IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 584 OF 1997

Smt.Mangala d/o Keshav Mule,
Age : 36 years, Occupation : Nil,
R/o 80, Vithu Mauli,
Sudarshan Housing Society,
Chakkar Bardi Road, Dhule.

...PETITIONER

-VERSUS-

1 President,
Manav Samaj Unnati Mandal,
R/o Navjivan Nagar,
Near Phashi Pool, Dhule.

2 Secretary,
Manav Samaj Unnati Mandal,
Dhule. C/o Rajendra Chhatralaya,
Deopur, Dhule.

3 Head Mistress,
Manav Samaj Unnati Mandal
Sanshalit Primary School,
Raskarar Nagar, Chittod Road, Dhule.

4 Administrative Officer,
Municipal School Board, Dhule.

5 Deputy Director of Education,
Nashik Division, Nashik.

6 Presiding Officer,
School Tribunal, Nashik Region,
Behind Runanubandh Mangal
Karyalaya, Near Pay Unit Office,
Bombay-Agra Road, Nashik-422001.

7 The State of Maharashtra.
Copy to be served through

G.P., High Court of Bombay,
Bench at Aurangabad.

...RESPONDENTS

...

Advocate for Petitioner : Shri R.R.Mantri h/f Shri R.B.Ade.
AGP for Respondents 5 and 7 : Shri N.T.Bhagat.
Advocate for Respondent 3 : Shri S.P.Brahme h/f Shri N.B.Suryawanshi.
Advocate for Respondent 4 : Shri P.S.Patil.

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CORAM: RAVINDRA V. GHUGE, J.
DATE :- 22nd July, 2016

Oral Judgment :

1 The Petitioner is aggrieved by the judgment and order dated 27.11.1996 passed by the School Tribunal, Nashik by which Appeal No.32/1996 filed by her was dismissed.

2 This petition was admitted on 17.02.1997.

3 I have heard the learned Advocates for the respective sides at length on 19.07.2016, 20.07.2016, 21.07.2016 and today.

4 The submissions of Shri Mantri, learned Advocate for the Petitioner, can be summarized as follows:-

(a) The Petitioner had passed her SSC when she was appointed on 01.06.1987 as an Assistant Teacher.

(b) For three years, she had not completed her postal Diploma in

Education (D.Ed.) which was to be completed by correspondence course.

(c) Her first application for being admitted to the postal D.Ed. course is dated 21.01.1991 which was rejected by Respondent No.5/ Deputy Director of Education.

(d) The Petitioner challenged the order of the Deputy Director by filing R.C.S. No.202/1992.

(e) By judgment dated 29.04.1995, the said Civil Suit was dismissed.

(f) She preferred Regular Civil Appeal No.101/1995 before the learned District Judge, which was allowed by the judgment dated 12.04.2001 and the Petitioner was permitted to complete her postal D.Ed. course.

(g) Prior thereto, the Petitioner had preferred Writ Petition No.2812/1996 before the learned Division Bench of this court making out the grievance with relation to admission to the postal D.Ed. course.

(h) The Management informed the Court that the Petitioner is not in service from 30.04.1991 as she has been terminated.

(i) This Court, therefore, dismissed the said petition by order dated 16.07.1996.

(j) The Petitioner completed her D.Ed. on 04.07.2003.

(k) False document dated 20.04.1991 was created by the Management so as to project a picture that the Petitioner was disengaged from 30.04.1991 after having worked for only one year from 01.06.1990 to 30.04.1991.

(l) The document dated 02.05.1991 placed on record before the School Tribunal indicates that the then Headmistress Smt.Savita Vinayak Bhoite was terminated and the Petitioner was appointed as an Incharge Headmistress in her place.

(m) The order of termination was never served upon the Petitioner.

(n) Actual appointment order dated 01.06.1987 would indicate that the Petitioner was appointed from June, 1987 onwards.

