that their recognition exists and in case of Co-educational institutions permission of Co-education also exists in absence of which grant-in-aid may be stopped at any time.
2. In no way term expired managing committee/Administrator/Ad-hoc Committee should function. In such cases the head of the institution will be held responsible and grant-in-aid to the institution will be stopped as soon as the fact is detected.
3. No staff beyond sanctioned strength should be appointed. If there is any such staff he/she should be removed if there is no order of maintaining status quo from Court or, any court from competent authority to maintain status quo.
4. Timely submission of grant-in-aid application, audit report, utilization certificate should be ensured. Terminal benefit (Pension etc.) Papers of a expired/retired staff of his school should be submitted within 3 (three) months from the date of death/retirement/resignation. Grant-in-aid to the defaulter Schools in these two respects may be stopped at any time. Pension to fill up the death/retirement vacancy will not also be accorded until terminal benefit papers are submitted.

5. After each terminal examination examined answer scripts should be given to students for 7 (seven) days within one month from the last date of examination to show into guardians & at least two teacher-guardian meetings should be held within a year (vide Board's Circular No. S/102 dt. 24th March/92). Proceedings of such meeting should be submitted to Board as well as to the D.I. of Schools (SE). This is very important.

6. School records including accounts should be made available to the inspecting officers at the time of inspection of the schools/Madrasahs.

7. No fake/false name should be kept as students in the record. If such practice is detected and if actual enrolment falls below requisite no as per (G.A. Rules grant-in-aid will be stopped. Board will be referred for de-recognition of the institution and the head of the institution will alone be held responsible for this.

8. 50 point vacancy Roster has been introduced with effect from 27.3.90. Now there should be two sets of vacancy roster-one for teaching staff (Headmistress, H.M. & Posts of Assistant teachers) & the other for non-teaching staff (Librarian, Clerk & Class IV staff) Permanent & short term vacancies should be taken together to prepare the 50 post vacancy roster. No post reserved for S.C. or S.T. candidates should be filled up by the candidates other than that particular caste and until the vacancy is filled in, by the candidate of the particular caste it will remain vacant i.e. no reserved post will henceforth be deviated unreserved. Reservation rule is not applicable to Senior Madrasahs. Approved holiday list for an academic session of the schools should be submitted office within the month of May of the year without fail.

Sd/- Illegible,

District Inspector of Schools

Secondary Education, South 24-Parganas.

15. It appears from the said circular letter issued by a junior most officer in the Education Department at the lowest level that in paragraph 8 casually there is a mentioning "reservation rule is not applicable in Senior Madrasah". In issuing the circular no government order has been relied upon whereby and where under the government intended to amend the Reservation Act, 1976.

16. Having regard to the Reservation Act, 1976 and the meaning of the word "establishment" u/s 2(b) of said Act, which includes all educational institutions who are getting government grant/aid, all Madrasahs may be junior or senior Madrasah where the government is paying salary, allowance and service benefits of teaching and non-teaching staff and also paying the fund for development as a government grant, we are of the view that they are coming under the purview of the said Reservation Act, 1976. Section 4 of the said Act, accordingly is squarely applicable and the 100 point Roster as issued became the basis of reservation of the concerned post for Scheduled Tribe category candidate. Prior permission to fill up such vacancy

was accorded by the District Inspector of Schools concerned directing the School Authority to invite the names from Employment Exchange and thereby to hold the interview and to select candidates from reserved category. It is an admitted fact that Employment Exchange never was directed to send the names of candidates of general category and there was no scope even to send any name of general category candidate for the reserved post of Scheduled Tribe community, unless and until, the said post is dereserved following the procedure laid down in Section 6, which admittedly has not been done by the State Government.

17. The circular letter of District Inspector of Schools concerned dated 20th June, 1992 being a circular letter, which under any stretch of imagination cannot amend the Reservation Act, 1976. The said officer had no power/jurisdiction to amend, modify the Reservation Act to say that Reservation Rule has no applicability to the Senior Madrasah. It is only the State Legislatures who have enacted the law has the power and jurisdiction to amend, modify Section 4 of Reservation Act, 1976 and also the meaning of the word "establishment" in terms of Section 2(b) of the said Act by exempting the Senior Madrasah from the Reservation Act. Admittedly, in the instant case, it has not been done by the State Legislatures.

