

**IN THE HIGH COURT AT CALCUTTA  
CONSTITUTIONAL WRIT JURISDICTION  
APPELLATE SIDE**

**Present:**

**THE HON'BLE JUSTICE HARISH TANDON  
&  
THE HON'BLE JUSTICE PRASENJIT BISWAS**

**FMA 1946 of 2018**

**The State of West Bengal and Ors.  
Vs.  
Mrinal Kanti Kumar and Ors.**

**Appearance:**

For the Appellants : **Mr. Avishek Prasad, Adv.**

For the Respondents : **Mr. Ekramul Bari, Adv.  
Mr. K. M. Hossain, Adv.  
Ms. Keya Sutradhar, Adv.  
Mr. Kazi Ardan Ali, Adv.**

Judgment On : **24.12.2024**

**Harish Tandon, J.:**

The instant case has a chequered history and the litigation pertaining to recognition and/or upgradation of the school and absorption and/or regularization of the teachers appointed by the managing committee are being pursued before this Court for more than two decades. The last writ petition which is decided in the impugned order is allowed by the Single Bench directing the approval of the appointment of the writ petitioners/respondent as teaching and non-teaching staff of the school

from the date of upgradation of the school with consequential relief of release of arrears and current service benefit to be extended to them. The State has challenged the said order taking clue from the various judgments of the Co-ordinate Bench as well as the Apex Court which, in their opinion, have decided the issues involved in the writ petition and impugned order runs contrary thereto.

The writ petition being WP 12615(W) of 2014 was filed by the writ petitioners/respondent assailing the order dated 12.05.2011 by the West Bengal Board of Secondary Education and an order dated 07.02.2014 by the Commissioner of School Education whereby and whereunder the prayer for approving the appointment of the writ petitioner/respondent as teaching and non-teaching staff of the said school was denied. The facts discerned from the record would reveal that one **Harin Khola D.A. High School** was established by the then reputed persons with an avowed object of imparting education to the local inhabitants and was granted recognition as far back as on 01.01.1965 as Class-IV high school. The District Inspector of School (SE South-24 Parganas) inspected the school on 18.09.1965 and observed that the said school being an old institution should be upgraded to high school.

Several representations were made as the competent authority did not grant approval for upgradation of the school for Class-IX and X and the inaction on the part of the authorities led several writ petitions to be filed before this Court. The Secretary and the Teacher-in-Charge of the said school filed writ petition being WP 3061(w) of 1997 for alleged refusal of the

authority to upgrade the said school and also denial of granting approval to the appointment of 6 organizing teachers and 4 non-teaching staff in the said school. The writ petition was also disposed of on 3<sup>rd</sup> August, 1997 and a direction was passed upon DI to inspect the said school through District Level Investigation Team and the report so submitted should be forwarded to the DI of school who was further obligated to make his comments and forward the same to the Director of School Education (West Bengal). The corresponding obligation of the Director of School Education was further indicated in the said order that all relevant papers shall be forwarded to the Education Department and upon taking a decision, the matter should be placed before the West Bengal Board of Secondary Education to take a decision strictly in accordance with law. Pursuant to the said order, the decision was taken by the authority on 15.09.1999 thereby rejecting the prayer for grant of approval pertaining to the upgradation of school which was challenged by the school authority in WP no. 594(W) of 2000. The said writ petition was disposed of on 10<sup>th</sup> July, 2000. The Court found that certain steps are required to be undertaken by the school authorities as pointed out in the decision of the authority and the liberty was given to the school authority to apply a fresh after such steps have been taken and the concerned authority was further directed to consider the same afresh in accordance with the relevant provision of law. Pursuant to the said order further application was made by the school authorities which was rejected by the WBBSE on April 16, 2001 meaning thereby the prayer for upgradation to the school for Class X level was denied. The said order was further assailed in WP 11197(W) of 2001 which came to be disposed on

25.04.2005 wherein the Court noticed that the school which was established sometimes in 1952 initially recognized by the authority as Second Class junior high School was subsequently upgraded to Four Class junior high school. It was further noticed in the said order that the school claims to have started classes IX and X in early part of the 70s but the District Level Inspecting Team did not submit any report in support thereof but indicated certain infrastructure deficiencies and the existence of the other high schools within the radius of 9 kilometers. It was further observed that unless the school posses requisite infrastructure for running Class IX and X, it cannot seek upgradation. It was observed that if the school removes the deficiencies with regard to the infrastructure then the request for upgradation may be considered both by the Government and the Board. The Court ultimately held that the technical objection that there are other high schools within the radius of 5 or 9 kilometers is not accepted in view of the need for upliftment of the childrens and the socio-economic disparity prevalent in the locality where the school is located and directed the authorities to reconsider the claim of the school afresh.