(o) There is no dispute that she has worked from June, 1987 till 30.04.1991 and is, therefore, deemed confirmed in service.

(p) The Management did not participate in the proceedings before the School Tribunal in the appeal preferred by the Petitioner and no Written Statement was filed.

(q) Though the Petitioner did not complete her D.Ed. within three years from the date of appointment, she cannot be blamed for the same as the Deputy Director of Education did not grant her permission for the postal D.Ed. course.

(r) The judgment of the learned District Judge in the regular civil

appeal by which the suit filed by the Petitioner was allowed, would indicate that the action of the Deputy Director of Education refusing permission to the Petitioner to complete her postal D.Ed., was illegal and she has practically lost her entire career.

(s) By the action of the Deputy Director of Education which is held to be illegal by the judgment of the learned District Judge, an irreparable loss, serious prejudice and manifest inconvenience has been caused to the Petitioner.

(t) Mrs.Bhoite, who is presently working as Headmistress, has filed the affidavit in reply and has admitted in the said reply in paragraph 7 that she was also appointed in 1987 and her services came to be approved in 1990 as a trained teacher only after she has completed her D.Ed. in May, 1990.

(u) Schedule F Category-G of the MEPS Rules, 1981 r/w Note-2 indicates that the D.Ed. course is to be completed within two years only for the purposes of seniority which would then date back to the appointment of the Petitioner.

(v) The Petitioner, no doubt, was only SSC when she was appointed and Schedule-B of the MEPS Rules, 1981 would indicate that an SSC candidate can be appointed as an Assistant Teacher and can continue as such until she

completes D.Ed. upon which her services would be approved from the date of her first appointment.

(w) Since the Petitioner is not at fault in relation to the failure to complete her D.Ed. before her termination, her termination is rendered illegal and as such, she deserves to be reinstated in service with continuity and full back-wages from May, 1991.

(x) The Petitioner has another about 18 months remaining for her attaining the age of superannuation.

(y) The impugned judgment of the School Tribunal is perverse and erroneous and therefore, this petition under Article 227 of the Constitution of India deserves to be allowed in the supervisory jurisdiction of this Court.

(z) The Petitioner relies upon paragraphs 14, 16, 17 and 26 of the judgment of this Court in the matter of *Sanjay Namdeo Mutha vs. Director, Maharashtra Educational Research and Training Institute*, **1996(1) BCR 656 : 1995 (2) Mh.L.J. 824**.

5 Shri Brahme, learned Advocate appearing on behalf of the Respondent/ Management, has strenuously defended the impugned judgment. His contentions can be summarized as under:-

(a) The Petitioner was not qualified to be appointed as an Assistant Teacher to the post of primary school teacher in the

light of the prescribed qualifications set out below Schedule-B of the MEPS Rules, 1981 which mandates that a candidate must have passed her SSC examination or matriculation examination or Lokshala examination or any other examination recognized as such by the Government and must acquire primary teachers certificate examination or diploma in education examination.

(b) Since the very appointment of the Petitioner is illegal, there is no question of deemed confirmation of the Petitioner after completion of two years.

(c) The Petitioner was not appointed by following the due procedure laid down in law.

(d) There was no advertisement, no interviews and no selection process undertaken by the Management when the Petitioner was appointed for one academic year from 01.06.1990 till 30.04.1991.

(e) Her appointment on 01.06.1987 was equally illegal as there was no procedure adopted by the Management for causing a lawful selection.

(f) The Management cannot be held responsible for the refusal of the Deputy Director of Education in granting permission to the Petitioner to complete her postal D.Ed. course.

(g) The Management received recognition for it's primary section only on 23.05.1988.

(h) Considering that the regular selection process was not followed while appointing the Petitioner, would, therefore, render the Petitioner disentitled for seeking deemed confirmation under Section 5 of the MEPS Act, 1977.

(i) In 1987, the School was not recognized as a private school as is defined under Section 2(20) of the MEPS Act, 1977.

