

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

THE HON'BLE JUSTICE HARISH TANDON

&

THE HON'BLE JUSTICE PRASENJIT BISWAS

FMA/613/2020

CAN/1/2020(Old No: CAN/2078/2020)

DEBASISH SADHUKHAN VS STATE OF WEST BENGAL & ORS

&

FMA/1192/2022

CAN/1/2020(Old No:CAN/2104/2020)

KARUNAMOY BHATTACHARYA VS STATE OF WEST BENGAL & ORS

&

FMA/239/2021

CAN/1/2020(Old No:CAN/1992/2020)

UTTAM KUMAR BETAL VS STATE OF WEST BENGAL & ORS

&

FMA/241/2021

CAN/1/2020(Old No:CAN/2119/2020)

ARNAB BASU VS STATE OF WEST BENGAL

&

FMA/242/2021

CAN/1/2020(Old No:CAN/2121/2020)

SUJOY KUMAR DATTA VS STATE OF WEST BENGAL

&

FMA/243/2021

CAN/1/2020(Old No:CAN/1985/2020)

UTPAL PAN VS STATE OF WEST BENGAL

&

FMA/244/2021

CAN/1/2020(Old No:CAN/1940/2020)

ABHIJIT SADHUKHAN VS STATE OF WEST BENGAL

&
FMA/245/2021
CAN/1/2020(Old No:CAN/1995/2020)

PROLAY MUKHOPADHYAY VS STATE OF WEST BENGAL & ORS
&

FMA/246/2021
CAN/1/2020(Old No:CAN/1991/2020)

SOUMEN KUMAR PAL VS STATE OF WEST BENGAL & ORS

&
FMA/247/2021

CAN/1/2020(Old No:CAN/2140/2020)

SUBHASIS BHATTACHARYA VS STATE OF WEST BENGAL & ORS

&
FMA/248/2021

CAN/1/2020(Old No:CAN/2060/2020)

PRASANTA DAS VS STATE OF WEST BENGAL & ORS

&
FMA/249/2021

CAN/1/2020(Old No:CAN/2122/2020)

MONOJ KUMAR DAS VS STATE OF WEST BENGAL & ORS

&
FMA/250/2021

CAN/1/2020(Old No:CAN/2085/2020)

TALEB HOSSAIN VS STATE OF WEST BENGAL & ORS

&
FMA/251/2021

CAN/1/2020(Old No:CAN/2111/2020)

DEBASISH SEN VS STATE OF WEST BENGAL & ORS

&
FMA/252/2021

CAN/1/2020(Old No:CAN/2123/2020)

BANI CHATTERJEE (CHAKRABORTY) VS STATE OF WEST BENGAL & ORS

&
FMA/253/2021

CAN/1/2020(Old No:CAN/2070/2020)

TAPAS MALIK VS STATE OF WEST BENGAL & ORS
 &
 FMA/254/2021
 CAN/1/2020(Old No:CAN/2141/2020)
GOUTAM KUMAR BAIRAGYA VS STATE OF WEST BENGAL & ORS
 &
 FMA/256/2021
 CAN/1/2020(Old No:CAN/2084/2020)
TARUN KUMAR PARUI VS STATE OF WEST BENGAL & ORS
 &
 FMA/258/2021
 CAN/1/2020(Old No:CAN/2146/2020)
ANATH PAL VS STATE OF WEST BENGAL & ORS
 &
 FMA/259/2021
 CAN/1/2020(Old No:CAN/2036/2020)
BIMAL KUMAR RUIDAS VS STATE OF WEST BENGAL & ORS
 &
 FMA/261/2021
 CAN/1/2020(Old No:CAN/2153/2020)
DIPIKA SANTRA VS STATE OF WEST BENGAL & ORS
 &
 FMA/265/2021
 CAN/1/2020(Old No:CAN/2115/2020)
SUKUMAR DHAN VS STATE OF WEST BENGAL & ORS
 &
 FMA/266/2021
 CAN/1/2020(Old No:CAN/2033/2020)
PRASANTA KUMAR MAITY VS STATE OF WEST BENAGL
 &
 FMA/267/2021
 CAN/1/2020(Old No:CAN/2055/2020)
ARINDAM KUMAR CHOWDHURY VS STATE OF WEST BENGAL
 &
 FMA/268/2021
 CAN/1/2020(Old No:CAN/2035/2020)

MADAN CHANDRA BAG VS STATE OF WEST BENAGL
 &
FMA/269/2021
CAN/1/2020(Old No:CAN/2092/2020)
SUKUMAR MALLICK VS STATE OF WEST BENAGL & ORS
 &
FMA/270/2021
CAN/1/2020(Old No:CAN/2147/2020)
BUBAI GUIN VS STATE OF WEST BENGAL & ORS
 &
FMA/271/2021
CAN/1/2020(Old No:CAN/2095/2020)
KABERI PATRA VS STATE OF WEST BENGAL & ORS
 &
FMA/382/2021
CAN/1/2020(Old No:CAN/2061/2020)
INDRAJIT KUMAR VS STATE OF WEST BENGAL & ORS
 &
FMA/383/2021
CAN/1/2020(Old No:CAN/2065/2020)
SWAPAN OROON VS STATE OF WEST BENGAL AND ORS
 &
FMA/384/2021
CAN/1/2020(Old No:CAN/2101/2020)
SWARUP KUMAR BARMAN VS STATE OF WEST BENGAL & ORS
 &
FMA/385/2021
CAN/1/2020(Old No:CAN/2066/2020)
SWAPAN KUMAR PATRA VS STATE OF WEST BENGAL & ORS
 &
FMA/386/2021
CAN/1/2020(Old No:CAN/2097/2020)
SWARUP KUMAR SAMANTA VS STATE OF WEST BENGAL & ORS
 &
FMA/387/2021
CAN/1/2020(Old No:CAN/1994/2020)
KEYA PAL VS STATE OF WEST BENGAL & ORS