Pursuant to the said order the inspection was done by the District Level Inspecting Team and a report was submitted on 26.08.2005 which was taken into consideration at the time of taking a final decision on the prayer for upgradation of the said school and it was found by the authorities that the school cannot be upgraded to Class X and communicated the said decision on 27.03.2006 to the school authorities. A further writ petition being WP 12595 (W) 2006 was filed challenging the said decision of the

authority as communicated on 27.03.2006 which was finally disposed of by the Single Bench on 09.08.2006. It was categorically observed by the Court that the Board on each occasion is coming up with the different grounds in order to achieve the refusal for upgradation and the deficiencies so pointed out must be disclosed in details. The order of the authority was ultimately set aside and a direction was passed to reconsider the recommendation of the school for recognition provided the school has a requisite infrastructure.

Despite the aforesaid direction having passed, the authority banked upon rejecting the prayer for upgradation by passing order dated 02.08.2007 which was further assailed by the school authority in WP no. 20405(W) of 2008. It appears from the record that in the said writ petition a Special Officer was appointed to submit the report. On the basis of the Special Officer's report, the Counsels appearing from the parties including the Board and the State submits that the said writ petition may be disposed of for reconsideration of the prayer for upgradation of the said school on the basis thereof. The said writ petition was disposed of on 19.02.2010 and it is not in dispute that subsequently the prayer for upgradation was allowed on the basis of a School Education Department memo dated 12<sup>th</sup> May, 2011 with retrospective effect from 1<sup>st</sup> February, 2011 for 3 years with the condition that the teaching and non-teaching staff of the school has to be recruited in accordance with the provisions contained in West Bengal School Service Commission Act, 1997 as amended from time to time and the Rule framed thereunder.

Since the grievance of the school authorities were ultimately redressed by the authority by upgrading the school to Class IX and X, it took a shift to a grievance of the writ petitioners/respondent when the prayer for approval of their appointment was not addressed to which led the writ petition being WP no. 12615 of 2014 to be filed by the writ petitioner/respondent. The Single Bench allowed the said writ petition and directed the authorities to approve the appointment of the writ petitioners/respondent as teaching and non-teaching staff of the school with effect from the date of recommendation of the school with further direction to release all arrears and current service benefits to them.

The Counsel for the State assailed the said order on the ground that the condition for upgradation of the school for Class IX and X was imposed to the effect that the school authority shall recruit and/or appoint the staff in accordance with the provisions contained in West Bengal School service Commission Act, 1997 and the Rules framed therein and, therefore, the writ petitioner/respondent, having appointed by the school authorities much prior to the date of the recommendation and/or upgradation having extended to the school, cannot seek the approval and/or recognition to their appointment which is contrary to the said statute. It is sought to be contended that the school cannot appoint the teaching and non-teaching staff before the upgradation is accepted by the authority and such appointment does not create any vested right in them despite the effect that the District Level Inspecting Team found them to have been discharging their duties. It is contended that the authorities cannot travel beyond the

purview of the law nor the Court should issue a writ of mandamus upon the authorities to act contrary to the law. The reliance is placed upon a Division Bench judgment of this Court in case of ***State of West Bengal and Ors. Vs. Smritikana Maity and Ors., reported in (2008) 1 CHN 582*** wherein an identical issue was considered and it was held that unless the appointment to the post of teaching and non-teaching staffs are in conformity with the statutory provision, mere recommendation or granting of upgradation to the school does not *ipso facto* render the initial appointments made not in accordance with law to have any conferred right into them. The reliance is further placed upon another judgment of the Co-ordinate Bench rendered in case of ***Manindra Nath Sinha and Ors. Vs. State of West Bengal and Ors. reported in (2006) 4 CHN 513*** wherein the same principles have been reiterated. It is further submitted that the judgment rendered in ***Manindra Nath Sinha (supra)*** was challenged before the Apex Court in Civil Appeal no. 7897 of 2010 and the same was dismissed on December 4, 2014. Taking a clue from the dismissal of the said Civil Appeal by the Supreme Court, it is sought to be contended that the said order rendered in ***Manindra Nath Sinha (supra)*** merged with the order of the Supreme Court and, therefore, no contrary view can be taken by the High Court as the law declared in the said judgment would be regarded as a declaration of law under Article 141 of the Constitution of India. Lastly the reliance is placed upon an unreported judgment of the Special Bench in a lead case of the ***Managing Committee, Kadamtala High Madrasah vs. State of West Bengal and Ors. (WP no. 11254(W) of 2010 decided on 13<sup>th</sup> March, 2019)*** wherein the Special Bench held that the Rule prevalent at the time of initiation of recruitment