(j) After June, 1985, considering the effect of clause (4) below I under Schedule-B of the MEPS Rules, 1981, any Management was not permitted to appoint any SSC candidate until the candidate had acquired the prescribed qualification.

(k) It cannot be explained as to why and how the order dated 02.05.1991, after the Petitioner was terminated on 30.04.1991, was issued thereby, terminating Mrs.Bhoite as Headmistress and appointing the Petitioner as an Incharge Headmistress.

(l) The then President Mr.Baviskar had issued the said order on 02.05.1991, unauthorisedly.

(m) It is not the case of the Petitioner that she continued in employment after 30.04.1991 as an incharge Headmistress of the school.

(n) All untrained teachers similarly situated as like the Petitioner were terminated/ removed in 1991 and thereafter, trained teachers who were legally eligible to be appointed, were so appointed in 1993.

6 Shri Brahme has placed reliance upon the following judgments:-

(1) *Secretary, State of Karnataka vs. Umadevi and others,* ***AIR 2006 SC 1806 : 2006(4) SCC 1***.

(2) Priyadarshini Education Trust vs. Ratis (Rafia) Bano d/o Abdul Rasheed, ***2007(6) ALL M.R. 238***.

(3) Chandramani Devraj Tiwari vs. The Secretary, Smt.R.B.Tiwari Sanskrutik Kendra, ***2008(3) ALL M.R. 138***.

(4) Rayat Shikshan Sanstha vs. Yeshwant Dattatraya Shinde, ***2009(5) ALL MR 151***.

(5) Jaimala Bhaurao Ramteke vs. Presiding Officer and others, ***2009(5) Mh.L.J. 333 : 2009 BCI 101***.

(6) Tanaji Madhukar Barbade vs. State of Maharashtra, ***2011(1) ALL MR 912***.

7 Having considered the submissions of the learned Advocates

as have been recorded herein above, it is an undisputed position that from 02.05.1991 till this date, the Petitioner is not in employment and has about 18 months left for retirement. It is also undisputed that the Petitioner has worked for a period of only four years with the Management.

8 The litigating sides have placed reliance upon Rule 6 of the MEPS Rules, 1981, Schedule B(I) and (II), which prescribe qualifications for primary teachers and trained teachers and have referred to categories G and H r/w Note-4 below Schedule-F of the MEPS Rules, 1981, which read as under:-

> *"Rule 6. Qualifications of Teachers:-*
>
> *The minimum qualifications for the posts of teachers and the non-teaching staff in the primary schools, secondary schools, junior colleges and junior colleges of education shall be as specified in Schedule B:*
>
> *Provided that, the Education Officer may allow Managements to appoint untrained Science graduate teachers for teaching Mathematics and Science subjects or untrained Arts or Commerce graduates for teaching other subjects in secondary schools in exceptional circumstances, such as non-availability of trained graduates. Such appointments shall, however, be allowed on an year to year basis, on the clear understanding that they shall have to obtain training qualification at their own cost and further subject to the condition that their services shall be liable for termination as soon as trained graduate teachers become available.*
>
> *Provided further that the untrained graduate appointed as a teacher after obtaining the permission*

from the Education Officer before the commencement of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 and who continues to be in service in any school on the date of commencement of the Maharashtra Employees of Private Schools (Conditions of Service) (Amendment) Rules, 1984 shall, be continued in service on the condition that he obtains the prescribed training qualifications at his own cost before 01st June, 1987, unless he has already obtained such qualifications, failing which his services shall be terminated."

"Schedule-B:-

I. Qualifications for Primary Teachers : Appointment to the posts of Primary School Teachers (other than special teachers- Drawing teachers) shall be made by nomination from amongst candidates who have passed SSC examination or Matriculation examination or Lokshala examination or any other examination recognised as such by Government and the Primary Teachers Certificate examination or Diploma in Eduction examination, or a Diploma in Education (pre-primary of two years' duration)."

