

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10845 OF 2015

1. Magasvargiya Shikshan Sanstha,
Talegoan, Tq. Bhokardan,
District Jalna through its President,
Shri Kailas Manikrao Gavhad,
Age... years, Occ. Service,
R/o Bhokardan, Dist. Jalna.

2. Magasvargiya Shikshan Sanstha,
Talegoan, Tq. Bhokardan,
District Jalna through its Secretary,
Shri Keshavrao Anandrao Gavhad,
Age years, Occ. service,
R/o Bhokardan, Dist. Jalna.

..Petitioners

Versus

1. Bhausahab Sonaji Kakade,
Age 32 years, Occ. Service
R/o Naik Nagar, Tq. Sillod,
District Aurangabad.

2. The Education Officer(S),
Zilla Parishad, Jalna.

3. Saraswati Vidyalalay,
Talegaon, Ta. Bhokardan,
District Jalna through its
Head Master, R/o Talegoan,
Tq. Bhokardan, Dist. Jalna.

..Respondents

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Advocates appearing for :

Petitioners : Shri V.V.Deshmukh
Respondent 1 : Shri H.S.Surve
Respondent 2 : Shri A.P.Basarkar, AGP
Respondent 3 : Shri S.V.Dixit
Amicus curiae : S/Shri Ashok Patil, T.K.Prabhakaran,
S.V.Dankh, Yatin Thole & Y.R.Marlapalle

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CORAM : RAVINDRA V. GHUGE, J.

Reserved on : April 25, 2016
Pronounced on : May 6, 2016

JUDGMENT :-

1. Heard learned Advocates for the respective parties.
2. Rule.
3. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.
4. A vital issue emerges in this petition:-

"Whether under Rule 16(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 ("MEPS Rules" for short), issuance of a notice to the temporary / probationer employee before arriving at a conclusion that he/she has voluntarily abandoned employment would be a necessity?"

5. Considering the conspectus of the matter, I had invited the learned Advocates practicing in service law to render their assistance in this matter. I have thus heard the learned Advocates for the litigating sides, as well as, those learned Advocates.

6. The petitioner / management has challenged the judgment and order dated 24.9.2015, delivered by the School Tribunal, Aurangabad, by which, Appeal No. 5 of 2013, filed by the appellant / employee Respondent No.1 herein, has been allowed and he has been granted reinstatement with continuity of service, without backwages.

7. The undisputed aspects in this case are as under:-

(A) The employee is a trained graduate holding B.A. and B.Ed. qualifications.

(B) He was appointed as an Assistant Teacher on probation for two years from 2.8.2008.

(C) The Education Officer has accorded approval to his appointment on probation by order dated 20.2.2009 with effect from 2.8.2008.

(D) The appellant was absent from 20.4.2010.

(E) The last working day, prior to commencement of the

vacation was 27.4.2010.

(F) The management has mentioned on the muster roll that the appellant was treated as being on leave from 20.4.2010 till 27.4.2010.

(G) The opening day after vacation was 14.6.2010.

(H) The appellant alleged oral termination on 2.9.2010.

(I) The appellant preferred an Appeal under Section 9 of the said Act, on 28.4.2011 for challenging his oral termination with effect from 2.9.2010.

(J) The petitioners averred that the appellant has abandoned employment.

(K) By the impugned judgment of the School Tribunal, the appeal was allowed and by setting aside the oral termination dated 2.9.2010, the appellant was granted reinstatement with continuity of service and all consequential benefits. The appellant has waived the back-wages till the filing of the appeal and the claim for back-wages till reinstatement has been rejected.

8. The following provisions under the said Act have been referred to by the learned Advocates and by this Court, in this judgment:-

"PREAMBLE

An Act to regulate recruitment and conditions of service of

employees in certain private schools.

WHEREAS, it is expedient to regulate the recruitment and conditions of service of employees in certain private schools in the State, with a view to providing such employees security and stability of service to enable them to discharge their duties towards the pupils and their guardians in particular, and the institution and the society in general, effectively and efficiently;

AND WHEREAS, it is further expedient in the public interest to lay down the duties and functions of such employees with a view to ensuring that they become accountable to the Management and contribute their mite for improving the standard of education;

AND WHEREAS, it is also necessary to make certain supplemental, incidental and consequential provisions; it is hereby enacted in the Twenty-eighth year of the Republic of India as follows ;

"Section 4 - Terms and conditions of service of employees of private schools.

(1) Subject to the provisions of this section, the State Government may make rules providing for the minimum qualifications for recruitment (including its procedure), duties, pay, allowances, post-retirement and other benefits, and other conditions of service of employees of private schools and for reservation of adequate number of posts for

members of the backward classes:

Provided that, neither the pay nor the rights in respect of leave of absence, age of retirement and post-retirement benefits and other monetary benefits of an employee in the employment of an existing private school on the appointed date shall be varied to the disadvantage of such employee by any such rules.

(2) Every employee of a private school shall be governed by such code of conduct as may be prescribed. On the violation of any provision of such code of conduct, the employee shall be liable to disciplinary action after conducting an enquiry in such manner as may be prescribed.

(3) If the scales of pay and allowances, post-retirement and other benefits of the employees of any private school are less favourable than those provided by the rules made under sub-section (1). the Director shall direct in writing the Management of such school to bring the same upto the level provided by the said rules, within such period or extended period as may be specified by him.

(4) Failure to comply with any direction given by the Director in pursuance of sub-section (3) may result in the recognition of the school concerned being withdrawn, provided that the recognition shall not be withdrawn unless the Management of the school concerned has been given a reasonable opportunity of being heard.

(5) No employee working in a private school shall work in

any coaching class. If any employee, in contravention of this provision, works in any coaching class, his services shall be liable to be terminated by the Management, provided that no such order of termination shall be issued unless the employee concerned has been given a reasonable opportunity of being heard.

(6) No employee of a private school shall be suspended, dismissed or removed or his services shall not be otherwise terminated or he shall not be reduced in rank by the Management, except in accordance with the provisions of this Act and the rules made in that behalf.

"Section 5 - Certain obligations of Management of private schools.

(1) The Management shall, as soon as possible, fill in, in the manner prescribed, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy :

Provided that unless such vacancy is to be filled in by promotion, the Management shall, before proceeding to fill such vacancy ascertain from the Educational Inspector, Greater Bombay, the Education Officer, Zilla Parishad or, as the case may be, the Director or the officer designated by the Director in respect of schools imparting technical, vocational, art or special education, whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools; and in the event of such person being available, the Management shall appoint that person in such vacancy.