&
 FMA/388/2021
 CAN/1/2020(Old No:CAN/2129/2020)
SHANKARI DAS VS STATE OF WEST BENGAL & ORS
 &
 FMA/389/2021
 CAN/1/2020(Old No:CAN/2134/2020)
RAM PRASAD DAS VS STATE OF WEST BENGAL & ORS
 &
 FMA/390/2021
 CAN/1/2020(Old No:CAN/2124/2020)
RADHESHAYM DAS VS STATE OF WEST BENGAL & ORS
 &
 FMA/391/2021
 CAN/1/2020(Old No:CAN/2039/2020)
SUPPRITI SINHA VS STATE OF WEST BENGAL & ORS
 &
 FMA/392/2021
 CAN/1/2020(Old No:CAN/2133/2020)
SAMAR DAS VS STATE OF WEST BENGAL & ORS
 &
 FMA/393/2021
 CAN/1/2020(Old No:CAN/2100/2020)
PARTHA PRATIM GHOSH VS STATE OF WEST BENGAL & ORS
 &
 FMA/394/2021
 CAN/1/2020(Old No:CAN/2127/2020)
MAHADEB PANDIT VS STATE OF WEST BENGAL & ORS
 &
 FMA/395/2021
 CAN/1/2020(Old No:CAN/2080/2020)
SANKAR KUMAR PANJA VS STATE OF WEST BENGAL & ORS
 &
 FMA/396/2021
 CAN/1/2020(Old No:CAN/2082/2020)
ANJAN KUMAR KUNDU VS STATE OF WEST BENAGL & ORS
 &

FMA/402/2021

CAN/1/2020(Old No:CAN/2067/2020)

SAIKAT DAS VS STATE OF WEST BENGAL & ORS

&

FMA/403/2021

CAN/1/2020(Old No:CAN/2068/2020)

SYAMAL KUMAR GHOSH VS STATE OF WEST BENGAL & ORS

&

FMA/404/2021

CAN/1/2020(Old No:CAN/2081/2020)

SANJAY KUMAR MALIK VS STATE OF WEST BENAGL & ORS

&

FMA/405/2021

CAN/1/2020(Old No:CAN/2120/2020)

SAMIR KUMAR DAS VS STATE OF WEST BENGAL & ORS

&

FMA/406/2021

CAN/1/2020(Old No:CAN/2117/2020)

MADHABI DAS VS STATE OF WEST BENGAL & ORS

&

FMA/407/2021

CAN/1/2020(Old No:CAN/2053/2020)

SANJIB DAS VS STATE OF WEST BENGAL & ORS

&

FMA/408/2021

CAN/1/2020(Old No:CAN/2145/2020)

AVIJIT DUTTA VS STATE OF WEST BENGAL

&

FMA/409/2021

CAN/1/2020(Old No:CAN/2083/2020)

JAYANTA SAHA VS STATE OF WEST BENGAL

&

FMA/410/2021

CAN/1/2020(Old No:CAN/2128/2020)

ARUN KUMAR SANTRA VS STATE OF WEST BENAGL

&

FMA/411/2021

CAN/1/2020(Old No:CAN/2152/2020)
PRABIR KUMAR PAL VS STATE OF WEST BENAGL & ORS
 &
 FMA/412/2021
 CAN/1/2020(Old No:CAN/2112/2020)
AYAN DAS VS STATE OF WEST BENGAL & ORS
 &
 FMA/413/2021
 CAN/1/2020(Old No:CAN/2062/2020)
SUMANTA SASMAL VS STATE OF WEST BENGAL & ORS
 &
 FMA/414/2021
 CAN/1/2020(Old No:CAN/2037/2020)
CHHANDA DAS VS STATE OF WEST BENGAL & ORS
 &
 FMA/415/2021
 CAN/1/2020(Old No:CAN/2135/2020)
SK. SAIFUR RAHAMAN VS STATE OF WEST BENGAL & ORS
 &
 FMA/416/2021
 CAN/1/2020(Old No:CAN/2054/2020)
SUBHANKAR DAS VS STATE OF WEST BENGAL & ORS
 &
 FMA/417/2021
 CAN/1/2020(Old No:CAN/2088/2020)
SUSHIL KUMAR PAL VS STATE OF WEST BENGAL & ORS
 &
 FMA/418/2021
 CAN/1/2020(Old No:CAN/2096/2020)
PUSPENDU MANDAL VS STATE OF WEST BENGAL & ORS
 &
 FMA/419/2021
 CAN/1/2020(Old No:CAN/2137/2020)
ASHISH KUMAR SANTRA VS STATE OF WEST BENGAL
 &
 FMA/420/2021
 CAN/1/2020(Old No:CAN/2113/2020)

MAHABT ALI MALLICK VS STATE OF WEST BENGAL & ORS
 &
FMA/421/2021
CAN/1/2020(Old No:CAN/2150/2020)
SK. NAZRUL ISLAM VS STATE OF WEST BENGAL & ORS
 &
FMA/614/2020
CAN/1/2020(Old No:CAN/2040/2020)
AMALENDU DE VS STATE OF WEST BENGAL & ORS
 &
FMA/628/2020
CAN/1/2020(Old No:CAN/1986/2020)
PRANAB KUMAR PAL VS STATE OF WEST BENGAL & ORS
 &
FMA/635/2020
CAN/1/2020(Old No:CAN/2038/2020)
ASTU CHARAN GHANTI VS STATE OF WEST BENGAL & ORS
 &
FMA/636/2020
CAN/1/2020(Old No:CAN/2136/2020)
AMAR NATH MEDDA VS STATE OF WEST BENAGL
 &
FMA/638/2020
CAN/1/2020(Old No:CAN/1998/2020)
PRABIR KUAMR DEY VS STATE OF WEST BENGAL
 &
FMA/639/2020
CAN/1/2020(Old No:CAN/2059/2020)
MD. NASIM VS STATE OF WEST BENGAL
 &
FMA/640/2020
CAN/1/2020(Old No:CAN/2052/2020)
JOYDEB SEN VS STATE OF WEST BENGAL & ORS
 &
FMA/641/2020
CAN/1/2020(Old No:CAN/2087/2020)
GOLAM MORSHED VS STATE OF WEST BENGAL & ORS