"II. Qualifications for trained Teachers in Secondary Schools and Junior Colleges of Education:

(2) For Undergraduate Teachers:-

(i) A Diploma in Education of Nagpur and Bombay Universities which is awarded two years after Secondary School Certificate Examination.

(ii) A Secondary Teachers' Certificate of the Education Department of Maharashtra State or the Teachers' Diploma of any statutory University, if the person holding it is appointed for the first time before the 01st October, 1970 and continues to serve as a teacher with or without break after that date.

(iii) A certificate in Physical Education recognised by Government, if the person had acquired the said qualification before the 31st May, 1971 and was appointed on or before the 20th September, 1978.

(iv) A Diploma in Education (Primary) awarded by

Government; or
(v) Any other equivalent diploma or certificate approved by Government or Inter-University Board."

"Schedule F.
Category-G : Untrained Matriculates or holders of equivalent qualification.

Category-H : All teachers other than those mentioned in categories A to G.

Note 4: The categories mentioned above represent the ladder of seniority and have been mentioned in descending order."

9 It is equally undisputed that the Petitioner did not have D.Ed. qualification and as a consequence of which, she has been terminated. The qualifications for primary teachers reproduced above below Schedule-B indicate that a primary teacher must have SSC qualification and must have primary teachers certificate examination or Diploma in Education so as to qualify for appointment as a primary teacher. The Petitioner has contended that she has attained the deemed status of permanency in the light of Section 5 of the MEPS Act, 1977.

10 Insofar as continuance of the untrained teacher is concerned, reliance has been placed by the Petitioner on paragraphs 14, 16, 17 and 26 of *Sanjay Namdeo Mutha* judgment (supra), which read as under:-

"14. The argument regarding the policy laid down by the State Government in favour of the reserved categories

of S.C., S.T. and V.J.N.T. only cannot be accepted for other reasons also. It is admitted position that till last year, many untrained teachers from Open and O.B.C. categories spread over the entire State and from all regions were granted admission to the Correspondence D.Ed. Course. This procedure to admit candidates belonging to Open and O.B.C. categories was followed since the inception of the said Course till last year. The departure is made for the first time in the year 1995 and tried to be supported on the basis of certain statements appearing in the policy Resolution dated 4th October, 1973. If that was the policy of the State Government, then the Government authorities in the Education Department would not have granted approval to the services of the persons belonging to Open and O.B.C. categories and, especially in the cases of those who are untrained. Not only the condition consistently is laid down to acquire the qualification of D.Ed. within five years, but the admissions are given for those untrained teachers in the Correspondence D.Ed. Course, which indicates that the authorities of the State Government are now estopped from saying that it was the policy of the State Government to provide the scheme of Correspondence D.Ed. Course only in favour of those reserved categories of S.C., S.T. and V.J.N.T. As we have already pointed out, such policy cannot be spelt out from the Resolution dated 4th October, 1973. Even assuming that there was such a policy in the undisclosed mind of the State Government, but the disclosed mind has to be worked out on the basis of the admissions granted to the candidates belonging to Open and O.B.C. categories to the said course. The conduct of the officers at different levels in giving approvals to the appointments of Open and O.B.C. category untrained primary teachers as against the alleged policy of not making appointment after 31st January, 1969 is sufficient to repeal the argument of the learned A.G.P. The reference to the date, 31st January, 1969, is, therefore, to a factual situation and has nothing to do with the policy. In fact, such appointments were not only granted approval, but

such teachers were also allowed to acquire training, by way of Correspondence D.Ed. Course.