(2) Every person appointed to fill a permanent vacancy except shikshan sevak shall be on probation for a period of two years. Subject to the provisions of sub-sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed :

Provided that, every person appointed as shikshan sevak shall be on probation for a period of three years.

(2A) Subject to the provisions of sub-sections (3) and (4), shikshan sevak shall, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher.

(3) If in the opinion of the Management, the work or behaviour of any probationer during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice or salary or honorarium] of one month in lieu of notice.

(4) If the services of any probationer are terminated under sub-section (3) and he is reappointed by the Management in the same school or any other school belonging to it within a period of one year from the date on which his services were terminated, then the period of probation undergone by him previously shall be taken into consideration in calculating the required period of probation for the purposes of sub-section (2).

(4A) Nothing in sub-section (2), (3) or (4) shall apply to a person appointed to fill a permanent vacancy by promotion or by absorption as provided under the proviso to sub-section (1).

(5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf, and shall state the period of appointment of such person.

Section 9 - Right of appeal to Tribunal to employees of private schools.

(1) Notwithstanding anything contained in any law or contract for the time being in force, ¹[any employee in a private school, -

(a) who is dismissed or removed or whose services are otherwise terminated or who is reduced in rank, by the order passed by the Management; or

(b) who is superseded by the Management while making an appointment to any post by promotion,

and who is aggrieved, shall have a right of appeal and may appeal against any such order or supersession to the Tribunal constituted under section 8.:

Provided that, no such appeal shall lie to the Tribunal

in any case where the matter has already been decided by a Court of competent jurisdiction or is pending before such Court, on the appointed date or where the order of dismissal, removal, otherwise termination of service or reduction in rank was passed by the Management at any time before the 1st July, 1976.

(2) Such appeal shall be made by the employee to the Tribunal, within thirty days from the date of receipt by him of the order of dismissal, removal, otherwise termination of service or reduction in rank, as the case may be :

Provided that, where such order was made before the appointed date, such appeal may be made within sixty days from the said date.

(3) Notwithstanding anything contained in sub-section (2), the Tribunal may entertain an appeal made to it after the expiry of the said period of thirty or sixty days, as the case may be, if it is satisfied that the appellant has sufficient cause for not preferring the appeal within that period.

(4) Every appeal shall be accompanied by a fee of five hundred rupees which shall not be refunded and shall be credited to the Consolidated Fund of the State.

"Section 16 - Rules

(1) The State Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) *In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :*

- (a) the minimum qualifications for recruitment of employees of private schools (including its procedure);*
- (b) their scales of pay and allowances;*
- (c) their post-retirement and other benefits;*
- (d) the other conditions of service of such employees including leave, superannuation, re-employment and promotion;*
- (e) the duties of such employees and Code of Conduct and disciplinary matters;*
- (f) the manner of conducting enquiries;*
- (g) any other matter which is required to be or may be prescribed.*

(2A) *The power to make rules under clauses (a) to (d) conferred by sub-section (2) shall include the power to give retrospective effect to the rules or any of them but no retrospective effect shall be given to any rule so as to prejudicially affect the interests of any person to whom such rule may be applicable.*

(3) *All rules made under this Act shall be subject to the condition of previous publication.*

(4) *Every rule made under this Act shall be laid, as soon as may be, after it is made before each House of the State Legislature, while it is in session for a total period of thirty*

days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree the rule should not be made, and notify such decision in the Official Gazette, the rule shall from the date of publication of such notification have effect, only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done or omitted to be done under that rule."

9. The following Rules under the MEPS Rules read as under:-

"Rule 10. Categories of Employees.

(1) Employees shall be permanent or non-permanent. Non-permanent employees may be either temporary or on probation.

(2) A temporary employee is one who is appointed to a temporary vacancy for a fixed period.

"Rule 16. Leave.

(1) Leave shall not be claimed as a matter of right. Discretion to grant, refuse or cancel leave (other than casual leave) is reserved. (i) in the case of teaching and non teaching staff (other than the Head), with the School Committee and (ii) in the case of the Head, with the management.

(2) *An application for leave other than casual leave or extension of leave or to proceed on leave after vacation shall ordinarily be made in good time before the date from which the leave or its extension is sought. Even in exceptional cases, where it is not possible to apply beforehand because of circumstances beyond the control of the employee, the application shall be made within 7 days from the date of absence. A non-permanent employee shall be deemed to have abandoned his service if he fails to apply for leave within seven days from the date of absence.*

(3) *In the case of a permanent employee who, without sufficient cause, fails to apply for leave within 7 days from the date of absence, it shall be treated as breach of discipline and he shall be liable for suitable disciplinary action after due inquiry. A permanent employee who is absent from duty without leave continuously for a period exceeding three years, shall be deemed to have voluntarily abandoned his Services.*

(4) *....."*

"Rule 28. Removal or Termination of Service.

(1) *The services of a temporary employee other than on probation may be terminated by the Management at any time without assigning any reason after giving one calendar month's notice or by paying one month's salary (pay and allowances, if any) in lieu of notice.*

In the case of an employee entitled to vacation, the notice shall not be given during the vacation or so as to cover

any part of the vacation or within one month after vacation."

10. The learned Advocate for the management Shri Deshmukh contends that the appellant had not filed any application seeking leave. Yet he was granted leave from 20.4.2010 to 27.4.2010. Thereafter, he had abandoned his employment. He filed an appeal belatedly and after the delay was condoned, the appeal was registered in 2013.

11. The alleged leave application filed by the appellant through his father dated 14.6.2010 is a forged document. No such application was filed. So also, the purported joining application dated 2.9.2010 is also a forged document and the same was never served upon the management.

12. It is further submitted that the appellant was summoned in a meeting conducted by the School Committee on 6.7.2010. He remained present in the meeting. He was counseled and was informed that if he does not report for duties immediately, it will be presumed that he has voluntarily resigned from employment. It is further submitted that as the appellant did not report for duties till 2.8.2010, it was presumed that he stood disengaged as his probation period had also come to an end on 1.8.2010.

13. It is then submitted that as the probation period had come to an end and the appellant employee stood disengaged, the management appointed a new person, namely, Shri Vitthal Sadashiv Dalvi as an Assistant Teacher on probation for two years, vide order dated 3.11.2012 and he was finally confirmed in employment. As of today, there is no vacancy available with the management so as to reinstate the appellant in service.