&
FMA/642/2020
CAN/1/2020(Old No:CAN/2051/2020)
RAJJAK ALI MALLIK VS STATE OF WEST BENGAL & ORS
&
FMA/645/2020
CAN/1/2020(Old No:CAN/2098/2020)
BANDANA ADAK (DAS) VS STATE OF WEST BENGAL & ORS
&
FMA/646/2020
CAN/1/2020(Old No:CAN/2142/2020)
GOUTAM PAKIRA VS STATE OF WEST BENGAL & ORS
&
FMA/647/2020
CAN/1/2020(Old No:CAN/2143/2020)
PRADIP KUMAR JANA VS STATE OF WEST BENGAL & ORS
&
FMA/650/2020
CAN/1/2020(Old No:CAN/2132/2020)
KALOSONA ADAK VS STATE OF WEST BENGAL & ORS
&
FMA/651/2020
CAN/1/2020(Old No:CAN/2034/2020)
TAPAS CHAKRABORTY VS STATE OF WEST BENGAL
&
FMA/653/2020
CAN/1/2020(Old No:CAN/2079/2020)
SUBRTA PATRA VS STATE OF WEST BENGAL & ORS
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FMA/654/2020
CAN/1/2020(Old No:CAN/2069/2020)
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17
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20
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40
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55
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60
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65

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69

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81

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Judgment on : **02.12.2024**

Harish Tandon, J.

The aforesaid mandamus appeals are filed assailing the common Judgment on 09.08.2019 passed by the Single Bench dismissing the writ petitions filed by the several writ petitioners challenging the recruitment process initiated in the year 2009 for several posts of Assistant Teachers in various primary and junior basic schools.

All the writ petitioners of their respective writ petitions filed the aforesaid mandamus appeals raising the identical and similar points and therefore, an order was passed to hear out of the aforesaid mandamus appeals analogously. All the appearing Counsel are uniform in their submissions that though the writ petitioners of their respective writ petitions have obtained different marks in the said recruitment process but

the point of law involved in the instant appeals are identical and therefore, the mandamus appeal being FMA 244 of 2021 be taken into consideration to decide the aforesaid points.

Though the writ petitions were filed by the respective appellants assailing the recruitment process but have decided to squeeze the point which we would later on indicate and therefore, the zone of consideration becomes limited and mainly revolved around the provisions of the relevant Rules applicable in this regard and its interpretation in juxtaposition with the law declared by the Apex Court in catena of decisions.

Sworn of unnecessary details the facts emanating from the aforesaid appeal (FMA 244 of 2021) is adumbrated as prelude to the litigations and the points urged in respective writ petitions. By virtue of a notification dated 3rd December, 2009 issued and published by the District Primary School Council, Hooghly, the recruitment to the several posts of the Assistant Teachers in the various primary and junior basic schools within the said District was notified and the application was invited from the eligible aspiring candidates. Admittedly, the writ petitioners applied in terms of the said notification having the eligibility qualifications as indicated therein and participated in the examination, written or oral. The panel was published of the successful candidates in or about the months of January, 2010 which does not include the name of the writ petitioners. According to the Writ Petitioners, the panel of the successful candidates uploaded and published by the District Primary School Council revealed that 11 candidates were awarded additional marks for having undergone a

teachers training course not recognised by the National Council for Technical Education (NCTE) but was set up by the State and, therefore, awarding of an additional marks is *per se* illegal and impermissible. Immediately, the appellant of the instant appeal approached the Writ Court in WP no. 5501 (W) of 2013 raising such issues and the writ petition was disposed of on 25th April, 2013 directing the Chairman, DPSC Hooghly to dispose of the representation by passing a reasoned order. Simultaneously, the Commissioner of the School Education was also directed to pass an appropriate order on receipt of the reasoned order passed by the Chairman of the said DPSC. In compliance of the said direction passed in the said writ petition, the Chairman of the DPSC *vide* its order dated July 20, 2013 rejected the claim of the appellant solely on the ground that he had secured far less marks than the last empanelled candidate in the untrained category.

The Writ Petitions which were under consideration before the Single Bench are filed by the several unsuccessful candidates assailing the said decision of the Chairman of the DPSC with the primary contention that the aforesaid 11 candidates, who are also arraigned as a respondent in the said writ petition as well as the instant appeal, could not have been awarded an additional marks on the basis of the teachers training courses which they had undergone in an institution set up by the State and not recognised by the NCTE. It is a uniform stand of all the appellants that had those allotted marks been not allotted to the aforesaid 11 candidates, they would not have come within the zone of the appointment.

The aforesaid challenge of the appellants is founded upon a judgment of this Court in ***Tulsi Baksi vs. State of West Bengal & Ors., reported in 2008 (4) CHN 789*** wherein it is held that the candidates who have undergone a teachers training courses in the institution not recognised by NCTE cannot be awarded an additional marks in terms of the Rules as the certificate issued by such institution set up by the State is in contravention to the relevant statute concerning NCTC. It is further submitted that the reply to the query made under Right to Information Act, 2005 indicated that additional marks have not been allotted to the trained candidate but later on it transpired that the said reply is factually incorrect.

It further transpired from the record as well as the facts narrated in the impugned judgment that on the basis of the written test held on 20th December, 2009, the DPSC Hooghly prepared the panel for recruitment to the post of Assistant Teachers in different primary schools imparting education in different mediums wherein 960 candidates were empanelled under Unreserved candidate (non-trained) for Bengali medium schools. The panel in such category further disclosed the marks obtained by the first empanelled candidate to be 65.0938 and the last empanelled candidate secured the marks of 48.8944. Because of the unavailability of suitable candidate in the Unreserved category 61 posts were diverted from the exempted category (unreserved) to normal (unreserved) for Bengali medium school and, therefore, were reserved for unreserved candidates wherein the last candidate appointed therein secured 47.700 marks.

So far as the OBC Category is concerned, 110 candidates were empanelled and the last candidate who was appointed under such category secured 48.8722 marks. However, 34 posts were converted from an exempted category OBC to normal OBC on the unavailability of the suitable candidate in the said exempted category wherein the last cut-off marks was fixed at 45.0889. Similarly, 4 posts were also diverted from Ex-Serviceman. OBC to normal OBC and the candidate acquiring 45.0167 was appointed. So far as the Scheduled Caste category is concerned, 346 candidates were empanelled and the last cut-off marks was 37.0111 and in the similar fashion as there was no suitable candidates available in the said category, 106 posts were converted from the Exempted Category (SC) to normal SC and the last cut-off marks in such diverted post was 36.2833. 21 posts were also converted from Ex-serviceman (SC) to normal SC and in such converted post the last candidate secured 36.1444 marks. In the similar way, 94 candidates were initially empanelled under the Scheduled Tribe category with the lowest marks of 39.6250 but again 29 posts were diverted to a normal Scheduled Tribe category because of the unavailability of the suitable candidates wherein the last cut-off marks was fixed at 38.2333.