16. *If we go through the other Resolution, on record, which is dated 20th April, 1989, in this connection, there is nothing to indicate about such a policy.*

17. *Articles 14, 15 and 16 of the Constitution deal with right to equality and of reasonable restrictions. Admittedly, having regard to the resources of the State, even accepting that there are only 3060 seats available to which the candidates seeking admission to the Correspondance D.Ed. Course can be admitted every year, yet, in view of the policy of the State Government laid down in the schedule for admission this year, all the 3060 seats in the course are reserved in favour of S.C., S.T. and V.J.N.T. categories. The other candidates are totally excluded from the admission to the Correspondance D.Ed. Course. Such 100 per cent reservation in the matter of acquiring qualification is purely and patently arbitrary and has no nexus with the object sought to be achieved by the policy Resolution dated 4th October, 1973. In the said Resolution, the broad policy of the State Government was to give employment even to untrained persons and to allow them to acquire qualification within five years. Acquisition of the qualification within five years is imposed and is a must except in certain cases, such as hilly tracts and inaccessible areas, etc. The policy is to impart training to untrained teachers by way of Correspondence D.Ed. Course. Reading of the Resolution as a whole indicates that the Government was aware of the fact that there are untrained teachers both from Open and O.B.C. categories as well as in the reserved categories of Scheduled Caste, Schedule Tribe and V.J.N.T. The purpose of introducing the Correspondence D.Ed. Course is to impart training to untrained teachers. The purpose was not to train untrained teachers from any particular category only; but the scheme was formulated to give training to all such untrained teachers, who were in service or who would be*

employed thereafter also, having regard to the large number of employment opportunities, irrespectively of the fact of any particular teacher belonging to any particular category. The discrimination so made, therefore, has no nexus with the object sought to be achieved.

26. There are several petitioners, who had applied for the Correspondence D.Ed. course right from the year in which they were appointed, but they were not granted admissions, either because of the lack of facility or because of the large number of candidates from the same school willing to complete the said course. The petitioners could not get the qualification of D.Ed. because of the circumstances beyond their control, though all the while they have desired to acquire the qualification. Some of the petitioners have repeatedly applied for admission to the Correspondence D.Ed. Course, but their claims for admission to the said course were denied on one or the other ground, may be for the grounds which are convenient to the authorities and the managements; but the fact remains that the petitioners, who were given opportunity to acquire the qualification within 5 years, were denied such opportunity in the midst, before expiry of 5 years period."

11 Apparently, this Court in *Sanjay Mutha judgment* (supra) has considered the intent and object of the correspondence D.Ed. course so as to enable the untrained teachers to acquire the qualifications and thereby, gain an opportunity of becoming trained teachers and continue in employment. The purpose of introducing the correspondence D.Ed. course was to impart education to the untrained teachers and thereby, promote the prospect of their confirmation in service as trained teachers.

12 There is no doubt as well as no dispute that it was on account of the order of the Deputy Director of Education that the Petitioner lost an opportunity of completing her D.Ed. course by correspondence. The order passed by the Deputy Director of Education refusing permission to the Petitioner has not been placed on record. It is also undisputed that had the Petitioner completed her D.Ed. by correspondence, she would have gained an opportunity of becoming a trained teacher and would, therefore, have been granted confirmation in service which would have changed the entire course of her life and destiny. By the order of rejection at the hands of the Deputy Director of Education, she has thus lost that opportunity. The situation becomes more grim considering the fact that the learned District Judge has allowed the regular civil appeal filed by the Petitioner, concluding that the rejection of her application was illegal and thereby, holding that she is entitled to complete her D.Ed. course by correspondence.

13 Insofar as the claim for deemed confirmation in employment is concerned, Shri Brahme has placed reliance upon paragraphs 36 and 38 of the *Secretary, State of Karnataka vs. Umadevi* (supra), which read as under:-

> *"36. While directing that appointments, temporary or*

casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain, not at arms length, since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to

enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India.

38. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post."

14 Based on the said ratio, Shri Brahme submits that deemed permanency cannot be granted to a candidate whose very induction in employment was illegal. Since the Petitioner was not qualified to be appointed as an Assistant Teacher primary, deemed confirmation would

not aid her since her very appointment was illegal.