process for filling up the post should be followed and not the Rule or the Regulation prevalent at the time of creation of a vacancy.

On the other hand, the Counsel for the writ petitioner submits that the judgment rendered in ***Manindra Nath Sinha (supra)*** cannot be said to have merged with the order of the Supreme Court as there was no decision on merit but the said appeal was dismissed simplicitor on the point that no interference is called for. In support of the aforesaid condition, the reliance is placed upon a judgment in the Supreme Court in ***Kunhayammed & Ors. vs. State of Kerala and Anr., reported in (2000) 6 SCC 359***. It is further submitted by the writ petitioners that the moment the school is recognized by the authority, the approval of service of the teaching and non-teaching staff would reckon from the date of such approval as relied by the Coordinate Bench in ***Hemoprova Sikdar vs. The State of West Bengal & Ors., reported in (1998) WBLR (Cal) 223***. The reliance is further placed upon an unreported decision of the Single Bench in ***Sri Dinesh Chandra Karjee & Ors. vs. State of West Bengal & Ors. (WP 10966(W) of 2005 decided on 05.06.2014)*** where on recognition of the school the services of the teaching and non-teaching staffs were also directed to be approved. The Counsel for the writ petitioner heavily relies upon an unreported judgment of the Apex Court passed in SLP (C) 27804 of 2019 on May 6, 2022 wherein it is held that the moment the teaching and non-teaching staff are found to have been rendering services and their appointment was made by the school authorities prior to coming in force of the said Act cannot be said to be illegal and directed the regularization of their appointment. Lastly it is

submitted that there is no infirmity in the finding returned by the Single Bench in the impugned order and, therefore, the appeal should be dismissed.

The facts narrated hereinabove involves a point as to whether the appointment made to a teaching and non-teaching staff by the managing committee of the school prior to the upgradation of the school to Class IX would entitle the person so appointed to get the regularization and approval to such appointment when the intervening act creates an embargo in appointment of a teaching and non-teaching staff by the managing committee of the school.

It is not in dispute that the writ petitioners were appointed prior to the grant of approval for upgradation to Class IX and X and were also found to have discharged duties at the time of inspection conducted by the District Level Inspecting Team as well as the Special Officer appointed by this Court in one of the aforementioned writ petition filed by the school authorities. Indubitably, the school was initially established by the reputed persons of the localities with an avowed object of imparting education to the children suffering impunity on account of socio-economic disparity. The school was granted recognition as far back as on 01.01.1965 as Class IV high school and later on approached the authority for granting recognition or in other words to accord upgradation for Class IX and X. The spate of litigation has succinctly narrated hereinabove is galore that the school authorities were persistently approaching the Court assailing the decision of the authority in rejecting the prayer for upgradation and ultimately, the upgradation was

granted w.e.f. 1<sup>st</sup> February, 2011. Almost in all the writ petitions filed by the school authorities, the High Court was of the view that the technical objections taken by the authority in denying the prayer for upgradation is not acceptable and the moment the school authorities redressed the deficiency in infrastructure, the authority must take a pragmatic view while granting recognition. Once the recognition is granted, it leads to an inescapable conclusion that the deficiency as initially pointed out by the authorities have been redressed and the school is capable of imparting education upto Class IX and X level. The teachers who have been rendering the services by imparting education to the children of Class IX and X seeks for their approval which is denied by the authority.

