

(2003) 03 CAL CK 0032**Calcutta High Court****Case No:** C.O. No. 8048 (W) of 1998

Jamadar Sha and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision: March 27, 2003**Acts Referred:**

- Constitution of India, 1950 - Article 14, 16, 21, 226

Citation: (2004) 3 CALLT 48 : 108 CWN 520**Hon'ble Judges:** Bhaskar Bhattacharya, J**Bench:** Single Bench

Advocate: Ashoke Kumar Maity and T.P. Halder, Sougata Bhattacharyya, for the Appellant; Ekramul Beri, for the Respondent Nos. 17, 21 and 32, P.Q. Mondal, Sarmistha Sarkar, for Respondent No. 23, Mala Mitra, for the Respondent No. 26, Amalesh Roy and Debasish Ghosh for Respondent Nos. 15, 18, 24, 25, 31 and 34, R.N. Garat, for Respondent No. 20 and Subrata Mukhopadhyay and Gopa Aditya for the Respondent Nos. 13, 36, 37 and 38, for the Respondent

Final Decision: Allowed**Judgement**

Bhaskar Bhattacharya, J.

By this writ application, the writ petitioners, whose names were sponsored by the District Employment Exchange, Siliguri for the posts of Primary Teacher, have prayed for direction upon the respondents to cancel the orders of appointment of private respondent Nos. 13 to 39 with a direction upon the respondents to appoint the petitioners in the aided Government sponsored free primary school under the urban area of Siliguri Municipality on the allegation that according to the existing rule the private respondents whose names were not sponsored by the Employment Exchange could not be considered for appointment.

3. Following facts are not in dispute:

The petitioners earlier filed another writ application being C.O. No. 714(W) of 1997 challenging the legality of the preparation of panel for the posts of Assistant Teacher in various aided primary schools in the District of Darjeeling prepared by the respondents authority. The said writ application came up for final hearing before Umesh Chandra Banerjee, J. (as His Lordship then was) on August 13, 1987 but on that date His Lordship dismissed the said writ application in view of the fact that Minister-in-Charge of Education (Primary and Secondary) had already been approached in the matter and the concerned Minister had also passed an order suspending payment of further salary of the newly appointed Assistant Teachers until further order. However, while dismissing the said writ application, Banerjee, J. granted liberty to the petitioners to move afresh if further cause of action arose.

4. After the dismissal of the earlier writ application filed by the petitioners, the respondent authorities in violation of the order of District Inspector of Schools (PE), Darjeeling dated July 17, 1987 released the salary of all the Assistant Teachers who were appointed under the panel of 1986 for the posts of Assistant Teachers of Primary School in Siliguri urban area. The petitioners, therefore, filed the present writ application with a prayer to cancel the appointments of the Assistant Teachers in primary schools in the District of Darjeeling who have been given appointment in violation of the relevant rules for preparation of the panel in urban area. At the time of entertaining this writ application Mohitosh Majumdar, J. by an order dated July 20, 1998 passed an interim order to the effect that appointments given to the respondent Nos. 13 to 39 should be treated as purely on ad-hoc basis and would abide by the result of the present writ application. It was further ordered that in the event their appointments are found to be illegal, they would be liable to refund the salary drawn pursuant to such appointment.

5. In the mean time, some of the private respondents whose salaries were withheld by the concerned respondent filed a separate writ application being C.R. No. 8858(W) of 1987 before this Court challenging such action on the part of the respondent. Ultimately the said writ application was finally disposed of by Ajit Kumar Sengupta, J. on November 17, 1992. His Lordship while allowing such writ application held that there was nothing wrong in the recruitment of the private respondents as primary teacher and consequently, the order passed by the Director of School Education was set aside and the respondents were directed to treat those persons at par with other teachers recruited through Employment Exchange. His Lordship further held that the private respondents who were petitioners therein would be entitled to arrears of Salary and direction was given for payment of such arrears. It appears from page 18 of the said judgment that before Sengupta, J. no material was placed indicating that there was definite instruction of the State Government not to recruit any teacher except through Employment Exchange and not through any other sources. His Lordship further held that such being the position, the validity of any such restriction through executive fiat did not call for consideration. It may further be mentioned here that the present writ petitioners

were not made parties to the said writ application before Justice Sengupta and the present writ application where the petitioners of the writ application before Sengupta, J. are made private respondents was still pending.