15 He has also placed reliance on paragraphs 9 and 11 of *Priyadarshani Education Trust judgment* (supra), which read as under:-

> *"9. The gist of various cases relied upon by both the counsel can be drawn as under.*
>
> *In order to claim benefit of deemed permanency, a teacher must be duly selected, he must be appointed in clear permanent vacancy, his appointment must not be for a fixed/limited period, and preferably it ought to indicate that the appointment is on probation. If and only if these conditions are fulfilled, a teacher will be able to claim deemed permanency on completion of service of two years from the date of appointment on probation or at least by an appointment fulfilling all above conditions, even though the order may not specifically indicate that he is appointed on probation.*
>
> *In the matter at hands, it is the claim of the teacher that she was appointed on probation and for that purpose, she has relied upon order dated 13.6.1992 at Exhibit D, although it is her claim that she is in continuous service since 1987. According to the management, the order is not an order regarding appointment on probation, but the same is an order of appointment purely on temporary basis for one academic year. It is also a question of debate whether the teacher was "duly appointed."*
>
> *In order to demonstrate that the order was regarding appointment for a fixed period and also for claiming that it was an appointment on probation, both the learned Advocates have placed reliance upon Exhibit D. Advocate Shri Salunke for the appellant has pointed out that the order clearly indicates that it was for academic year 1992-93 and it does contain a clause that on expiry of the said period, the services of the teacher shall stand terminated without requiring any notice. As against this, Advocate Shri Kazi*

pointed out that clause in the order pertaining to appointment on probation, which is in the form as prescribed by schedule D, is not scored out and, therefore, it must be said that the appointment was on probation for a period of two years. As Advocate Shri Salunke pointed out that if the appointment was on probation, the teacher would not have accepted fresh order at the beginning of each academic year, Advocate Shri Kazi replied that no fresh appointment order was issued for academic year 1993-94 and, therefore, order dated 13.6.1992 must be taken as an order of appointment on probation. Shri Kazi has also relied upon other documents, such as, experience certificate issued sometime in the year 1988 and also a certificate, indicating the management having accorded no objection to the teacher going for B. Ed. course and details regarding salary which indicate the teacher having been permitted to draw an increment.

Our query that the teacher must demonstrate that she is duly appointed, in order to claim that her appointment was on probation, although the teacher has not come before this Court with support of copy of advertisement in response to which she had applied, or even claiming in the petition that the advertisement had occurred in the newspaper; that she had responded to it; that she was subjected to competitive examination, screening test etc., Advocate Shri Kazi pleaded that the teacher was duly appointed as contended in the petition. In the alternative, he submitted that the teacher does not belong to reserved category and tried to demonstrate from the rules that for open category candidate, there is no need for issuing an advertisement or inviting applications and holding competitive examination.

11. *It was argued by Advocate Shri Kazi that Rule 9 is the only rule, regarding the manner of appointment of staff and, therefore, the procedure as contained in this rule, must be taken as "in the manner prescribed" as contemplated by Sub-section (1) of Section 5. He also referred to Sub-rule (8) and pointed out that the the said sub-rule makes a provision for advertisement of*

the vacancy in at least one newspaper having wide circulation, when the management desires to fill in the vacancies reserved for SC/ST/DTNT/OBC. According to him, Sub-rule (3) makes no such provision and, therefore, it must be inferred that there is no necessity to issue an advertisement for the purpose of filling up vacancies of open category.