In ***Smritikana Maity & Ors. (supra)*** the core question involved therein was as to whether the claim of regularization of the organizing staff of the upgraded section (Class IX and X) who initially entered into services in the unrecognized Class IX and X of a Non-Government aided educational institution are entitled to get the approval and regularization of their appointment. The Division Bench was also considering the fact that the report of the DLIT indicates that they have been rendering such services after having appointed in an unrecognized section and held that it does not confer any inchoate right to claim absorption and/or regularization in the following:

***“26. We are also of the view that inclusion of names of such organizer teachers in the report of the DLIT (District Level Inspection Team) can never be taken into consideration until and unless it is shown that such appointment is given by a validly constituted managing committee of a***

*recognized aided institution within the sanctioned strength and that such appointment is given according to the provisions of the relevant Rules.*

*27. As we have already discussed above, in the case of Uma Devi (supra) the Hon'ble Supreme Court having considered various judgments of the Hon'ble Supreme Court as also of other High Courts observed that appointments made without following due process of the rules for appointment do not confer any right on the appointees and that the Court cannot direct their absorption or regularization or re-engagement or making them permanent.*

*28. In view of the discussions made above, we find sufficient merit in the submission of Mr. Banerjee, learned Advocate of the appellant. We are of the view that when the initial appointments of the writ petitioners/respondents were not in accordance with the Rules, any executive order or instruction issued by the State Government cannot confer any right upon such organizer teachers to claim absorption or regularization of their services."*

In *Manindra Nath Sinha (supra)* another Division Bench of this Court was considering the question whether the teachers who were appointed by the then organizing managing committee of the school as organizing staff is entitled to the approval of their services in accordance with the existing statutory provisions. It is held that in view of the Rules, there is no scope of appointment of an organizing staff and any teaching and non-teaching staff having appointed beyond the sanctioned strength, cannot claim any regularization. It is further held that any appointment made before the recommendation of the school by the managing committee would be regarded as an illegal appointment being contrary to the statutory Rules and, therefore, no right is created in them. It is held that the moment the upgradation or recognition is created to the school, it would be regarded as

a new set up and, therefore, the appointment can only be made under the statutory Rules prevalent at the time of such recognition or upgradation and any appointment made prior thereto cannot be regularization in the following:

*“After going through the materials on record we are at one with the District Inspector of Schools that this was a new School created by the local Panchayat and the land and the building also vested in the local Panchayat. Therefore, the claim of the writ-petitioners that they had been acting as organizer-staff from an earlier point of time is on the face of it contrary to the materials on record. The findings of the learned Special Officer appointed by Shyamal Kumar Sen, J. was contrary to the materials on record and thus, even on merit, the petitioners have failed to prove their case that they were organizing staff.*

*On considerations of the entire materials on record, we, thus, find that the petitioners have failed to prove that they had any existing legal right to have their alleged appointment regularized under the provision of the act or the Rules framed thereunder. We further hold that even the writ-petitioners could not be said to be organizer-staff of the School and the School was really established by the local Panchayat long thereafter and the petitioners’ names even never found place in the inspection report of DLIT.”*

However, in the subsequent decision rendered in case of **Sri Dinesh Chandra Karjee & Ors. (supra)** the Single Bench was of the view that the moment the appointment is made by the managing committee in an unrecognized school after recommendation, such appointment is also required to be regularized. The judgment of the Single Bench was challenged before the Division Bench in FMA 1497 of 2015 but the Division Bench on

06.03.2019 set aside the said judgment on the basis of the law declared in ***Manindra Nath Sinha (supra)***.

There appears to be a consistency in the decision of the Court of the Division Bench of this Court on upgradation or recognition of the school the appointment made contrary to the statutory rules by the managing committee does not *ipso facto* confer right upon such appointees to get the approval of their services. The Judgment of the Special Bench as relied upon by the appellant does not appear to have any bearing on the issue involved in the instant case. The question which was referred to the Special Bench was basically founded on the applicability of the Recruitment Rules at the stage of creation of a vacancy or at the stage of an advertisement published for filling up such vacancies. The ancillary question in relation thereto were also framed therein and in unequivocal terms it has been answered that the Recruitment Rule prevalent at the time of initiation of a process for vacancy would apply and not when the vacancy occurs.