6. Mr. Bhattacharya, the learned counsel appearing on behalf of the petitioners had relied upon four Circulars issued by the Education Department, Government of West Bengal and has contended that in view of those circulars there was no scope of considering the case of any person other than those sponsored through Employment Exchange. Those circulars are reproduced below:

"GOVERNMENT OF WEST BENGAL

EDUCATION DEPARTMENT: PRIMARY BRANCH

No. 421-Edn (P)

Dated Calcutta, the 27th March, 1978

5B-2/77

From : Shri M.M. Sinha Roy,

Deputy Secretary to the Government of West Bengal

To : The Director of Primary Education,

West Bengal.

Sub : Setting up of new Primary Schools and appointment of teachers.

The undersigned is directed to refer to G.O. No. 153-Edn. (P) dated 31.3.78 in which sanction was granted to the setting up of 1000 new Primary Schools and appointment of 4000 teachers during 1977-78.

The Governor is now pleased to order that the following instructions should be followed in the matter of setting up of new Primary Schools and appointment of teachers:-

(a)(i) Organised Primary Schools set up at private initiative should no longer be granted recognition as already intimated in G.O. No. 503-Edn. (P) dated 20.4.77. Quota of Primary Schools remaining unutilised, out of the quotas sanctioned earlier, may now be utilised by setting up new schools only and the previous Government orders permitting grant of recognition to organised schools should be deemed to have been amended accordingly.

(ii) The list of villages for setting up of new schools will be sent to the District Schools Boards by the Deputy Director of Public Instruction (PE). The Board will select the sites/villages from out of the list sent by the Deputy Director of Public Instruction (PE) and send their recommendation to the Director of Primary Education, for approval.

(b) The Board will also select the sites/villages, from out of the list furnished by the Deputy Director of Public Instruction (PE), for setting up new Primary Schools in Scheduled Caste & Schedule Tribe villages. The list of such villages so selected may be sent to the District Welfare Committee for Scheduled Caste and Scheduled Tribe for approval. But final decision regarding selection of sites will rest with the Board.

(c) If the Board finds any difficulty in the matter of selection of villages from out of the list furnished by the Deputy Director of Public Instruction (PE), the matter may be referred to the Director of Primary Education. If it is found that a recognised Primary Schools is already being run in the village included in the list of the Deputy Director of Public Instruction (PE), the case of the village may not be given any further consideration and the case of some other deserving village in the list may be considered. The District School Board may also consider the case of any school which is already pending with the Education Directorate for approval.

(d)(i) Initially the Head Teacher may be appointed from out of the panel of Head Teachers (prepared Circle-wise), to organise a new school which the Board decides to set up. In case, no panel of Head Teachers is readily available, an existing Head Teacher or a Teacher-in-Charge or a Senior Assistant Teacher may be transferred to organise a new primary school which is to be set up by the Board.

(ii) All teachers should be appointed from panels, which may be prepared by the District School Boards only from names of candidates received from Employment Exchanges of the District. This will be applicable to normal vacancies as well. Candidates who passed School Final or equivalent examination upto 1970 and Higher Secondary Examination upto 1971, may, however, apply direct to the Board quoting their Employment Exchange Registration numbers. Other candidates shall not be allowed to apply direct. Candidates passing School Final or Higher Secondary Examination in earlier years may be given preference at the time of preparation of panels.

(e) In all new posts sanctioned for new schools, trained and untrained candidates are to be appointed on a ratio of 60:40 basis as stipulated in G.O. No. 153-Edn (P) dated 31.1.78. Para 6 of G.O. No. 503-Edn (P) dated 20.4.77 should be deemed to have been amended to this extent. The present rule that (i) all posts for additional teachers in existing school are to be filled up by trained candidates only and (ii) normal vacancies by trained and untrained candidates on 50:50 basis, should however continue for the present.