14. Much grievance has been made by the petitioner about the affidavit filed by the father of the appellant / employee before the Tribunal on the ground that when the matter was posted for judgment, the appellant tendered the affidavit of his father in support of his contention that a leave application along with medical certificates was filed by the appellant through his father. Said affidavit was tendered at Exhibit 35 on 31.8.2015 and the impugned judgment was delivered on 24.9.2015.

15. Shri Deshmukh, learned Advocate submits that the petitioner never got an opportunity to confront the affidavit. The appellant had never applied for leave. His father never approached the management, either to file a leave application or even to inform the management that his son had met with an accident. He further submits that another person, namely, Shri Dalvi has already been appointed in the place of the appellant and there is no vacancy with

the management.

16. Shri Surve, learned Advocate for the appellant / employee (Respondent No.1 herein) has defended the impugned judgment by stating that the petitioner / management has approached the Tribunal with a stand that the appellant has abandoned his employment. However, a conflicting stand has been taken before this Court by contending that the management had marked the appellant as on leave from 20.4.2010 till 27.4.2010. It is also stated that the appellant was summoned before the School Committee and he was given an understanding on 6.7.2010 that if he does not resume duties immediately, it would be presumed that he has voluntarily resigned from employment. In paragraph No.10 of the Written Statement of the management before the Tribunal, it is stated that the School Committee had resolved to presume that he had abandoned his service.

17. He further submits that if the appellant had not tendered a leave application, the management would not have noted on the muster roll that casual leave has been granted to the appellant from 20.4.2010 to 27.4.2010 and would not have waited till the end of his probation. This fortifies the contention of the appellant that he had forwarded a leave application.

18. He further submits that the appellant had suffered an accident and, therefore, had filed an application along with the medical certificates on 14.6.2010. He had already obtained leave upto 27.4.2010. However, while travelling towards his village on 20.4.2010, he had met with an accident and there were serious injuries to his knee. Considering the damage caused to his knee, he was advised rest for three months by the concerned Doctor. By the leave application dated 14.6.2010, tendered through his father, he had volunteered to report for duties after August 2010 along with a fitness certificate.

19. He further submits that there was no communication, even orally, much less in writing, about the meeting scheduled by the School Committee. There is no notice issued. As the appellant was never called for the meeting, his signature does not appear in the proceeding book. The management has not produced any notice. The resolution passed with regard to the appellant on 6.7.2010 by the School Committee does not bear the signature of the appellant.

20. The appellant / employee had raised an issue before the School Tribunal with regard to Rule 16(2). It was contended that he had not abandoned his employment, but was orally terminated on 2.9.2010. In the light of the ratio laid down by this Court in the matter of S.R.Ambedkar Samiti (Dr.) and another V/s M.L.Lonkar and

others [2000 (4) MLJ 507 = 2001 I CLR 239], the employer could not have presumed abandonment of service without hearing the appellant as it amounted to alleging unauthorized absenteeism and therefore, it amounts to a stigmatic termination.

21. Much grievance is also made about the fact that a written order of termination has not been issued as the petitioner / management was unsure of the stand to be taken. On the one hand, the management contends that it waited till 2.8.2010 and disengaged the appellant as his probation period came to an end and on the other hand, it is contended that the appellant has abandoned his service. It is, therefore, submitted that there is no perversity in the impugned judgment and this Court has no reason to interfere with the conclusions of the School Tribunal.

22. Shri Surve reiterates that the appellant's father had approached the management and had filed a leave application on behalf of the appellant along with the medical certificates. Out of goodwill, he did not demand an acknowledgment from the management as he trusted the management. Rule 28 provides for terminating the service of a temporary by giving one month's notice. The management could have issued an order of termination, with one month's notice, to the appellant / employee. Response from the employee's could have, therefore, indicated to the management,

whether he had a desire to work or whether he desired to abandon employment.

23. In the light of the pleadings and the contentions putforth by the learned Advocates, the issue as regards application of the Principles of Natural Justice with regard to abandonment of service by a probationer, has been seriously raised by the litigating sides.

24. Shri Deshmukh contends that the Court cannot travel beyond what has been provided in the Statutes and the Rules and hence, if abandonment can be presumed after seven days from the date of absence of the probationer, no order for ending the services of such a probationer is required to be passed.

25. The appellant / employee has, therefore, relied upon Rules 10, 16(2), 25A, 26 and 28 of the 1981 Rules. Contention is that a “non-permanent employee” includes a “probationer” as well as a “temporary employee” under Rule 10. Rule 28(1) pertains to the removal or termination of a temporary employee. Protection granted to a temporary, ought to be granted to a probationer who is on a higher footing and is engaged on a permanent vacant post.

26. Learned Advocate Shri A.V.Patil submitted that various categories of employees are mentioned in Rule 10. A “probationer”

cannot be equated with a “temporary”. Abandonment of service is always based upon a charge of unauthorized absenteeism. If there is no charge of unauthorized absenteeism, the employer is not required to take a stand that a probationer has abandoned employment. Therefore, it necessarily means that abandonment of employment is founded on a specific assessment / conclusion arrived at by the management that a probationer has abandoned his employment.

27. He further submits that no employer can be allowed to maintain secrecy about the alleged abandonment of service. Rule 16(2) may entitle an employer to assume that a probationer has abandoned employment since he has not joined and worked for seven days. The act of unauthorized absenteeism and the failure to make an application for leave, leads an employer to presume that he has abandoned his service.

28. He further submits that seven days' period is a very short period for presuming abandonment of employment. An employer cannot be given the liberty to presume abandonment without making any documentation that the probationer is deemed to have abandoned employment. This would virtually entitle an employer to simply remove the name of the probationer from its muster roll without even issuing any order.

29. He further submits that since abandonment is founded on a charge of unauthorized absenteeism and there can be no different meaning attributed to the charge of abandonment, principles of natural justice demand that the probationer should be heard before the employer presumes abandonment and removes his name from its muster roll. Though the Legislature has provided seven days' period of unauthorized absence to be enough for dispensing with the service of a probationer, however, if Rule 16(2) is likely to result in exploitation and termination of a probationer by the high handed actions of the employers, it is necessary that this Court should observe that principles of natural justice cannot be given a go-bye to presume abandonment.