In order to bring clarity in relation to the aforesaid disclosures made hereinabove, none of the appellants have raised any issue in this regard. The issue relates to the appointment of the 11 candidates who were empanelled as a trained candidates in the separate panel so prepared wherein the last cut-off marks was shown at 38.0772 whereas the last cut-

off marks for untrained teachers under the General Category in the Bengali Medium was fixed at 47.7000.

On the basis of an undisputed fact discerned from the record as well as the stand of the parties, the Trial court held that the appellant having secured less than 47.7000 is not entitled to be included in the panel of the successful candidate and therefore, the contention of the petitioner is not acceptable. The Trial Court also took note of a judgment of this Court rendered in ***W.P. No. 18584 (W) of 2012 (Ananya Banerjee vs. State of West Bengal & Ors.) (decided on 19th December, 2012)*** wherein the appointment of the private respondent nos. 5 to 15 (11 trained candidates) were challenged wherein it was held that the selection process cannot be said to be illegal and further direction was passed upon the authorities to prepare a panel in respect of a selected candidates irrespective of their category in the first phase and thereafter the category wise panel should be prepared depending on whether a candidate is trained or untrained. In the said judgment, the Single Bench also upheld the decision of the authority in awarding 22 marks to the trained candidates to be within the four corners of the provisions contained in the West Bengal Primary School Teachers Recruitment Rules, 2001.

On the conspectus of the aforesaid more or less undisputed facts, the point involved in the instant appeals is whether the preparation of a separate panel for trained candidate is strictly in tune and/or conformity with the provisions of Recruitment Rules, 2001. It is nobody's case that the said recruitment Rule does not apply but the parties or their respective

Counsels are not *ad idem* on the interpretation of the various provisions contained in the said Rule.

According to Mr. Sanyal, the Counsel appearing for the appellant, the said Recruitment Rules, 2001 provides a complete mechanism for recruitment to the post of the teachers in various government schools within the State of West Bengal and, therefore, the authority cannot whimsically act which is, *per se*, in contravention with the said Rules. Mr. Sanyal fairly submits that awarding of 22 additional marks to the trained candidates cannot be reopened in view of the judgment rendered in **Ananya Banerjee's** case but the authorities cannot make a separate panel for the trained candidate. He further submits that the aforesaid 11 candidates who were put under the separate panel of trained candidates secured lesser marks than the appellants even after awarding 22 additional marks for their certificate issued by the institutions set up by the State and not recognised by the NCTE. Mr. Sanyal further submits that those 11 candidates are arraigned as respondents in the writ petition as well as in the *mandamus* appeal and therefore, the finding of the Trial Court that unless the appointed candidates are afforded an opportunity of hearing, the order affecting their rights should not be passed, is factually incorrect. Mr. Sanyal submits that Rule 6 of the Recruitment Rules, 2001 relates to the qualification or in other words, the eligibility criteria for appointment to the post of a teacher and once such eligibility criteria is fulfilled, the authority cannot take arbitrary stand in segregating the class i.e., trained or untrained. He thus submits that the authorities have misinterpreted the

provisions contained in Rule 6 that a separate panel for trained and untrained categories are to be prepared as provided in sub-Rule (6) of Rule 6 which relates to a priority and preference be given to the candidates having requisite training from the recognised institute. Mr. Sanyal vociferously submits that the preference as contemplated in the said sub-Rule (6) of Rule 6 does not mean that the panel for a separate class of the candidate should be prepared but would apply in the event, the untrained candidates secured equal marks with the trained candidates, in such event, the preference may be given to the trained candidates. In support of the aforesaid contention, Mr. Sanyal relies upon a judgment of the Apex Court in case of ***State of U.P. & Anr. Vs. Om Prakash & Ors., reported in (2006) 6 SCC 474*** and ***Abdul Hamid & Ors. vs. Union of India & Ors., reported in (2017) 16 SCC 346***. Mr. Sanyal contends that the appellants who secured the requisite marks above the aforesaid 11 marks are entitled to be considered for appointment in an existing vacancy or in future vacancy and placed reliance upon a Single Bench decision rendered in WPA 15128 of 2017 decided on 8th January, 2001. Mr. Sanyal concludes that there is an apparent illegality and/or infirmity in preparation of separate panel for trained and untrained candidates and, therefore, the judgment of the Single Bench in rejecting the writ petition warrants interference.

Per contra, the counsels for the DPSC and State uniformly submit that sub-Rule (6) of Rule 6 of the Recruitment Rule, 2001 postulates the priority and preference be taken to the candidates having requisite training from the recognised institute and, therefore, the trained candidates constitute a

separate class. It is further submitted that the judgment of the Division Bench in **Tulsi Baksi (supra)** though held that the certificate issued by the institute for such training course having not recognised by the NCTE, is illegal and void but the said judgment was made prospective in operation and cannot apply to a candidate who underwent such training course from the institute prior to the said judgment. It is thus submitted that the 11 candidates were awarded the certificate having undergone the training course prior to 1995 and, therefore, awarding of an additional marks in terms of Rule 9 of the said Recruitment Rules cannot be said to be illegal or infirm. It is further submitted that the appellants secured less marks in a panel prepared in untrained candidates category and were kept outside the zone of appointment which cannot be faulted with. It is a specific stand of the aforesaid authorities that awarding of additional marks to the trained candidates is upheld by this Court in **Ananya Banerjee's** case which has attained finality and, therefore, cannot be reopened in a subsequent proceeding. The Counsels for the aforesaid respondent vociferously submits that sub-Rule (6) of Rule 6 of the Recruitment Rule, 2001 postulates the priority and preference to be given to the trained candidates with the rider that the candidates to be recruited on merit basis if the trained candidates is not available and therefore, there is no illegality in preparing a separate panel for trained candidates in terms of the aforesaid provision. It is further submitted that in absence of the candidates who were included in the panel and the appointments have been made, to be impleaded as a party in the proceeding, the writ petition is liable to fail and placed reliance upon

the judgment of the Apex Court in ***Ranjan Kumar & Ors. vs. State of Bihar & Ors., reported in (2014) 16 SCC 187.*** It is thus submitted that there is no illegality and/or irregularity in the impugned judgment passed by the Single Bench dismissing the writ petitions and therefore, no interference is warranted in the instant mandamus appeals.