(f) The District School Boards, should immediately publish an advertisement for public information (in the manner as laid down in this Department No. 21260-Edn (P) dated 18.12.75) (copy enclosed) for preparation of a panel for appointment of teachers in the District School Boards. A model form of advertisement is enclosed herewith. Applications already received by the District School Boards, for new appointments should not be considered. Fees, if any, already realised from the

applicants praying for appointments under the Board should be refunded.

(g) For giving appointment towards of Teachers dying in harness after 1.4.76, the names need not be included in the panel. Necessary Statutory Rules in this regard are being framed. The names of such candidates should be approved by the Directorate of Primary Education before appointment letters are issued by the District School Board. In case of extreme hardship only appointments may be given provisionally subject to approval of the Director of Primary Education.

(h) The District School Boards may fill up existing vacancies, if any, in the offices of the District School Boards in accordance with the rules for the purpose.

M.M. Sinha Roy

Deputy Secretary"

"GOVERNMENT OF WEST BENGAL

EDUCATION DEPARTMENT : PRIMARY BRANCH

No. 1457-Edn. (P)

Dated Calcutta, the 21st August, 1978

5C-3/78

From : Shri M.M. Sinha Roy, Deputy Secretary to the Government of West Bengal.

To : The Director of Primary Education West Bengal.

Sub : Setting up of Advisory Committee for selection of Primary Schools", sites.

Ref : His Memo No. 4322-Sc/P dated 19.7.78

In continuation of Government Order No. 1234-Edn (P) dated 23rd June, 1978 (substituted), the undersigned is also directed by the order of the Governor to State that the Urban Advisory committees in Municipal areas may also be empowered to prepare panels for appointment of school teachers in aided and Government sponsored primary/junior basic schools in municipal areas, after obtaining names from the Employment Exchanges of the Districts. The guidelines issued in Government Order No. 421-Edn (P) dated 27th March, 1978 in respect of rural areas in the matter of preparation of panels and setting up of schools will apply mutatis mutandis in all the municipal areas.

Since the Urban Advisory Committees will be merely advisory in character, recognition of schools will be finally given by the District Inspectors of Schools (PL) with the approval of the Director of Public Instruction.

Government Order No. 1614-Edn (P) dated 8th November, 1974 which has not been given effect to, should now take immediate effect.

M.M. Sinha Roy,

Deputy Secretary."

"GOVERNMENT OF WEST BENGAL

EDUCATION DEPARTMENT: PRIMARY BRANCH

No. 197-Edn (P)

Dated Calcutta, the 7th February

5B-277

From : Shri M.M. Shinha Roy,

Deputy Secretary to the Government of West Bengal

To : The Director of Primary Education,

West Bengal.

Sub : Policy of Government on the appointment of primary teachers in the State.

The undersigned is directed to say that in para 2(d)(ii) of Government Order No. 421-Edn (P) dated 27.3.78. It was decided that all primary school teachers should be appointed from panels which may be prepared by the District School Boards only from names of candidates received from Employment Exchanges of the District. Candidates who passed the School Final Examination (or its equivalent examination) in the year 1970 or earlier or those candidates who passed the Higher Secondary Examination in the year 1971 or earlier were however permitted to apply direct to the District School Boards quoting their Employment Exchange Registration Numbers.

2. The question of preparation of panels of qualified candidates for appointment to the post of primary school teachers by obtaining names from Employment Exchange has been re-examined by this Department with the approval of the Cabinet. After careful consideration of the whole issue the Governor is pleased to order, in partial modification of para 2(d)(II) of Government Order No. 421-Edn (P) dated 27.3.78, the 70% of the total number of vacancies in the posts of primary school teachers should be filled up through Employment Exchanges and that the candidates who have been allowed to apply direct in terms of Government Order No. 421-Edn (P) dated 27.3.78 for inclusion in the panel should be accommodated within the above-mentioned 70% of the vacancies earmarked for recruitment through Employment Exchange.