30. Shri Patil has relied upon the judgment in the matter of Noble Paints Private Limited Vs. Ashok Tukaram Shinde [2004 II CLR 318 - Bombay High Court]. He also relies upon the judgments in the matters of Managing Director, Gujrat Water Resources Development Corporation Ltd. and others Vs. Kanaiyalal Ambalal Shah [1994 Lab. IC 1170], Hindustan Fertilizer Corporation and others Vs. Subhas Chandra Mukherjee [1992 I LLL 164], and Acharya Dhonde Shikshan Prasarak Mandal and others Vs. Vithal B. Kamble and others [2007 III CLR 1].

31. Shri Thole, learned Advocate submitted that the deeming

fiction under Rule 16(2) does not conclude the issue. There cannot be utter silence as regards, whether the management has invoked Rule 16(2) so as to presume that the probationer has abandoned service. Some order, in order to close the file of the employee needs to be passed by the management before striking off the name of the appellant from the muster roll. He, therefore, submits that if it is held that a notice by way of compliance of the principles of natural justice is issued to the probationer, he would be put on alert that the management desires to invoke Rule 16(2) and he might be in a position to explain the circumstances in which he has remained absent. The management maintaining a secretive silence on the issue of abandonment of service would be in violation of the principles of natural justice and seven days' period would be an extremely short period to conclude that an employee has abandoned his employment. Therefore, an employee, in such a situation, cannot be rendered defenseless.

32. Shri Dankh, learned Advocate submits that abandonment of service is a voluntary act. It amounts to giving up employment by an employee. However, that is an opinion formed by an employer on the basis of unauthorized absenteeism. Abandonment, therefore, rests on the charge of absenteeism. This charge has to be proved.

33. He relied upon Section 16 of the said Act to contend that the

State Government has the powers to make Rules for carrying out the purposes of this Act. Section 16(2)(d) is with regard to preparation of Rules concerning conditions of service of such employees including leave, superannuation, reemployment and promotion. Sub-clause (e) deals with the duties of such employees and Code of Conduct and Disciplinary matters. He, therefore, submits that the law of abandonment of service is an ancient concept and time has come for the concept of abandonment to undergo a change so as to ensure that an employer does not misuse the said provision and does not exploit the employee by getting rid of him on the basis of alleged abandonment.

34. He further submits that even in a case of a probationer, if any charge is levelled upon him and his probation period is discontinued or brought to an end, a departmental enquiry is a necessity. Abandonment is also a charge of unauthorized absenteeism and, therefore, an opportunity of hearing ought to be given to the probationer before concluding that since he has been unauthorizedly absent, he deserves to be removed from employment on the ground of abandonment.

35. He submits that without any hearing, there cannot be deemed abandonment. Merely because an employee may be a temporary or probationer, principles of natural justice cannot be disregarded while

bringing his service to an end on the ground of abandonment, which in itself is held to be “otherwise termination” under Section 9 of the said Act. If such termination falls under Section 9, it would amount to a stigmatic termination since the employer alleges that the employee is unauthorizedly absent.

36. Shri Marlapalle, learned Advocate has drawn my attention to the preamble of the 1977 Act. He contends that the Act is aimed at providing security and stability of service to the employees so as to enable them to discharge their duties towards the pupils and their guardians in particular and the institution and the society in general, effectively and efficiently.

37. He further submits that Rule 16(2) lays a heavy thrust on the aspect of failure to apply for leave within seven days from the date of absence. He, therefore, submits that two aspects need to be looked into. Firstly, whether a non-permanent employee is absent and whether, he has failed to apply for leave within seven days from the date of absence. These aspects are disputed questions of facts and therefore, a hearing is necessary.

38. He submits that Rule 16(2) has given an unfettered power to the employer in violation of the principles of natural justice. In contra-distinction, Rule 16(3) prescribes a period of continuous

absence for three years as a condition precedent to conclude "deemed to have voluntarily abandoned his services".

39. Shri Prabhakaran, learned Advocate submits that the first part of Rule 16(2) applies to all employees and the second part applies to non-permanent employees. By remaining unauthorizedly absent, an employee has expressed his desire to remain absent and his failure to report for duties expresses his desire to abandon services. The case of the teaching staff has to be treated differently in comparison to the non-teaching staff. A teacher abstaining from duties would virtually leave the school at his mercy, which cannot be tolerated.

40. He further submits that after 30 days of continued absence, lien over the job would be extinguished. Rule 16(2) need not be termed as arbitrary. There can be no presumption of leave and hence if a temporary teacher is absent, the presumption would be that he desires to abandon his service, if he does not file an application for leave.

41. He, however, clarifies that if after an employer presumes abandonment and the employee questions the abandonment, Section 9 of the said Act would be attracted so as to enable the Tribunal to lift the veil and find out whether the employee had tendered any application prior to proceeding on leave or even after proceeding on

leave. A probationer can be reinstated as a probationer to serve his remainder period of probation if it is noticed that he had not abandoned employment and was interested in continuing with his service. In similar circumstances, if a temporary returns back to employment, expressing a desire to work, the employer may consider his case. However, there is no reason for the employer to issue any notice to a temporary or a probationer since he would be waking up a sleeping employee and would be creating a cause of action by issuing a notice.

42. Shri Dixit, learned Advocate appearing for respondent No.3 - School submits that the appellant / employee was absent from 20.4.2010. He attempted to resume duties on 2.9.2010. There is no evidence that he had applied for leave. For the first time he complained to the Education Officer on 20.1.2011 that the petitioner / management is not allowing him to report for duties. He filed his appeal on 20.4.2011. Delay in approaching the Tribunal indicates that he had no interest in employment.

43. He submits that the affidavit of the employee's father needs to be discarded as the said affidavit was filed when the matter was at the stage of judgment. The Tribunal did not give any opportunity to the management to contradict the affidavit and cross-examine the father of the appellant. The impugned judgment is based on the

affidavit of the appellant's father and hence the judgment deserves to be quashed and set aside.