On the backdrop of the aforesaid facts and the submissions so advanced it would be relevant to quote the relevant provisions of the Recruitment Rules, 2001:

“Rule 6:-

“Qualifications –

(1) No person shall be appointed by the Council as a teacher unless he is a citizen of India and has completed the age of 18 years and has not completed the age of 40 years on the first day of the January 1st of the year of advertisement.

(2) The candidate shall possess the following minimum educational qualifications:-

a) Higher Secondary pass under the West Bengal Council of Higher Secondary Education or its equivalent with at least 50% marks and 2-year Diploma in Elementary Education (by whatever name known); or

b) Higher Secondary pass under the West Bengal Council of Higher Secondary Education or its equivalent with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in accordance with the National Council for Teacher Education (Recognition Norms and Procedure) Regulations 2002; or

c) Higher Secondary pass under the West Bengal Council of Higher Secondary Education or its equivalent with at least 50% marks and 4-year Bachelor of Elementary Education (B. El. Ed.); or

d) Higher Secondary pass under the West Bengal Council of Higher Secondary Education or its equivalent with at least 50% marks and 2-year Diploma in Education (Special Education); or

e) Graduation and two year Diploma in Elementary Education (by whatever name known);

Note 1. – A person with D.Ed. (Special Education) or B.Ed. (Special Education) qualification shall, after appointment, undergo six month special programme in Elementary Education recognized by the National Council for Teacher Education (NCTE).

Note 2. – The persons having qualification of Higher Secondary pass under the West Bengal Council of Higher Secondary Education or its equivalent with at least 50% marks or graduate

(irrespective of marks obtained therein) or equivalent without 2-year Diploma in Elementary Education (by whatever name known) or 4-year Bachelor of Elementary Education (B. El. Ed.) or 2-year Diploma in Education (Special Education) shall also be eligible for appearing in the Teacher Eligibility Test (TET) to be conducted for appointment of primary school teachers in the State upto 31st March, 2014, subject to condition that those who are appointed without professional qualification shall acquire the professional qualification as specified in sub-rule (2) of rule 6 above within a period of two (2) years from the year of appointment.

Note 3. – Priority mentioned in sub-rule (8) rule 9, shall be given to the eligible candidates who possess the minimum qualifications as specified in sub-rule (2) of rule 6.

Note 4.- For the purposes of this rule, –

a) a diploma in teacher education recognized by the National Council for Teacher Education (NCTE) shall be considered;

b) in case of Diploma in Education (Special Education) and B. Ed (Special Education), a course recognized by the Rehabilitation Council of India (RCI) only shall be considered.

Note 5. – Any candidate seeking appointment to the post of primary school teacher shall have studied and passed in the

specific language as the first or the second language in the Higher Secondary Level or equivalent for which medium of instruction, the candidate is seeking appointment:

Provided that in case of Santhali as medium of instruction, the candidate shall only require to possess proficiency of reading, writing and speaking in OLCH1K1 scripts. It shall not be obligatory for the candidates seeking appointment to the post of primary school teacher in Santhali medium schools to have passed in the specific language as the first or the second language in the Higher Secondary Level or equivalent for which medium of instruction, the candidate is seeking appointment.

Note 6. – In case of the certificate issued by the authority other than the West Bengal Council of Higher Secondary Education, the said certificate issuing authority shall be set up a statutory authority and the said certificate issuing authority shall be authorized by the Government of India or by the State Government of the concerned State, as the case may be, for issuing Higher Secondary Level certificate.

Note 7. – All candidates must have studied and obtained Madhyamik (Secondary) Pass Certificate or equivalent with Mathematics and English as subjects.

Note 8. – The equivalent of Madhyamik certificate means the said certificate issuing authority shall be set up as per Act framed by the Government of India or by the State Government of the concerned State and the said authority shall be authorized by the Government of India or by the State Government of the concerned State, as the case may be, for issuing Secondary Level certificate.

Note 9. – The decision of State Government on the question of equivalence for the purpose of sub-rule (2) of rule 6 shall be final.

Note 10. – Candidates belonging to reserved categories SC/ST/OBC/PH/EC shall be allowed relaxation upto 5% in the qualifying marks.

Note 11. – The State Government may, by notification, declare reservation upto 10% of the total posts newly created, for maintaining pupil-teacher ratio in accordance with the provisions of the Right of Children to Free and Compulsory Education Act, 2009, with a view to providing adequate representation of the candidates of such categories without disturbing the 100-point roster as notified by the State Government from time to time:

Provided that the qualifications for such categories of candidates shall be the same as mentioned in sub rule (2) of rule 6:

Provided further that notwithstanding anything contained in any other rule of these rules, the period of service rendered by any candidate of such categories, shall be available as relaxation of age and no such candidate attaining 55 years of age as on the 1st day January of the year of the advertisement, shall be considered:

Provided also that notwithstanding anything contained in any other rule of these rules, State Government may also issue appropriate order of relaxation of age to a specific category of candidates or some categories of candidates pursuant to order passed by any Court of competent jurisdiction.

Note 12. – The reservation quota for the candidates belonging to the Scheduled Castes (SC), Scheduled Tribes (ST), Other Backward Classes (OBC), Exempted categories (EC), Ex-Service men and for Physically Handicapped (PH) candidates, shall be maintained as per the existing reservation rules as framed by the competent authority, after deducting 10% from total vacancies for appointment on compassionate ground, with relaxation of the upper age limit as admissible under the Government order:

Provided that in case the notification as mention in Note 11 is declared by the State Government, the total vacancies shall mean the existing vacancies plus newly created vacancies after deducting 10% as per provision of this Note.

9. Procedure of Selection.-

(1) (a) The Selection Committee shall, after prima facie scrutiny of the duly filled application forms submitted by the eligible candidates having minimum educational qualifications as per rule 6, call for Teacher Eligibility Test (TET) in the form of written examination as specified in sub-rule (2) below.