3. The Governor is further pleased to order that 30 per cent of the remaining vacancies to the posts of primary school teachers should be kept reserved for exempted categories of the following types regarding which the appointing authority is competent to give appointment without any reference to the Employment Exchange:-

- (a) Candidates hailing from families who might have been uprooted from their places of residence as a result of the land in question being acquired by Government for major development projects like setting of a power plant or a township etc. as in Haldia. Only one member from an uprooted family shall be eligible for such preference for jobs in and around the area acquired,
- (b) a son/daughter/wife for a primary school teacher dying in harness after 1.4.76 subject to fulfilment of prescribed minimum qualifications,
- (c) ex-Industrial Census personnel who were retrenched with effect from 1st February, 1975 by the Cottage and Small Scale Industries Department, ex-Census employees who have not been absorbed in any service and ex-employees of R.R. & R. Department (ex-Subir Karmacharies who served in connection with the relief and rehabilitation of the Refugees from Pakistan and Bangladesh) who have put in at least six months" continuous service in their previous jobs,
- (d) sons, daughters or dependants of a family any one of which have lost his life as a result of participation in or association with any political democratic movement during the period from 1970 onwards, i.e. after the fall of the Second United Front Government,
- (e) Ex-servicemen who may apply.

In each of the above cases the candidates must possess the requisite minimum qualification. A separate panel should be prepared from the names obtained from candidates belonging to exempted categories. But the names of candidates belongings to teachers" wards (included within exempted categories dying in harness need not be included in the panel as already ordered in para 2(b)(g) of G.O. No. 421-Edn (P) dated 27.3.78.

4. If sufficient number of candidates belonging to exempted categories are not available for the 30% vacancies reserved under paragraph 3 above, the remaining vacancies should be filled up by the candidates from the panel mentioned in para 2 above.

5. The vacancies reserved for trained candidates should not be filled up by untrained candidates so long as trained candidates are available. Further the vacancies reserved for Scheduled Caste and Scheduled Tribe candidates should not be filled up by candidates of general category even in sufficient number of candidates belonging to Scheduled Caste and Scheduled Tribes are not available. The usual reservation quota of Scheduled Caste and Scheduled Tribe candidates i.e. 15% of the total number of vacancies for Scheduled Caste candidates and 5% of the total number of vacancies for the Scheduled Tribe candidates should be strictly followed.

M.M. Sinha Roy

Deputy Secretary."

"GOVERNMENT OF WEST BENGAL

EDUCATION DEPARTMENT: PRIMARY BRANCH

No. 459-Edn (P) Dated Calcutta, the 4th August, 1981

3P-16/81

From : Shri P.K. Ganguly,

Deputy Secretary to the Government of West Bengal.

To : The Director of Primary Education,

West Bengal.

Ref : His No. 1879/1(1)-Sc/P dated 2nd June 1981 and this Department Order No. 421-Edn (P) dated 27th March, 1978.

The undersigned is directed to say that after careful consideration of the proposal for preparation of panels in regard to appointment of teachers in primary schools the Governor has been pleased to order that all panels should be prepared by the District School Boards/the District Inspector of Schools (Primary Education), as the case may be, from amongst the names obtained from the Employment Exchanges of the District concerned.

2. This order should take immediate effect.

3. This order modifies the terms laid down in Para 3d(ii) of Government Order No. 421-Edn (P) dated 27th March, 1978.

P.K. Ganguly,

Deputy Secretary."

7. Mr. Bhattacharya, however, fairly concedes that respondent Nos. 17, 21, 23, 32 and 39 were appointed prior to preparation of panel in the year 1986 and as such, the petitioners are not disputing their appointments. He further submits that respondent Nos. 26 and 34 ought not to have been added as party respondent in view of the fact that their names were really sponsored by the concerned Employment Exchange. He thus prays for dismissal of this writ application so far those respondents No. 17, 21, 23, 32, 39, 26 and 34 are concerned.

8. In view of such submission, the writ application is dismissed as against the respondent Nos. 17, 21, 23, 26, 32, 34 and 39 with costs which I assess at 30 G.Ms. each to be payable by the petitioners.

9. This writ application has been seriously contested by the other respondents by filing affidavits-in-opposition. Both Mr. Mondal appearing on behalf of the State respondent and Mr. Maity appearing on behalf of the Council vehemently

contended that in view of the order passed by Ajit Kumar Sengupta, J. in the earlier writ application, this writ application should be held to be barred by the principle of res judicata. According to them, the State Government and Council are both bound by the order of Ajit Kumar Sengupta, J. and as such, this Court cannot pass any order which is contrary to or inconsistent with the order passed by the Sengupta, J. They also contended that even if it is assumed for the sake of argument that the decision of Sengupta, J. is not binding upon the petitioners as they were not made parties in the said writ application, the decision of Sengupta, J. should be treated to be precedent and if this Court intends to disagree with view taken by the Sengupta, J. in such a case, the matter should be referred to a Larger Bench.