44. Shri Deshmukh has relied upon the following judgments:-

- i. State of Bombay V/s Pandurang Vinayak and others [AIR 1953 SC 244],
- ii. Arjun Singh Vs. Mohindra Kumar [AIR 1964 SC 993]
- iii. Wasudeorao Babasaheb Sonone V/s Jagannath Ramlalji Jugele [1986 (O) BCI 119],
- iv. Sudhakar Chindu Bhadane V/s Niphad Taluka Education Soc. [2008 (1) Mah.L.J.448],
- v. Mohd. Salman Vs. Committee of Management and others [AIR 2012 SCW 2527],
- vi. Mushtaq Shah Meheboob Shah Vs. Haidarya Urdu Education Society and others [2008 (4) Mh.L.J.734],
- vii. Vijay S.Sathaye Vs. India Air Lines [AIR 2014 SC (Suppl) 514],
- viii. Chief Engineer Vs. Keshavrao (died) [2005 (11) SCC 229],
- ix. Amgauda Sidram Hakke Vs. Maharashtra Small Scale Industries Development Corporation [1995 (2) BCR 595],
- x. G.T.Lad Vs. Chemicals and Fibers India [AIR 1979 SC 582],
- xi. Buckingham & Carnatic Company Vs. Venkatiah and another [AIR 1964 SC 1272],
- xii. Shahoodul Haque Vs. The Registrar, Cooperative Societies [AIR 1974 SC 1896],
- xiii. M. Venugopal Vs. The Divisional Manager, LIC [AIR 1994 SC 1343],
- xiv. Life Corporation of India Vs. Raghvendra Sheshgiri Rao Kulkarni [AIR 1998 SC 327],
- xv. Dipti Prakash Banerjee Vs. Satyendra Nath [1999 (3) SCC 60],

- xvi. State of Bombay Vs. Pandurang Vinayak [AIR 1953 SC 244],
 - xvii. Mahadeosa Mokamatisa Vs. Deputy Commissioner [AIR 1954 Nagpur 217],
 - xviii. Nalinakhya Bysack Vs. Sham Sundar Haldar [AIR 1953 SC 148].
45. Shri Surve has relied upon the following judgment:-
- i. S.R.Ambedkar Samiti (Dr.) and another V/s M.L.Lonkar and others [2000 (4) MLJ 507 = 2001 I CLR 239],
 - ii. Shri Baburao Amrutrao Kharekar Vs. The State of Maharashtra [1997 (2) Bom.C.R.447].
46. Shri Patil has relied upon the following judgments:-
- i. Noble Paints Private Ltd. Vs. Ashok Tukaram Shinde [2004 II CLR 318],
 - ii. Mahamadsha Ganishah Patel Vs. Mastanbaug Consumers' Co-op. and Retail Stores [1998 I CL 1205],
 - iii. Mohd. Vakil Khan Vs. State of U.P. [2006 (110) FLR 438],
 - iv. Managing Director Vs. Kanaiyalal Ambalal Shah [1994 LAB.I.C.1170],
 - v. M. Sankaranarayanan Vs. First Additional Labour Court [1993 II LLN 346],
 - vi. Hindustan Fertilizer Corporation Vs. Subhas Chandra Mukherjee [1992 I LLN 164],
 - vii. Acharya Donde Shikshan Prasarak Mandal Vs. Vitthal D. Kamble [2007 III CLR 1].
47. Shri Prabhakaran has relied upon the following judgments:-
- i. Buckingham and Carnatic Co. Ltd. Vs. Venkatiah and another [1963 (II) LLJ 638],
 - ii. Ridge Vs. Baldwin (House of Lords 5 JJs) - [1964 AC 40],

- iii. Moti Ram Dekha Vs. General Manager [1964 II LLJ 467 - SC],
- iv. G.T.Lad and others Vs. Chemical and Fibres India Ltd. [1979 LIC 290 (SC)],
- v. S.L.Kapoor Vs. Jagmohan and others [AIR 1981 SC 136],
- vi. K.L.Tripathi Vs. SBI and others [1984 (48) FLR 38],
- vii. Workmen of Hindustan Steel Ltd. Vs. Hindustan Steel Ltd. [1985 (1) LLJ 267],
- viii. Union of India Vs. Tulsiram Patel [1985 SCC (L & S) 672],
- ix. Delhi Transport Corporation Vs. DTC Majdoor Congress [1991 SCC (L & S) 1213],
- x. Mafatlal Engineering Industries Vs. Mafatlal Engineering Industries Employees Union [1991 (1) CLR 851],
- xi. Hindustan Fertilizer Corporation Vs. Subhas Chandra Mukherjee [1992 I LLN 164],
- xii. D.K.Yadav Vs. JMA Industries Ltd. [1993 (II) CLR 116],
- xiii. Amgauda Sidram Hakke Vs. Maharashtra Small Scale Industries Development Corporation [1995 (II) BCR 818],
- xiv. Secretary, Bihar State Electricity Supply Workers' Union Vs. Presiding Officer [1995 (I) LLJ 633],
- xv. State of Haryana Vs. Om Prakash [1998 (8) SCC 733],
- xvi. Syndicate Bank Vs. The General Secretary, Syndicate Bank Staff Association [2000 (II) CLR 472],
- xvii. National Aluminum Company Vs. Deepak Kumar Panda [2002 (3) LLN 759],
- xviii. Lakshmi Precision Screws Ltd. Vs. Ram Bahagat [2002 (3) LLJ 516],
- xix. Dr. (Mrs.) Gurjeewan Garewal Vs. Dr. (Mrs.) Sumitra Dash [2004 (101) FLR 999],
- xx. Vivek Nand Sethi Vs. Chairman, J & K Bank Ltd.

[2005 (106) FLR 207] and

xxi. Banaras Hindu University Vs. Shrikant [2006 (11) SCC 42].

48. Shri Dixit has relied upon the following judgments:-

- i. Union of India Vs. Deoki Nandan Aggarwal [AIR 1992 SC 96],
- ii. Anandji Haridas Vs. Engineering Mazdoor Sangh [AIR 1975 SC 946],
- iii. Satheedevi Vs. Prasanna and another - [AIR 2010 SC 2777],
- iv. Emperor Vs. Benoari Lal Sarma [1945 (47) BOM L R 260],
- v. State of Maharashtra Vs. Pandurang Vinayak Chaphalkar [AIR 1953 SC 244]

49. I have considered the submissions of the learned Advocates and have gone through the judgments cited.

50. The intent and object of the introduction of the said Act is for the purpose of regulating the recruitment and conditions of service of the employees in private schools, with a view to provide security and stability of service to such employees and to enable them to discharge their duties effectively and efficiently for the benefit of the students, the society and the institution. The Act is introduced also to lay down the duties and functions of such employees and to ensure that they are accountable to the management and they render wholehearted contribution for improving the standard of education.

51. Section 4 of the said Act provides for the terms and conditions of service of the employees. Section 4(6) has been held to be mandatory in nature and not directory since prohibitive or negative words can rarely be directory and are indicative of the intent of the legislature and hence mandatory (read Vanmala Vs. National Education Society - [1982 Mh.L.J. 403]).