We are unable to appreciate, much less accept, such an argument. Referring to proviso to Sub-section (1) of Section 5 of the Act, it is evident that, as soon as there is vacancy, the management is required to communicate with the Education Officer, Zilla Parishad. The vacancy is to be filled in, from the list of surplus persons maintained by the Education Officer. This is the first indication of control of the State over the recruitment and appointment of staff, even of private schools. Even on reference to Sub-rule (3) of rule 9, the candidate eligible for appointment and desirous of applying for such post, is required to apply in writing, by giving full details. We are unable to visualise a possibility of deserving candidate knowing about the vacancies in any private schools, unless the school invites applications by advertisement. The persons, who may learn about vacancies without advertisement, may only be kith and kins or those in close contact with the management or at the most staff members. If argument of Advocate Shri Kazi is to be accepted, it will be tantamount to accepting that rule 9 is drafted in such a manner as to promote nepotism, so far as appointments of open category candidates to teaching and non-teaching posts in private schools are concerned. If the argument of Advocate Shri Kazi is to be accepted, rule 9 will have to be read in a fashion, where reserved category candidates are required to enter the service by competing amongst themselves, but an open category candidate may be in a position to seek an appointment without competing. Legislature could not have intended to prescribe a manner of recruitment which would discriminate between reserved and un-reserved categories in respect of manner in which they can seek appointments. A

legislation making it easier for a reserved candidate, may be justified, in view of Article 15(4) of the Constitution. But, a reverse position cannot be justified by any line of argument.

Article 14 guarantees equality before law and Article 16 gives equality of opportunity in the matter of public employment. Article 16(1) reads;

16. Equality of opportunity in matters of public employment. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

In case we are to accept the submission as advanced by Advocate Shri Kazi, Rule 9 not only creates a discrimination in the recruitment and appointments of candidates between reserved and unreserved categories (making it more difficult for the reserved categories), but it also denies equal opportunity for all citizens desirous of seeking employment/appointment. In the absence of any advertisement, only those favoured by nepotism will be able to seek employment/appointments at the cost of all equally placed and desirous candidates, who are ignorant of such vacancies. Any procedure for recruitment/appointment, which does not afford equal opportunity to all eligible and deserving candidates to compete for seeking appointment and employment, must be seen and termed as unconstitutional as being violative of Articles 14 and 16(1).

On reference to Rule 9 Sub-Rule 2, it can be seen that appointments of teaching and non-teaching staff are required to be done by the School Committee and only the short term appointments in leave vacancies, of a duration not exceeding three months are permitted to be done by the Head, if so authorized by the School Committee.

In this context, we may also refer to the text of Sub-Section 2 of Section 5, which is already re-produced hereinabove. From the opening part "every person appointed to fill in permanent vacancy shall be on probation for a period of two years...", it is evident

that once a person is selected in the manner prescribed and duly appointed, the Management or the School Committee has no option. Such a person must be appointed on probation. If there is a permanent vacancy and if a person duly qualified is selected in the manner prescribed and then duly appointed, the Management has no choice or option to appoint him for a limited period such as one academic year or shorter than that.

Thus, although Sub-rule (3) of rule (9) does not specifically speak of requirement of publication of vacancies by an advertisement and inviting applications from candidates eligible and desirous of seeking appointment, as Sub-rule (8) speaks for the purpose of filling up the vacancies reserved under Sub-rule (7), requirement of such an advertisement must be read within the provisions for the reasons discussed hereinabove and which may be summarized, at the cost of repetition as follows.

(i) Statute is enacted for the purpose of regulating the recruitment in private schools in the State.

(ii) Interpretation that Sub-rule 3 of rule 9 does not prescribe publication of advertisement, when read in the light of Sub-rule 8, would be discriminatory and capable of promoting arbitrariness and nepotism.

(iii) Such an interpretation would be against the spirit of Articles 14 and 16 of the Constitution, and therefore, interpretation which would make rule 9 unconstitutional will have to be rejected.

(iv) When Sub-section 2 of Section 5 compels the Management to appoint eligible, duly selected candidate only on probation, the backdoor entry of a person who alone knows about existence of vacancy cannot be accepted as palatable interpretation either of Rule 9 or Section 5 read with Rule 9."

16 He has, therefore, contended that a candidate, in order to claim the benefits of deemed permanency, must be duly selected, must be

appointed against the permanent and vacant post and the appointment must necessarily be on probation.