10. They further contended that there was no bar of considering the case of other persons than those sponsored from Employment Exchange for the post of primary teacher in view of the circulars dated December 1, 1971 and November 8, 1974 issued by Education Department, Government of West Bengal. Those circulars are quoted below:

"GOVERNMENT OF WEST BENGAL

EDUCATION DEPARTMENT: PRIMARY BRANCH

No. 1176-Edn (P)

Calcutta, the 1st December, 1971

From : Shri J.C. Sengupta, I.A.S.

Secretary to the Government of West Bengal.

To : The Director of Public Instruction,

West Bengal.

Sub: Appointment of teachers in Primary Schools Managed by the District School Boards.

The undersigned is directed by order of the Governor to say that the rules regarding the qualifications and recruitment of teachers if Primary Schools maintained by the District Boards have been amended in terms of the notification No. 975-Edn (P) dated the 26th October, 1971, which has been published in a extraordinary issue of the Calcutta Gazette of the same date. It is imperative that action be taken in accordance with the amended rules as early as possible.

The minimum qualification for an Assistant Teacher in a Primary School is a School Final pass and for a Head Teacher, it is either a School Final pass in the second division or a School Final pass with two years continuous service as a teacher in a recognised primary school. The first explanation to the rule indicates that for the purpose of the rule, a teacher shall be deemed to have passed the School Final Examination if he has passed any public examination declared or deemed to be equivalent by the Education Department of the State Government for the purpose of

appointment in a teaching post. In the rules now amended, higher qualifications like a Higher Secondary pass or a Pre-University pass have not been explicitly mentioned. It is the intention of Government that those who have passed the Higher Secondary or the Pre-University Examination or any other public examination, which is more than just a mere equivalent of the School Final, should be deemed to be qualified. Over-qualified candidates, graduates or M.A.'s, however, should not, as far as possible, be considered for appointment in such posts.

The Director of Public Instruction, West Bengal, will set up a Selection Committee in each District to assist him in selecting suitable persons from amongst the candidates for inclusion in the panel of qualified teachers for the District. A proposal for constituting such a Selection Committee has already been received from the Director of Public Instruction, West Bengal, and after due consideration by Government it has been decided that the proposal be approved. The District Magistrate or the Additional District Magistrate as his nominee will be the Chairman of the Selection Committee for his District, the District Inspector, will be the Convenor-Secretary and Social Education Officer will be the third member. The Director of Public Instruction may issue orders immediately setting up a Selection Committee for each District.

In order to prepare a panel of qualified persons for appointment as teachers in Primary Schools under each District School Board, the District Inspector of Schools, as Officer-in-Charge of the District School Board, shall give adequate publicity in the District, including advertisement in the leading dailies, both in English and Bengali and also in the local newspapers, if any, inviting applications from eligible candidates by a specified date. After the specified date is over, the Selection Committee will take steps for preparing the panel for the District in the manner indicated in Rule 3B. In preparing the panel, proper representation of scheduled caste/ tribe teachers and women teachers should be ensured in accordance with Rule 3C.

As soon as the panel is prepared it should be submitted to the Director of Public Instruction, West Bengal, who will approve it with or without changes. When appointments from a panel, which has been finally approved by the Director of Public Instruction, West Bengal, are being made, any empanelled person who fails to accept or join, in time, an appointment offered by the Board will forfeit his turn for appointment, the Board, in such circumstances, may without waiting for formal approval from the Director of Public Instruction, West Bengal, under Rule 3B(5), withdraw the offer made to the defaulter and offer the appointment to the next person in the panel and so on. The names of all defaulters may be reported after such intervals as may be desired by the Director of Public Instruction, for the orders of the Director of Public Instruction, in terms of Rule 3B(5).