18. Beside such, there is no circular letter or the government order issued under Article 162 of the Constitution of India or under Article 166 of the Constitution of India being an executive decision of the State Government with the object to exempt the Senior Madrasah from the Reservation Act, 1976 and the 100 point Roster. No such government order has been placed before this Court. Even if any government order is in existence, same cannot nullify the Act made by the State Legislatures, wherein, there is no ambiguity in defining the word "establishment" by the language "other educational institutions, which are owned or aided by the State Government". Reliance may be placed to the judgment passed in the case [B.N. Nagarajan and Others Vs. State of Karnataka and Others](#), wherein the Apex Court held that when there is existence of rule framed under Article 309 of the Constitution of India in the field of service matter of the employees, government has no power to modify or amend it by executive decision even under Article 162 of the Constitution of India, this principle has been followed in the case [Secretary, State of Karnataka and Others Vs. Umadevi and Others](#), a Constitution Bench judgment.

19. It is an admitted fact that the present institution is getting government aid for payments of salary, allowances and service benefits of teaching and nonteaching staff and also the grant relating to the development of this institution. So the present institution is an aided institution getting government grant. Having regard to such, the stand as taken further by the added respondent and the Madrasah Authority that the concerned institution since is a minority institution being protected under Article 30(1) of the Constitution of India, Reservation Act has no applicability, has no legal basis to stand. Any institution run by a private body when

accept the government grant and aid, is bound to follow the government orders and decision including the legislation as passed by the State and Central Legislatures as well as the provision of selection of teaching and non-teaching staff framed by the Director of School Education, West Bengal. The issue has been considered by the Apex Court in the case [T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others,](#) a judgment of 11 Judges Bench.

20. It is a settled legal position that an executive officer of the government, which in the instant case the District Inspector of Schools concerned holding the lowest post in the Education Department and that too in a particular district, namely, South 24-Parganas (the present Madrasah is situated in another district Malda under the jurisdiction of District Inspector of Schools (SE) Malda) had no power to nullify the Reservation Act, 1976 by using the word under Clause (8) aforesaid by mentioning that "reservation rule is not applicable to Senior Madrasah". The circular letter of the District Inspector of Schools concerned dated 20th June, 1992 accordingly is of without jurisdiction and same is set aside and quashed so far as the words mentioned under Clause (8) that "reservation rule is not applicable to Senior Madrasah". Hence, the point as urged that Reservation Act, has no applicability, has no merit.

21. From the writ application and pleading it appears that School Authority accepted the prior permission decision issued by the District Inspector of Schools concerned whereby the post was reserved for Scheduled Tribe community. With reference to the same-self post, when the School Service Commission came into effect, a writ application was moved by the Secretary of the concerned Madrasah, who is also the writ petitioner in the present writ application. Amitava Lala, J. (as His Lordship then was) passed the order directing to fill up the vacancy following the prior permission decision issued by the District Inspector of Schools concerned, that means to fill up the two vacancies, one for Scheduled Caste category and another for Scheduled Tribe category in terms of the prior permission of District Inspector of Schools concerned. School Authority admittedly did not follow that but filed a contempt application raising an issue that as they have selected a candidate from general category for the post reserved for Scheduled Tribe category, the District Inspector of Schools concerned committed a contempt due to his inaction to accord approval of said panel and as such, appropriate direction should be passed directing him to accord approval of panel, wherein the added respondent was selected as a first candidate from general category sponsored candidates. Amitava Lala, J. (as His Lordship then was) in the contempt proceeding did not allow such prayer as it appears from the order dated 10th July, 2001. His Lordship did not accept such contention and dismissed the prayer relating to that particular post in question, which was termed in the order sheet as second post of Theology Group. The relevant portion of the order re-quoted again:-

So far as the second post of Theology Group which was fixed for the reserved candidate as per the prior permission dated 30.4.1997 at the time of approving the panel pursuant to the order of this Court is concerned, the contemnor found that no reserved candidates were forwarded for the purpose of giving approval as a result whereof he was not in a position to comply with the same.