Note.- Teacher Eligibility Test (TET) will be conducted by the Board on a single day throughout the State of West Bengal.

(2) The Teacher Eligibility Test (TET) shall be held as per guidelines issued from time to time by the National Council for Teacher Education and a person who will score 60% or above in the Teacher Eligibility Test (TET) examination shall be considered as Teacher Eligibility Test (TET) pass provided relaxation upto 5% marks shall be allowed to the candidates belonging to the reserved categories, such as SC/ST/OBC/PH/EC.

(3) Teacher Eligibility Test (TET) shall held in 100 marks consisting of the following (five) 5 Sections:-

- (a) Section 1 – Child Development – 20 Marks – Question 1 to 20.**
- (b) Section II – Language I – 20 Marks – Questions 21 to 40.**
- (c) Section III – Language II – 20 Marks – Questions 41 to 60.**
- (d) Section IV – Mathematics – 20 Marks – Questions 61 to 80.**

(e) Section V – Environmental Science – 20 Marks – Questions 81 to 100.

Note 1.- All questions shall be of multiple choice types with four alternatives out of which one option will be correct. All questions shall be compulsory and each item shall carry one mark. But there will be no negative marking.

Note 2.- First Language of the candidate shall be determined as per the medium of instruction of the primary school for which the vacancy occurred and Second language be English.

(4) The Selection Committee shall call all Teacher Eligibility Test (TET) qualified candidates as mentioned sub-rule (2), for the Viva-Voce/interview. The performance of the candidates who will be called for Viva-Voce/interview shall be assessed out of 10 marks by the Interview Board formed for the specific purpose.

(5) Thereafter academic, training, performance in Teacher Eligibility Test (TET), Extra Curricular Activities and performance in Viva-Voce/interview of the candidates appeared at the Viva-Voce/interview shall be computed in the following manner as mentioned in Table A below :-

Table-A

(i)	Madhyamik pass under the West Bengal Board of Secondary Education or its equivalent	10
(ii)	Higher Secondary pass under the West Bengal Council of Higher Secondary Education or its equivalent	15
(iii)	Training as prescribed in sub-rule (2) of rule 6.	20
(iv)	Teacher Eligibility Test (TET)	40
(v)	Extra Curricular Activities	05
(v)	Total	90
(vi)	Viva-Voce or Interview.	10
(vii)	Total	100

Note 1.-The percentage of marks to the total full marks obtained by the candidate in the Madhyamik Examination or its equivalent excluding additional marks, if any, shall be computed as percentage of 10.

Note 2.-The percentage of marks to the total full marks obtained by the candidate in the H.S. Examination or its equivalent excluding additional marks, if any, shall be computed as percentage of 15.

Note 3.- 70% and above marks obtained by the candidate in Training shall be awarded 20, 50% above but below 70% marks obtained by the candidate in Training shall be awarded 17 and below 50% marks but passed in the Training by the candidate shall be awarded 15.

Note 4.- The percentage of marks to the total full marks obtained by the Teacher Eligibility Test (TET) qualified candidate in Teacher Eligibility Test (TET) shall be computed as percentage of 40.

Note 5.- Maximum five (5) Marks shall be awarded to the candidates in the extra Curriculum Activities on the following extra Curriculum Activities:-

1	Games & Sports	1
2	National Cadet Crops (NCC)	1
3	Arts & Literature	1
4	Performing Art (drama)	1
5	Music	1
	Total	5

A certificate of representation in the State/National/International level Games or Sports issued by the

Competent State Govt or Central Government Authorities or agencies shall be awarded (01) mark.

Minimum 'A' certificate of National Cadet Crops (NCC) shall be awarded (01) mark.

A certificate that any essay, story, short story, drama, poetry written by the candidate selected for publication in any State level or National newspaper or Magazine. (Certificate alongwith a copy of publication shall be submitted), shall be awarded (01) mark.

(d) A certificate that the candidate has obtained proficiency in Performing Art (drama) issued by National School of Drama or by the State Government or Central Government shall be awarded (01) mark.

(e) A certificate that the candidate has obtained proficiency in Music or Instrumental Music issued by the State Government or Central Government shall be awarded (01) mark.

(6) (a) The Selection Committee thereafter shall prepare a district wise merit list out of 100 marks as specified as in Table -A of candidates appeared at the for interview under Unreserved Category comprising of the names of the candidates belonging to General Category, Scheduled Caste Category, Scheduled Tribe Category, OBC Category – A, OBC Category – B and PH Category

serially according to descending order of merit as per existing vacancy medium wise.

(b) Thereafter, the Selection Committee shall prepare separate district wise merit lists out of 100 marks as specified in Table -A belonging to Scheduled Castes, Scheduled Tribes, OBC Category - A, OBC Category – B and Physically Handicapped (PH) candidates in the respective category as per statutory reservation rules, from amongst the remaining candidates of such categories. Those lists must be prepared serially according to descending order of merit as per existing vacancy medium wise.

(c) In case of the candidates belonging to Exempted Category, Ex-Servicemen and Physically Handicapped (PH), separate merit lists category wise shall be prepared for vacancies reserved for the respective category.

(7) An additional panel of 5% of General, Scheduled Castes, Scheduled Tribes, OBC Category-A and OBC Category-B, Exempted Category, ex Servicemen and Physically Handicapped candidates shall be prepared in the same manner as referred to in sub-rule (b):

Provided further that additional panel of General Category shall not include the candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes category. However,

in case of appointment to the post of General Category from additional panel, if any reserved candidate secures higher marks than the candidate belonging to General Category in the left out merit list then the said reserved candidate shall be selected for appointment:

Provided also that in case of non-availability of suitable qualified Ex-servicemen candidates belonging to General, Scheduled Castes, Scheduled Tribes and Other Backward Classes, the said vacancy of Exempted Category candidates shall be filled up by non-exempted category candidates belonging to General, Scheduled Castes, Scheduled Tribes, and Other Backward Classes, as the case may be:

Provided also that in case of non-availability of suitable qualified Ex-Servicemen candidate belonging to General, Scheduled Castes, Scheduled Tribes and OBC Category – A and OBC Category – B, the said vacancy shall be filled up by non Ex-Servicemen candidates belonging to General, Scheduled Castes, Scheduled Tribes and Other Backward Classes, as the case may be.