Rule 3B provides for appointment of Organiser-teachers in a primary school at the time it is granted recognition. An Organiser-teacher is one who possess the

minimum qualification for appointment as an Assistant Teacher and who has been working in the concerned primary school since its establishment. At the time of recognition of a primary school, one Organiser-teacher or more can be appointed, provided the rules governing the entitlement of a school to teachers on the basis of roll-strength, are strictly observed. There may be some teachers who have been working in such a school before recognition but from a point of time after the establishment of the school. These teachers may be treated as "teacher-in-opposition" and may be given appointments in that school, provided they possess the minimum qualifications and the teacher-entitlement rules are strictly observed in that school, and provided that such preference in the matter of retention given according to seniority calculated on the basis of the date of appointment, that earlier appointments get some protection. When the choice lies between two or more teachers-in-position, who were appointed on the same day the better/best candidate may be determined and retained. All these appointments whether organiser-teachers or teachers-in-position are, however, subject to the provisions laid down in Rule 3C.

If any list maintained in terms of the old Rule 3 is in existence in any District, it shall remain valid for a period of 6 (six) months with effect from 26th October, 1971. Steps for preparing the new panel for each District should be taken immediately.

Sd/- J.C. Sen Gupta

Secretary."

"GOVERNMENT OF WEST BENGAL

EDUCATION DEPARTMENT: PRIMARY BRANCH

No. 1614-Edn (P) Dated Calcutta, the 8th November, 1974.

From : Shri M.M. Sinha Roy,

Deputy Secretary to the Government of West Bengal.

To : The Director of Public Instruction.

West Bengal.

Sub: Appointment of teachers in the recognised and aided Primary Schools and in Government Sponsored Primary Schools in Municipal areas.

The undersigned is directed to say that the Managing Committees of recognised (aided) Primary and Junior Basic Schools in urban areas are the appointing authorities in respect of teachers of such schools. But such appointments are approved by the District Inspectors of Schools (PE) in terms of the G.O. No. 1472-Edn. (P), dated 20.07.72. However, in case of appointment of organiser-teachers and the teacher-in-position, prior approval of the Director of

Public Instruction is necessary.

2. In terms of the G.O. No. 649-Edn (P), dated 24.4.71, free education for boys in classes I to IV has been introduced in all Primary and Junior Basic schools in urban areas (excluding the schools which received D.A. only). As the entire cost of running the Primary Junior Basic Schools is now borne by Government, it is considered necessary that Government should have adequate control over the private and aided Primary and Junior Basic Schools in the matter of appointment of teachers.

3. In the circumstances, in partial modification of the G.O. No. 1472-Edn (P), dated 20.7.72, the Governor is pleased to order that the Advisory Committee of each municipal area (including Calcutta) constituted by Government be empowered to prepare panels of candidates for appointment of teachers (both trained and untrained) in recognised Primary and Junior Basic Schools in urban areas. Rules and orders for preparation of panels under the District School Boards will apply mutatis-mutandis in this case. The case of unapproved teachers now working (appointed prior to 1.4.74 in aided Primary and Junior Basic Schools may be considered at the time of preparation of panels. The Managing Committees of recognised (aided) Primary and Junior Basic Schools shall appoint teachers from out of the approved panels for the respective municipal areas after the names of candidates are formally communicated by the District Inspector of Schools (PE) to the schools concerned.

4. The Governor is also pleased to order that all appointments in Government sponsored primary schools in urban areas (including Calcutta) shall be made by the District Inspectors of Schools (PE) from out of the approved panels for each municipal area. Appointments in Government sponsored primary schools in rural areas shall be made from out of the panels prepared by the District School Boards and approved by the District Schools Boards and approved by the Director of Public Instruction as usual.

5. This order will take effect from 1.1.75.

Sd/- Illegible

Deputy Secretary"

11. The learned counsel appearing on behalf of the private respondents adopted the argument advanced by Mr. Maity and Mr. Mondal.

The first question that falls for consideration in this writ application is whether the order of Ajit Kumar Sengupta, J. (supra) stands in the way of the petitioners in getting relief.