17 In paragraph 12 of the judgment of this Court in *Chandramani Devraj Tiwari (supra)*, it has been concluded that the claim for benefits of deemed permanency under Section 5(2) of the MEPS Act, 1977 necessarily requires a proper selection and proper appointment which means that the candidate complies with the requisite qualifications and eligibility criteria.

18 In paragraph 3 of the *Rayat Shikshan Sanstha judgment* (supra), after noting that there was no evidence on record that the appointment of the employee therein was made after following the due procedure of law laid down in the Act and the Rules, this Court concluded that the employee could not be granted any benefit and hence, could not be continued in service. Similar is the view expressed by this Court in paragraphs 17 and 24 of the *Jaimala Bhaurao Ramteke judgment* (supra).

19 The learned Division Bench of this Court in the matter of *Tanaji Madhukar Barbade* (supra) concluded in paragraph 17 that only an eligible candidate would have the right to apply for the teaching or non-

teaching posts in a private school. In the absence of requisite qualifications, no right would be created. In the absence of any vacancy, there cannot be deemed confirmation in service.

20 The Honourable Apex Court has concluded in the following four judgments that when an employee puts in a short spell of service and which is followed by a long duration of unemployment, it would be inappropriate to grant reinstatement with continuity and with or without back-wages:-

(a) *Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division, Kota Vs. Mohanlal,* ***[2013 LLR 1009]****;*

(b) *Assistant Engineer, Rajasthan Development Corporation and another Vs. Gitam Singh,* ***[(2013) 5 SCC 136]****;*

(c) *BSNL Vs. Man Singh,* ***(2012) 1 SCC 558****; and*

(d) *Jagbir Singh Vs. Haryana State Agriculture Marketing Board,* ***[(2009) 15 SCC 327].***

21 Shri Mantri has strenuously canvassed that Mrs.Bhoite, who is presently the Headmistress over the past two decades, is identically placed as like the Petitioner having been appointed in 1987, which is one year after the Petitioner was appointed and also did not have the requisite

qualifications. She completed her D.Ed. in 1991 when the Petitioner was terminated. She was continued in employment only because her brother was the President of the Institution. Shri Mantri has, therefore, submitted that the Petitioner deserves reinstatement with continuity and full back-wages.

22 In the light of the above, it is apparent that the Petitioner has lost an opportunity of completing her D.Ed. course only on account of rejection of her application by the Deputy Director of Education and which action has been held to be illegal. The said damage cannot be undone today, though by imposing costs on the Department of Education, some solace could be offered to her.

23 Similarly, the Respondent/ Management could have continued the Petitioner as an untrained teacher in the primary section until she completed her D.Ed. by correspondence, as after acquiring the said qualification, she could have been granted regularization and her seniority could have been maintained from the date of her appointment. It is given to understand that the scheme of postal D.Ed. has now been extended till March, 2019.

24 As such, granting reinstatement with continuity of service and

full back-wages to the Petitioner who has been out of employment for the last 25 years, appears to be impracticable. I, therefore, deem it proper to grant compensation to the Petitioner under Section 11(2)(e) of the MEPS Act, 1977.

25 This Writ Petition is, therefore, partly allowed. Though the impugned judgment of the School Tribunal is sustained considering the fact situation as above, I am directing as under in addition thereto:-

(a) The Department of Education shall pay compensation of Rs.50,000/- (Rupees Fifty Thousand) to the Petitioner within a period of TWELVE WEEKS from today.

(b) The Respondent/ Management shall pay the Petitioner an amount equal to the last six months' salary with pay and allowances as are applicable to an Assistant Teacher primary today, within a period of TWELE WEEKS.

26 Rule is made partly absolute in the above terms.

27 The record and proceedings from the School Tribunal, Nashik shall be returned back forthwith.

kps (**RAVINDRA V. GHUGE, J.**)