Upto the such stage, there was no ambiguity in our mind that the claim of the writ petitioners is unsustainable as mere recognition or upgradation of the school to Class IX and X does not automatically confer right upon the teaching and non-teaching staff appointed by the managing committee before such recognition or upgradation but our attention is drawn to a recent judgment of the Apex Court in ***Prabir Kumar Ghosh and Ors. (supra)*** where identical issue was raised and the Apex Court held that the moment it is found that the school was set up by the villagers and the teachers were rendering services in imparting education, there is no

justification in not approving appointment of the teachers before such recognition and/or upgradation in the following:

*“The afore-stated appeal arose out of the decision dated 05.06.2021 passed by the Single Judge of the High Court in Writ Petition No. 10966(W) of 2005. The Single Judge took note of the fact that pursuant to the order passed by the single Judge on 24.08.2012, the District Magistrate Cooch Behar had submitted a report which accepted the appointment and continuation of the services of the writ petitioners. Although stated that they were working as unapproved staff in the school in question. Considering the entirety of the matter, the single Judge found that in view of the report submitted by District Magistrate, Cooch Behar, order dated 12.04.2002 of Director of Education, was not sustainable. The Single Judge, therefore, directed District Inspector of School (Secondary Education) to approve the appointments of writ petitioners except writ petitioner No. 6 with effect from 05.06.2014.*

*The aforesaid decision of the Single Judge was, however, set aside by the Division Bench in an appeal arising therefrom.*

*It was observed by the Division Bench that if the initial appointment itself was illegal, the appointments could not be regularised and that the decision rendered by the Single Judge was otherwise unsustainable.*

*As the record indicates that the school was set up by the villagers. The facility of the school in the neighbourhood was not made available by the official agencies. In a situation such as that the engagement of the writ petitioners cannot strictly be called to be illegal. They were definitely imparting education in keeping with the letter and spirit of the legislation enacted by the Parliament being Right to Education Act.*

*In the circumstances, the Division Bench was not justified in setting the order passed by the Single Judge. Consequently, we allow the appeal, set aside the*

***order passed by the Division Bench and restore the order passed by the Single Judge of the High Court.”***

Though the Co-ordinate Bench in ***Manindra Nath Sinha (supra) and Smritikana Maity & Ors. (supra)*** held that the appointment to the staff before upgradation cannot be regarded as legal but in view of the judgment rendered by the Apex Court in ***Prabir Kumar Ghosh and Ors. (supra)*** such appointment cannot be said to be illegal. It leads to an another situation when the judgment rendered in ***Manindra Nath Sinha (supra)*** was assailed before the Apex Court and the appeal was dismissed without recording any finding on merit; whether to be considered as merger of the order. In ***Kunhayammed & Ors. (supra)*** the Apex Court had an occasion to consider the doctrine of merger in the perspective of an Indian Judicial System. It is held that the said doctrine neither emanate from the constitutional law nor having statutory recognition but originates from a common law principles in the hierarchy of the justice delivery system. The underlying principle of the doctrine of merger is to avoid one or more judgment or a decree to operate in the field simultaneously in relation to a same subject matter as the judgment passed by the Court of First Instance would merge with the judgment of the higher forum or in other words, the judgment of the Court of First Instance would merge with the judgment rendered by the highest Court of the country. However, the Apex Court was considering the various eventualities in pursuit of applying the doctrine of merger and ultimately held:

***“44. To sum up, our conclusions are:***

- (i) *Where an appeal or revision is provided against an order assed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.*
- (ii) *The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.*
- (iii) *The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.*
- (iv) *An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under*

*challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.*

- (v) *If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.*
- (vi) *Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.*
- (vii) *On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC.”*

It is evident from the above-noted report that the doctrine of merger cannot be applied in an isolated manner but depend upon the nature of the jurisdiction exercised by the higher forum and the context and the subject

matter of challenge made or capable of being made shall be the determinative factor. It is unequivocally held that refusal to grant leave to appeal simplicitor shall not attract the doctrine of merger but if the leave is granted and subsequently the order is passed by the highest Court would attract the doctrine of merger whether by virtue of such order, the order impugned is either reversed or modified or merely affirmed.

Taking a clue from the law stated in the above-noted report, it would appear that the judgment rendered in ***Manindra Nath Sinha (supra)*** was assailed before the Apex Court and the leave was granted which gave rise to a registration of Civil Appeal no. 7897 of 2010. The Three-Judge Bench of the Supreme Court ultimately dismissed the said appeal as no interference was called for and, therefore, it attracts the doctrine of merger.