12. There is no dispute that Sengupta, J. specifically held that even though the names of some of the private respondents were not sponsored by the Employment Exchange, in the absence of any decision of the State Government not to consider

their candidature, their appointments were legal. In my opinion, the said decision cannot be applied against the petitioners by taking recourse to the doctrine of res judicata and/or constructive res judicata in view of the simple fact that petitioners were not parties to the earlier writ application. In order that the principles of res judicata or constructive res judicata may be applicable, the present petitioners must be party to the earlier writ application or they should claim under any of the parties of the previous writ application. None of the aforesaid conditions is fulfilled in the present case.

13. Therefore, I reject the contention of the respondents that the writ application should be dismissed as barred by principle of res judicata or constructive res judicata.

14. Next question is whether the decision of Sengupta, J. can be treated as a valid precedent in the instant case. There is no dispute with the proposition of law that in order to be a valid precedent binding upon a co-ordinate Court, the first and foremost requirement is that the points taken in the subsequent case were also considered by the earlier authority. I have already indicated that in paragraph 18 of the judgment of Sengupta, J., His Lordship proceeded as if there is no policy decision of the State confining the employment of Primary Teacher only to the candidates sponsored through Employment Exchange and on that basis, His Lordship arrived at the conclusion. His Lordship's attention was not drawn to the Circular dated 4th August, 1981 quoted above restricting the preparation of panel only to the names sponsored by the employment exchange. Therefore, His Lordship had no occasion to consider the effect of the said circular. I thus hold that in the absence of any argument on the existence of the aforesaid circular dated 4th August, 1981, decision of Sengupta, J. cannot be said to be a valid precedent binding upon this Court.

15. Now coming to the merit of this application, I find that in the year 1986 when the disputed selections were made, preparation of panel was required to be governed by the Circular dated 4th August, 1981 quoted above and at that time selection panel could be prepared only from amongst the names of candidates obtained from Employment Exchange. By the said Circular dated August 4, 1981 the previous Circular dated 27th March, 1978 as amended up to that day was further modified. Circulars dated December 1, 1971 and November 8, 1974 relied upon by the respondents had by then lost their force. Even the benefits conferred by circular dated February 7, 1979 by amending Circular dated March 27, 1978 stood abolished by Circular dated August 4, 1981. Therefore, at the relevant point of time there was no scope of considering the candidature of any person whose name was not sponsored by the Employment Exchange as the same would have been in violation of Circular dated August 4, 1981 and thus the respondent authority acted illegally and with material irregularity in giving employment to some of the private respondents whose names were not sponsored by the concerned Employment Exchange. I thus, find that the process of selection ignoring the Circular dated 4th

August, 1981 was illegal and cannot be given effect to. Therefore, the entire process of selection was illegal. Although the learned advocates appearing for the respondents tried to convince this Court that since the private respondents have been working from 1986, their appointment should not be disturbed, I am not at all convinced by such submission. As pointed out earlier, while entertaining this writ application, Mohitosh Majumdar, J. made it clear that the appointments of the private respondents would be subject to the final decision of this writ application and if it was established that their selections were contrary to the rules, in that event, they would be bound to refund even salary drawn by them.

16. I, therefore, allow this writ application, set aside the entire process of selection and direct the respondent authority to prepare fresh panel strictly in accordance with the Circular dated 4th August, 1981. The respondents will declare the appointments of those private respondents whose names have not been sponsored through the Employment Exchange as invalid. However, they are not required to refund the salary, as they had performed their duty pursuant to such illegal appointment.

17. If name of any of the private respondents was sponsored by the Employment Exchange, in that case his service should be deemed to be continuing from the very beginning. The respondents authority are directed to prepare fresh panel in accordance with the aforesaid Circular and to publish such panel and give appointment to the successful candidates positively within three months from the date of communication of this order. No selected person should be disqualified on the ground of age bar due to pendency of this application.

The application is, thus allowed with costs which I assess at 300 G.Ms, to be paid by the State respondent as well as the Council to the petitioners separately.

Later

After this order is passed, both Mr. Mondal and Mr. Maity, learned advocates, appearing for the respondents, pray for stay of operation of this order.

In view of what has been stated above, I do not find any reason to stay my order.

Let xerox certified copy of this order be given to the parties by tomorrow, if applied for.