(8) While preparing final merit list for any category for appointment to the post of primary school teachers, if the marks of an untrained candidate becomes equal with that of a trained candidate, the trained candidate shall be given preference to the said untrained candidate having obtained equal marks.

(9) If in the process of recruitment or even after recruitment at any stage, it is detected or proved that a candidate has achieved success by way of unfair means or by suppression of some material facts, his or her appointment shall summarily be cancelled.”

It is apparent from the meaningful reading of the aforementioned provisions that the essential qualifications for the post of a teacher in the primary school is that the candidate must pass the School Final or Madhyamik Examination under the Board of Secondary Education or equivalent or erstwhile Higher Secondary pass (11 class) under the said Board or equivalent. Sub-Rule (5) of Rule 6 postulates that no extra marks shall be given to the higher academic qualification at the time of selection of teacher but extra marks may be given to the trained candidate under Clause D sub-Rule (2) of Rule 9 thereof. sub-Rule (2) of Rule 9 provides for segregation of 100 marks for which the 90 marks shall be computed in the manner i.e., 65 marks for academic qualification, 22 marks for training and 3 marks for extra-curricular activities. The 10 marks was reserved or allotted for written test.

We do not find any dissent in applying the standards as provided in the aforementioned provisions. Initially, the appellants took the stand that awarding of 22 marks for training is in contradiction with the Division Bench judgment of this Court rendered in the ***Tulsi Baksi (supra)*** but the appellants have abandoned the said claim and took a stand that even after

awarding 22 marks to the respondent no. 5 to 15, total marks so obtained by them is less than marks obtained by the respective Appellants and therefore, they should be included in the panel. The entire argument revolves around of interpretation of sub-Rule (6) of Rule 6 of the said Rules as quoted above and the meaning to be given to the word priority or and/or preference in juxtaposition with the stand of the State to segregate the class in preparing a separate panel for the trained candidates category.

On identical facts in relation to a recruitment process where the relevant Rule also contained a preference Clause, the Apex Court in case of ***Om Prakash (supra)*** was considering a question where the degree holder shall be given a preference over the diploma holder in homoeopathy. The recruitment authority therein placed the decree holders as well as the diploma holders in homoeopathy in one panel which constrained the degree holders to move the writ petition before the High Court challenging the entire selection process as the recruiting authorities have ignored the provision relating to a preference which would mean that the degree holder should be given an edge over the diploma holder. The High Court accepted the contention of the writ petitioners therein and ultimately the matter reached to the Supreme Court. The Apex Court held that the moment the selection process is conducted on the basis of a merit through a competitive examinations and interview, it would not be proper to give in en bloc preference ignoring the merit and the suitability. It was held that once the minimum educational qualification is prescribed in the recruitment process, the preference has to be construed in a qualitatively and quantitatively

equal and in the event both the category of persons are placed on equal position, the preference is to be construed in such perspective in the following:

“19. In the instant case, the requisite academic qualification for the post of Medical Officer of Homeopathy as prescribed in the advertisement was a recognised degree in homeopathy or a recognised diploma in homeopathy. A proviso has been added that preference will be given to degree-holders. This would mean that a recognised diploma in homeopathy prescribed in the advertisement is also a required minimum educational qualification with which they are entitled to compete with those candidates possessing the degree. The word “preference” would mean that when the claims of all candidates who are eligible and who possess the requisite educational qualification prescribed in the advertisement are taken for consideration and when one or more of them are found equally positioned, then only the additional qualification may be taken as a tilting factor, in favour of candidates vis-a-vis others in the merit list prepared by the Commission. But preference does not mean en bloc preference irrespective of inter se merit and suitability.”

The same view is expressed by the Apex Court in ***Abdul Hamid (supra)*** in relation to a recruitment process initiated in the railways in the following:

“11. Reliance has been placed by the learned counsel appearing for the Railways trained apprentices on the judgment of this Court passed in UP SRTC v. U.P. Parivahan Bigam Shikshukhs Berozgar Sangh. In para 12 of the judgment, it has been held that all other things being equal, the trained apprentices should be given preference upon direct apprentices. This judgment does not help the appellants at all. What has been held is that if the non-Railway trained apprentice is equal to the Railways trained apprentice on merit, then preference can be given to the Railways trained apprentice. The word “preference” does not mean that the Railways trained apprentice will have an exclusive right to the exclusion of all others to be considered for appointment. Both the Tribunal and the High Court were justified in deciding this issue against the Railways and in favour of the original applicants.”

The law enunciated above is exposit of the proposition that the expression “preference” amongst the others would mean prior right, advantage, precedence and further signifies that if the things are equal amongst others one will have preference over them. The word “preference” cannot be construed to give an edge over the superior thing but have to apply on overall situation which are found equal amongst them. Conceptually, “preference” would fundamentally mean that the authority must take into consideration all aspects in a recruitment process namely the merit, suitability, fitness and if found being equal, the preference may be

given to the one who had a higher qualification or experience. The moment the selection process is conducted on the basis of a merit as well as performance in the examination, the preference is to be accorded to the candidates having additional qualification or higher qualification. It cannot mean that such persons would be put as a whole lot ahead of the others *de hors* the intrinsic worth or preventing *inter se* merit and suitability.

Though the word “preference” is amenable to different meanings and of different shades depending upon the various factors *viz* the other context, purpose and objects of its use under the statutory Rules but it cannot be isolated and/or segregated while ascribing a meaning of a universal import for all contingencies which depends upon the multiple variables. The moment the selection process for appointment to the post of a teacher in the primary or a junior primary school is conducted on the basis of a merit, there is no scope for any escape from this ordeal and invite an en-bloc favoured treatment simply because someone has possessed an additional qualification than what is prescribed as a minimum basic educational qualification for such post.

The merit is to be judged on the basis of the all round preference and in the event the candidates possessing additional qualification and the candidate possessing minimum eligible qualification for the said post stands on a same pedestal, the preference Clause can be activated and the appointment may be given to the person having an additional qualification. The Rule of preference can be pressed in action to give extra advantage or

the weightage to the additional qualification and cannot be used as a separate class or a complete dominance over the equals.