52. In the matter of Devidas Dashrath Wiruthkar Vs. Shetkari Shikshan Sanstha [2013 (6) Mah.L.J. 500 (DB)], the termination of the employee was set aside on the ground that no enquiry as contemplated under the Rules was held and since the order of termination mentions a misconduct.

53. Section 5 is with regard to the obligations of the management in filling up vacancies and the deeming provision with regard to confirmation if an Assistant Teacher on probation for three years or any other teacher on a probation for the period of two years after having successfully completed their probation periods. Similar is the provision under Clause 2A of Section 5.

54. Section 9 of the said Act provides for challenging termination of service and supersession before the School Tribunal. It is trite law that any form of termination can be challenged under Section 9. It is equally trite law that an oral termination or the effect of the act of

the employer resulting into oral refusal is held to mean, “otherwise termination” and the said cause of action is held to be tenable under Section 9 of the Act.

55. The issue as raised before this Court is as to whether a probationer can be deemed to have abandoned employment on his failure to file an application for leave within a period of seven days after remaining absent.

56. It is no longer *res integra* that abandonment of service is held to be a charge of unauthorized absenteeism and if the said charge is not proved, the plea of abandonment would amount to an illegal termination. [Novartis India Ltd. Vs. State of West Bengal and others [AIR 2008 SC (Suppl) 836].

57. Similarly, an order of termination issued to any employee, be he a temporary or probationer or permanent, would amount to a stigmatic termination if the order indicates a stigma. [Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre for Basic Sciences [(1999) 3 SCC 60 = [AIR 1999 SC 983], & V.P. Ahuja Vs. State of Punjab and others [AIR 2000 SC 1080].

58. Rule 16(2) has a peculiar phraseology. The last sentence of the said Rule assumes importance to the extent of the controversy in this

case. The said sentence reads thus:-

“A non-permanent employee shall be deemed to have abandoned his service if he fails to apply for leave within seven days from the date of absence.”

59. Rule 28(1) provides that, ***the services of a temporary employee other than on probation may be terminated by the management at any time, without assigning any reason, after giving one calendar month's notice or by paying one month's salary (pay and allowances), if any, in lieu of notice.***

60. Similarly, Rule 10 defines categories of employees. Rule 10(1) provides that ***the employees shall be permanent or non-permanent and non-permanent employees may be either temporary or on probation.***

61. Rules 10, 16(2) and 28(1), if read together, would indicate that it is only with regard to a probationer that an employer may have the power to presume abandonment of service, is the contention of Shri Surve. He submits that Rule 28(1) empowers an employer to terminate a temporary without assigning any reason after giving one month's notice or one month's salary in lieu of one month's notice.

62. Section 5(2A) of the Act provides for deemed confirmation of an Assistant Teacher who is on probation. Section 5(2) also provides for deemed confirmation of any person appointed to fill a permanent vacancy and who is on probation, except an Assistant Teacher. Section 5(3) empowers the management to terminate the services of the probationer with one month's notice or salary in lieu of notice period if his work or behaviour during the probation period is not satisfactory. As such, even if a probationer is absent without leave, it would constitute a factor to be considered while testing his suitability for the institution. At the end of his probation, the management can conclude that he is not suitable for the institution. I, therefore, find that Rule 16(2) unduly empowers an employer to presume abandonment of service.

63. This brings me to the aspect as to whether an employer can reasonably presume abandonment of a non-permanent employee in a short duration of absence without leave. From the reproduced portion of Rule 16(2) as above, I do not find that it speaks of any specific duration of continued absence so as to enable an employer to presume abandonment on the basis of sufficient material. If the reproduced portion is read carefully, it speaks of a non-permanent employee being deemed to have abandoned his service, if he fails to apply for leave within seven days from the date of absence. The words used are, "***Seven days from the date of absence.***" It does

not provide, as has been canvassed by the learned Advocates, for continued absence for seven consecutive days. If the literal meaning of the said sentence is taken, it would mean that even if a non-permanent employee is absent for even a single day and fails to file a leave application within seven days from, "***the date of absence***", he shall be deemed to have abandoned his service.

64. For interpreting Rule 16(2) in the above backdrop, it would be apposite to have different illustrations, which could be as follows:-

(A) A non-permanent employee is absent, say on 1.4.2016, which is a working day. He reports back on duty on 2.4.2016. He is prevented from joining duties. However, he does not file an application for leave for seven days from the date of absence, which is 1.4.2016.

(B) A non-permanent employee is absent on the last working day of the academic year 2015-16, say on 30.4.2016. He does not file any leave application. On the opening day of the next academic year, should the employer presume "deemed abandonment".

65. None of the learned Advocates have cited any judgment of this Court or of the Honourable Supreme Court on Rule 16(2) to indicate that a particular meaning has been attributed to this last sentence under Rule 16(2).

66. Standing Order 9 of the Industrial Employment (Standing Orders) Central Rules, 1946, Schedule I, provides for leave to the “workman”. Standing Order 9(3) provides that if the workman remains absent beyond the period of leave, originally granted or subsequently extended, he shall lose his lien on his appointment unless he (a) returns within eight days of the expiry of the leave and (b) explains to the satisfaction of the employer or the officers specified in this behalf by the employer, his inability to return before the expiry of his leave.

67. In the Buckingham and Carnatic Company case (supra), Standing Order No. 8(ii) provided as under:-

“ Absent without leave: Any employee who absent himself for eight consecutive working days without leave shall be deemed to have left the Company's service without notice thereby terminating his contract of service. If he gives an explanation to the satisfaction of the management, the absence shall be converted into leave without pay or dearness allowance.”

The Honourable Supreme Court observed in paragraph No.5 of its judgment that in common law, ordinarily, an inference of abandonment or relinquishment of service is not easily drawn unless from the length of absence and surrounding circumstances, such an inference can be legitimately drawn, but which cannot be done

without adequate evidence. However, if the same is included in certified Standing Orders, the Doctrine of Common Law and consideration of equity would not be relevant.

68. In my view, arbitrariness is an anti thesis to the rule of law, equity, fair-play and justice. In the Hindustan Fertilizer Corporation Limited case (supra), the learned Division Bench of the Calcutta High Court noted that the leave Rules of the company provided that if an employee remained absent without permission for more than ten days, it would be treated as an act of voluntary abandonment of service. Standing Order 23, included such an act of unauthorized absence in the list of “misconducts”. Though the management did not prefer to treat the case of the employee as an act of misconduct and preferred to hold that he had voluntarily abandoned service, the learned Division Bench did not find fault in such action of the employer.