In a subsequent decision rendered in ***Prabir Kumar Ghosh and Ors. (supra)***, another Three-Judge Bench of this Court held that the appointment of staffs in the school before the upgradation and/or recognition by the competent authority cannot be regarded as illegal. We thus find that there is a conflicting view of two Co-ordinate Benches of the Apex Court operating in the field. Though in ***Manindra Nath Sinha (supra)*** the Apex Court did not record any finding but affirms the order of the Division Bench of this Court simplicitor but in a subsequent decision rendered in ***Prabir Kumar Ghosh and Ors. (supra)*** the Apex Court has rendered findings in a regular civil appeal and in view of the law laid down in ***Kunhayammed & Ors. (supra)*** both the decisions would attract the doctrine of merger.

It leads to a situation as to whether the judgment rendered by the Co-ordinate Benches which runs counter to each other which of the judgment would prevail over the other. The point which, in our opinion, emerged whether the judgment rendered by the Apex Court without recording any findings on the merit though attracts the principle of merger would be regarded as a declaration of law under Article 141 of the Constitution and whether the subsequent Co-ordinate Bench is bound by the same by deciding the point upon returning the finding on merit. The doctrine of merger stands on a different footing than the declaration of law by the Apex Court under Article 141 of the Constitution of India. The distinction must be borne in mind between the doctrine of merger and the declaration of law by the Apex Court under Article 141 of the Constitution of India. The Court must bear in mind before embarking his journey on the peripheral of examining the judgments rendered by the Apex Court is that it is not a statute, not to be read as *euclid's theorem* but decision of the Court is what is decided in the facts of a case which may not be the same in a different fact situation. It is axiomatic to consider whether the earlier judgment rendered by the Co-ordinate Bench is wholly founded upon the question of fact or coupled with a declaration of law. The moment the law is also declared, the ratio is to be culled out from the context and would be regarded as a declaration of law under Article 141 of the Constitution of India. Every judgment has to be read in the perspective of a particular facts having proved or assumes to be proved and the generality of the expressions found therein may not, at times be regarded as an exposition of whole law. The enunciation of a reasons or principles on each question was placed

before the Court and the decision is made thereupon would be regarded as a binding precedent. In other words, the principle laid down in the judgment that would be a binding law under Article 141 of the Constitution of India and, therefore, in order to ascertain and arrive at the decision that it has a binding force, all that is necessary to see the facts of the said case in which the decision is given and what was the point which has been decided. The word or the sentence used in the judgment may not be regarded as a full exposition of law.

In ***State of UP & Anr. vs. Synthetics and Chemicals Ltd. & Anr., reported in (1991) 4 SCC 139***, the Apex Court held that the decision which is not expressed or is not founded on reasons, nor is preceded on consideration of situation cannot be deemed to a law declared to have a binding effect as contemplated under Article 141 of the Constitution of India in the following:

***“41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. “A decision passes sub-silentio, in the technical sense that has come to be attached to the phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind.” (Salmond on Jurisprudence 12<sup>th</sup> Edn., p. 153). In Lancaster Motor Company (London) Ltd. V. Bremith Ltd. The Court did not feel bound by earlier decision as it was rendered ‘without any argument, without reference to the crucial words of the rule and without any citation of the authority’. It was approved by this Court in Municipal Corporation of Delhi v.***

*Gurnam Kaur. The bench held that, 'precedents sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In B. Shama Rao v. Union Territory of Pondicherry it was observed, it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."*

Obviously, in **Manindra Nath Sinha (supra)** there is no findings returned on the merit nor the law but Civil Appeal was dismissed as the Apex Court was of the view that the order of the High Court does not call for interference, therefore cannot be regarded as a law declared by the Apex Court under Article 141 of the Constitution of India. However, the judgment rendered in **Prabir Kumar Ghosh and Ors. (supra)** contained the factual aspect and the law so declared and, therefore it partakes a character of a binding precedent under Article 141 of the Constitution of India. In view of the decision rendered in **Prabir Kumar Ghosh and Ors. (supra)** by the Three-Judge Bench of this Court, the appointment as approved staff before the upgradation or the recognition having extended to it shall not be regarded as illegal and, therefore, such appointment should be regularized.

In view of the decision rendered in ***Prabir Kumar Ghosh and Ors. (supra)*** we find that the judgment of the Single Bench is in conformity with it and, therefore, cannot be said to be erroneous, infirm and/or illegal.

The appeal is thus dismissed.

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 the requisites formalities.

**(Harish Tandon, J.)**

I agree.

**(Prasenjit Biswas, J.)**