Rule 6 of the Recruitment Rule, 2001 provides the minimum educational qualification for such post to be School Final or a Madhyamik pass certificate issued by the West Bengal Board of Secondary Education or the equivalent or erstwhile Higher Secondary pass (11 class) from the West Bengal Board of Secondary Education or equivalent and, therefore, the candidates who possess the eligibility criteria cannot be kept as a separate class in comparison with the candidates having an additional qualification. The concept of preference as envisaged under sub-Rule (6) of Rule 6 cannot be construed in the manner that the person having a training certificate constituted a separate class and a separate panel so prepared is in tune with the spirit and the purpose of the said provision. The interpretation sought to be given to a rider appended in sub-Rule (6) of Rule 6 of the said Rule by the State is unacceptable. The said rider conveys a laudable intention that the candidates shall be recruited on a merit basis in the event the trained candidates are not available which cannot mean that the merit has to be done away with and the trained candidates stand on a higher pedestal even they lack merit. The expression “trained candidate is not available” is to be considered in conjunction with the earlier words or the expressions relating to the recruitment on merit basis and, therefore, the proper meaning in our opinion to be ascribed to the aforesaid rider appended thereto is that in the event the trained and untrained candidates

are equal on merit, the preference should be given to a trained candidates and not otherwise.

It leads to an ancillary point whether the authorities can prepare a separate panel for trained candidates when the modalities for the preparation of the panel is provided in Rule 9 of the aforesaid Rules. Sub-Rule (8) of Rule 9 postulates that after the completion of all exercises including the written test, the Selection Committee shall at first prepare a panel of the candidates under general category only which shall include all candidates coming under the General, Scheduled Castes, Scheduled Tribes and Other Backward Classes and to be arranged serially according to their merit. The said provision further clarified that the preparation of a panel of merit wise irrespective of category is to ensure that the appointments are made on merit so that the vacancies earmarked for reserved categories are not reduced. It further provides that after the preparation of the first panel on merit wise, the Selection Committee shall, thereafter, prepared a separate panel for Scheduled Tribes, Scheduled Castes and Other Backward Classes candidates in the respective category from amongst remaining candidates of their respective category. Such clarificatory expressions convey a definite intention of the authority that even a candidate offering candidature in a reserved category if secured higher marks on merit over the other candidates belonging to other categories, such candidate shall be considered under the general category so that the post earmarked for the respective reserved category is not diminished or diluted. The candidates who could not secure the position in the merit wise list shall then be considered in the

list of the respective categories on the basis of the merit amongst the candidate of such category which by no stretch of imagination would mean that the trained candidates would constitute a separate class. The statutory authorities cannot transgress the provision contained in the statutory Rules in picking and choosing a mode but have to act within the contours thereof. Rule 9 of the said Rule does not suggest the preparation of separate panel for trained and untrained candidates. It is evident from the conduct of the authorities that they have acted in contravention with Rule 9 of the Recruitment Rules, 2001 in preparing a separate panel for the trained candidates.

It is a specific stand of the appellant that after the judgment rendered in **Ananya Banerjee's** case the awarding of 22 marks in terms of Rule 9(2) of the said Rules cannot be reopened and/or questioned. However, a stand is taken that even after awarding the 22 marks to the trained candidates, the total marks obtained by the appellants are much higher than the marks obtained by the trained candidates and therefore, they are entitled to be appointed on the basis of a merit. We have gathered from the records disclosed by the respondents in the pleading that after awarding 22 marks for the training course, the total marks so obtained by the trained candidates are less than the marks obtained by the untrained candidates and, therefore, there is no justification on the part of the authorities in preparing a separate panel for the trained candidates as they are less meritorious than the untrained candidates.

Having held so, it leads to another point whether the Court can quash and set aside the entire panel after a lapse of more than a decade of the appointment of the candidates. There is no quarrel to the proposition propounded by the authorities that the Court should not pass an order behind the back of a person adversely affecting their rights as held by the Apex Court in ***Ranjan Kumar & Ors. (supra)***:

“13. In view of the aforesaid enunciation of law, we are disposed to think that in such a case when all the appointees were not impleaded, the writ petition was defective and hence, no relief could have been granted to the writ petitioners.”

There appears to be a fallacy in the submissions of the respondents in this regard. The challenge is not made to the entire panel prepared by the Selection Committee but is restricted to the 11 candidates who have been placed in a separate panel as trained candidates. The aforesaid 11 candidates are arraigned as a party in the writ petition as well as in the instant mandamus appeal as respondent no. 5 to 15. The notices were given to them yet they choose not to appear in the proceedings and, therefore, it cannot be said that they are not made a party to the proceedings. There is no fetter on the part of the Court to proceed and decide the matter ex parte against those 11 candidates who despite the service chose not to defend or contest the same. The contention of the respondents that all the candidates who have been shown in the panels and given an appointment are to be made party is unfounded in view of the limited scope of adjudication. What would be the remedy or the reliefs

which can be given to the appellants in the instant case, we are not unmindful of the situation that a candidate who have been serving for more than a decade should not be thrown out because of such irregularities having committed by the authorities but equally we cannot overlook the enforceable right of the appellants who were deprived of such right in the hands of the executives. We are conscious that in *Ananya Banerjee* the appointment of the 11 candidates were challenged and the Court held that such appointment is not illegal, simultaneously the Court directed the authorities to prepare the panel strictly in terms of Rule 9(8) of the said Rules which appears to have been misconstrued by the authorities that no further action is required to be taken. The direction passed in the ***Ananya Banerjee (supra)*** is explicit and clear that the authorities were directed to prepare the panel on the merit wise irrespective of the reserved categories and thereafter to proceed in accordance with the aforesaid provision.

We, therefore, set aside the order of the Trial Court by which the writ petition was dismissed on the score that the moment the appointments of the aforesaid 11 candidates are found to be legal, no interference in this regard is warranted.

The aforesaid appeals are disposed of directing the authorities to prepare a panel on merit wise which would include all the candidates of the unreserved and reserved category and in the event, any of the applicants are found having obtained more marks than the last cut-off marks as disclosed in the writ petitions, they shall be given an appointment in the existing vacancy or anticipated vacancy for this year or a future year.

All the appeals and applications are thus disposed of.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisites formalities.

(Harish Tandon, J.)

I agree.

(Prasenjit Biswas, J.)