69. In the case of D.K.Yadav (supra), decided by the Three Judges' Bench of the Honourable Supreme Court, it was held that the principles of natural justice must be read in Clause 13 of the Service Rules, which provided for loss of lien, otherwise, it would be arbitrary, unjust and an unfair violation of Article 14 of the Constitution of India.

70. In the case of Sudhakar Chindhu Bhadane V/s Niphad Taluka Education Society and others [2008 (1) Mh.L.J. 448 = 2008 (1) CLR 281], this Court concluded that a mere statement without any supporting proof that the employee had abandoned service voluntarily, cannot be accepted. The term “voluntary abandonment of service” means that a permanent employee is absent from duty without leave, continuously for a period exceeding three years or more which would be the basis for presuming voluntary abandonment. This Court, therefore, held that there must be some material before the employer to form an opinion that the employee has abandoned his service. This principle would be *mutatis mutandis* applicable even to a non-permanent employee.

71. It is thus apparent that if Rule 16(2) is read in its entirety, the deeming fiction with regard to abandonment is made applicable to a non-permanent employee for an absence of even a single day. Rule 16(3) pertains to a permanent employee, wherein, his absence on a particular date and failure to file a leave application within seven days from the date of absence is to be treated as a breach of discipline. If a permanent employee is absent from duties, without leave, continuously for a period exceeding three years, he is deemed to have voluntarily abandoned his services, thereby meaning that the very length of absence could constitute enough material for an employer to form an opinion.

72. Learned Advocates before this Court have contended in favour of the applicability of the principles of natural justice in this case. Learned Advocates for the petitioner and respondent No.3 School have contended that there is no place for applying the principles of natural justice to a non-permanent employee, when the second part of Rule 16(2) enables the employer to presume abandonment of service.

73. This Court referred to the judgment of the Honourable Supreme Court (in the matter of M/s Hindustan Tin Works Private Limited V/s Employee's of M/s Hindustan Tin Works Private Limited and others [1978 Lab. I.C. 1667]), and has concluded in Mahamadsha Ganishah Patel's case (supra) in paragraph 4 that, *“the legal position is almost settled that even in the case of abandonment of service, the employer has to give notice to the employee, calling upon him to resume his duties. If the employee does not turn up despite such notice, the employer should hold an enquiry on that ground and then pass appropriate order of termination. At the time when employment is scarce, ordinarily abandonment of service by employee cannot be presumed. Moreover, abandonment of service is always a matter of intention and such intention in the absence of supportable evidence cannot be attributed to the employee. It goes without saying that whether*

the employee has abandoned the service or not is always a question of fact which has to be adjudicated on the basis of evidence and attending circumstances.”

74. In the Mohd. Vakil Khan's case (supra), the petitioner joined at the new place of posting on 23.1.1986, obtained leave for four days and did not join upto 20.5.1994. The Rules provided for bringing the service of such an employee to an automatic end on the ground of abandonment of service. The Allahabad High Court held that with such a long absence, the only inference that can be drawn after considering the total absence is that the employee had abandoned his employment as he made no attempt to report for duties in eight years.

75. The Honourable Supreme Court in the matter of M/s Jeewanlal (1929) Limited, Calcutta Vs. It's workmen [1961 (2) FLR 537 (SC)] held as under:-

“ If an employee continues to be absent from duty without obtaining leave and in an unauthorized manner for such a long period of time that an inference any (can) reasonably by (be) drawn from absence that by his absence has abandoned service then such long unauthorized absence may legitimately be held to cast a break in continuity of service..... We would like to make it clear that that there would be the class of cases, where long unauthorized

absence may reasonably give rise to an interference (inference) that such service is intended to be abandoned by the employee.”

76. The Honourable Supreme Court in the matter of Shahoodul Haque Vs. The Registrar, Cooperative Societies Bihar and another [AIR 1974 SC 186], has observed that;

“ The un-denied and undeniable fact that the appellant had actually abandoned his post or duty for an exceedingly long period, without sufficient ground for his absence, is so glaring that giving him further opportunity to disprove what he practically admits, could serve no useful purpose. It could not benefit him to make any difference to the order which could be and has been passed against him. It would prolong his agony. On the view we have adopted on the fact of this case, it is not necessary to consider the further question whether any notice for termination of service was necessary or duly given on the assumption that he was not punished. We do not think that there is any question involved in this case which could justify an interference by us.”

77. The Honourable Supreme Court in the matter of Viveka Nand Sethi Vs. Chairman, J & K Bank Limited and others [2005 (5) SCC 337 = 2005 (106) FLR 207], has held in paragraph No.22 that the principle of natural justice, it is trite, is not an unruly horse. When facts are admitted, an enquiry would be an empty formality. Even the

principle of estoppel will apply. (see : Gurjeewan Garewal (Dr.) Vs. Dr. Sumitra Dash). The principles of natural justice are required to be complied with having regard to the fact situation appearing therein. It cannot be put in a strait jacket formula. It cannot be applied in a vacuum without reference to the relevant acts and circumstances of the case.

78. The Honourable Supreme Court in the matter of S.L.Kappor (supra) observed as under:-

“ Linked with this question is the question whether the failure to observe natural justice does at all matter if the observation of natural justice would have made no difference, the admitted or indisputable facts speaking for themselves. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observations of natural justice not because it approves the non-observance of natural justice but because Courts do not issue futile writs. But it will be pernicious principle to apply in other situation, where conclusions are controversial, however, slightly and penalties are discretionary.”

79. Rule 16(3) provides that a permanent employee would be deemed to have abandoned his service if he has remained continuously absent without leave for a period exceeding three years. Similarly, even if a permanent employee fails to apply for

leave within seven days from the date of absence, which could even be a single day, it shall be treated as breach of discipline and he shall be liable for suitable disciplinary action after due enquiry. In this backdrop, the employer has an option to initiate a departmental enquiry against a permanent employee if he is absent without leave. Similarly, Rule 16(3) enables an employer to wait for a period of three years, if a permanent employee is continuously absent and only then the employer can conclude that the permanent employee is deemed to have voluntarily abandoned his services.