The learned Counsel appearing for the petitioner contended that as per the Memo No. 281/AD/Gen(800) dated 20.6.92 reservation rule is not application to senior Madrasah.

According to me, it is a matter of interpretation and not a matter of willful disobedience so that the Court can give effect by directing the alleged contemnor to comply with the same ignoring the prior permission under which reservation has been provided. Therefore, to that extent contempt rule cannot be sustainable. Accordingly, the same is discharged, personal presence of the contemnor is permanently dispensed with. No order as to costs. Since it is a matter of interpretation of the prior permission dated 30.4.1997, the petitioner is at liberty to take the point afresh by making writ petition and in such circumstances principles of res-judicata or analogous thereto or question of delay will not be applicable.

Thus, the contempt matter is treated as disposed of in respect of general candidate and treated as dismissed so far as the purported reserved candidate under the prior permission dated 30.4.1997 is concerned.

22. Having regard to such state of affairs and from the pleadings of the writ application it appears that the added party Obaidur Rahman had no scope even to appear in the interview for the concerned post reserved for Scheduled Tribe community as admittedly he does not belong to the said community. Furthermore, Employment Exchange did not refer any name from Scheduled Tribe community, as such, there was no scope before the Managing Committee of the Madrasah to constitute a Selection Committee following the recruitment procedure issued by the Director of School Education, West Bengal for selection of any candidate in the said reserved post. Hence, the selection of Obaidur Rahman as claimed by the writ petitioner as well as the added respondent got no legal basis and his selection itself was de-hors of the recruitment procedures, prior permission decision, the Reservation Act, 1976 read with 100 point Roster Rule.

23. Having regard to all factual matrix of the case and finding and observation above, this Court is of the view that there is no merit in the writ application and also no merit in the stand as taken by the added respondent, Obaidur Rahman, in appeal before us. Learned trial Judge did not address the issue in the angle and relied upon an order of Amitava Lala, J. (as His Lordship then was) passed in another writ application being W.P. No. 29402 (W) of 1997, though Amitava Lala, J. (as His Lordship then was) himself while adjudicating the present lis as cropped up earlier in the contempt matter as already referred to, did not allow the submission to pass

necessary order in the contempt proceeding directing approval of panel and on the other hand His Lordship kept the point open for decision by interpretation of statute to identify the issue whether Reservation Rule would be applicable to the Senior Madrasah or not as urged. As per our reading learned trial Judge did not address the issue in the proper perspective and thereby there is illegality in the impugned judgment under appeal per se. Hence, the impugned judgment under appeal is set aside and quashed. As already held by us, writ application also has no merit. Writ application, accordingly, stand dismissed. The prayer of the added respondent, Obaidur Rahman, before us in the appeal Court also stand dismissed. The appeal is accordingly allowed.

24. Since, at the present moment the School Service Commission Act has come into effect from the year 1997, hence, the procedure laid down for selection of a candidates in a teaching post in the concerned Madrasah is controlled by the School Service Commission. The concerned District Inspector of Schools is directed to refer the vacancy following the Reservation Act, 1976 to the School Service Commission for their recommendation of a candidate from Scheduled Tribe category by inviting applications in terms of the procedures laid down by the School Service Commission for such selection.

25. It appears from the records that initially when the matter came up before the Division Bench to adjudicate the stay application, the Division Bench (Coram: V.S. Sirpurkar, C.J., and Soumitra Sen, J.) by the order dated 26th April, 2006 directed to approve the panel wherein Obaidur Rahman stood first subject to the result of the appeal.

In view of our judgment as delivered, impugned judgment under appeal is set aside and quashed and writ application stands dismissed. Said interim order dated 26th April, 2006, as already passed by the Appeal Court, stands vacated and the approval decision as taken by the District Inspector of Schools concerned as per said interim order is set aside and quashed and as a consequence of that, the appointment of Obaidur Rahman in the Madrasah concerned stood quashed. Appeal is, thus allowed.

26. Later:

Let Xerox certified copy of this judgment, if applied for, be given to the learned advocates appearing for the parties expeditiously.

Sankar Prasad Mitra, J.