80. This, therefore, mandates that no employer can presume that a permanent employee has abandoned his service unless and until he has remained continuously absent without leave for a period exceeding three years. Hence, there can be no presumption of abandonment of service by a permanent employee if he is absent continuously without leave for less than three years, in which situation, the employer can initiate disciplinary proceedings and award him suitable punishment.

81. Rule 16(2) in contra-distinction to Rule 16(3), notwithstanding that it applies to a non-permanent employee, virtually permits an employer to act arbitrarily and thereby defeat the intent and object of the Act. It is trite law that long periods of unauthorized absenteeism can be a ground for deemed abandonment of service.

However, under Rule 16(2), an absence of even a single day by a non-permanent employee can be presumed by the employer that he has deemed to have abandoned his service on his failure to apply for leave within seven days from the date of absence, under Rule 16(2).

82. In the above backdrop, I find that Rule 16(2) as regards the last sentence in relation to a non-permanent employee, virtually gives an employer an unfettered right to presume abandonment of service, even if a non-permanent employee is absent for a single day, without sufficient material to form an opinion. I find that this portion of Rule 16(2) is not compatible with the intent and object of the Act, as is summarized in the preamble of the said Act, as it gives no protection to such non-permanent employee, who are left to the unmerciful decision of the management which is shrouded in secrecy. The said provision can be made compatible with the intent and object of the Act by ensuring that even a temporary or a probationer is heard before assuming that he has abandoned his employment, which is based on the charge of unauthorized absenteeism. (Read : D.P.Bannerji and V.P.Ahuja, supra).

83. Considering the law as above, the issue would be as to whether Rule 16(2) gives any scope, either for the management to form an opinion that the employee has abandoned employment or even to the employee to explain away to the management that he has no desire

to abandon employment. In the case of New India Cooperative Bank V/s Shankar Bangera [2007 LLR 149], the Honourable Court concluded that the presumption of abandonment can be upheld only when the Bank employee was repeatedly called upon to resume duties and he failed to report for duties. In Gaurishankar Vishwakarma v. Eagle Spring Industries P. Ltd. [1988 (I) C.L.R. 38], it was held that an employer must give notice calling upon the worker to resume duties before assuming abandonment of service.

84. Considering the entire law as is discussed hereinabove and especially in the light of the phraseology of Rule 16(2) (the last sentence), I find that failure by an employee to file an application for leave within 7 days from the date of unauthorized absence, is an extremely short period to form any opinion on abandonment and would not constitute sufficient material to enable the employer to form such an opinion. So also, it amounts to attaching a stigma to a probationer while concluding that he had abandoned employment.

85. I, therefore, find it necessary, in the interest of justice, equity and fair-play, that an employer, before presuming that the employee has abandoned employment under Rule 16(2), shall issue a notice to the employee calling upon him to explain as to why the employer should not form an opinion that the employee has abandoned employment. Upon receiving the explanation of the employee, the

Management may then proceed to pass an appropriate order. This would not only enable the Management to take a decision after following the principles of natural justice, at the same time, it would enable the employee to disclose his decision whether to continue in employment or set out an explanation for his absence. This would render some protection to a non-permanent employee under Rule 16(2) and eliminate secrecy in the presumption of abandonment by the employer.

86. In so far as the material aspects of the case in hand are concerned, the petitioner/management has taken a specific stand that the appellant/employee was marked as being on casual leave from 20/04/2010 till 27/04/2010 and thereafter he was called upon by the School Committee on 06/07/2010 for counselling. It is stated that he was directed to report for duties failing which the Management would presume that he has voluntarily resigned from employment.

87. As such, I find that the petitioner/management has taken 3 stands. Firstly, that the appellant has abandoned employment. Secondly, that as he did not report for duties after the counselling session on 06/07/2010, he is presumed to have resigned and thirdly, the petitioner waited till 02/08/2010 and since the probation period of the employee came to an end, he was disengaged. In so far as the

second and the third stand of the Management is concerned, they have not passed any order either to hold that they have presumed voluntary resignation of the respondent, or to inform the respondent/employee that his probation period has come to an end and he is not found suitable for the organization, hence disengaged.

88. The petitioners have assailed the judgment of the School Tribunal with much vehemence. Grievance is that a probationer could not have been granted continuity of service and other consequential benefits. The appellant / employee had waived backwages till the filing of the appeal and the Tribunal has deprived him of entire backwages. I have, in the light of the law and the facts of this case as discussed above, come to a conclusion that there was no material before the petitioners, so as to conclude that the appellant / employee had abandoned employment. I am, therefore, of the view that the Tribunal has rightly concluded that the appellant had not abandoned his employment.

89. Notwithstanding the above, no probationer can be granted regularization or confirmation by a Tribunal or Court except in accordance with the scheme of law as enunciated in Section 5 of the Act. This decision of confirming a probationer in service is to be left to the employer who is subjectively scrutinizing such a probationer for his suitability for the organization. In my view, the

Tribunal should have ordered the petitioner to allow the appellant / employee to resume duties and complete the remainder portion of 2 months of his probation for which he is admittedly absent due to his injuries suffered in the accident. Had the appellant completed his probation period and yet was continued even thereafter without any further orders, Section 5 would have had its effect in granting deemed confirmation to such a probationer. This has not so happened in this case.

90. Considering the above, this petition is partly allowed. The impugned judgment and order dated 24/09/2015 is quashed and set aside only to the extent of the direction by the Tribunal granting continuity of service and other consequential benefits to the appellant / employee.

91. Therefore, Appeal No.5/2013 stands partly allowed only to the extent of directing the petitioners to reinstate the appellant/employee as an Assistant Teacher on probation, so as to discharge his duties as a Probationer for the remainder period of 2 months from the date he is reinstated. After the completion of the 2 months of probation, the petitioner / management shall take a decision considering the overall performance of the appellant /employee of 2 years as a probationer in accordance with the requirements of the 1977 Act and 1981 Rules and pass, necessarily, a

reasoned order with regard to whether the appellant employee deserves to be confirmed in service. Needless to state that the petitioners shall consider the total performance of the appellant / employee as a probationer from 2.8.2008 till 19.4.2010 and the further two months of probation as directed hereinabove.

92. Considering the peculiar facts of this case, the appellant / employee, if is aggrieved by the decision of the petitioners, which shall be forthwith communicated to him in writing, immediately after the conclusion of his remainder period of probation, he shall be at liberty to take recourse to the available legal remedy for questioning the legality of the decision of the management.

93. Rule is made partly absolute in the above terms. No order as to costs.

(RAVINDRA V. GHUGE, J.)

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