

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.5247 OF 1998**

Mrs.Sneh Kohli )  
residing at Building No.2,Flat No.202,) )  
Zakaria Aghadi Nagar No.1, )  
Yari Road, Versova, Mumbai 400 061.) .. Petitioner

**VERSUS**

1. The Universal English Trust, )  
through the Managing Trustee, )  
293, Javahar Nagar, Goregaon (West), )  
Mumbai 400 062. )

2. The Headmistress, )  
Universal English School, )  
292, Javahar Nagar, Goregaon (West), )  
Mumbai 400 062. )

3. The Dy. Director of Education, )  
Government Barracks, )  
Opp.CCI Churchgate, )  
Mumbai 400 020. )

4. The State of Maharashtra, )  
through its Department of Education )  
and Employment, )  
Mantralaya Annexe, Mumbai 400 032.) .. Respondents

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Mr.Mihir Desai, Senior Advocate, i/b. Ms.Devayani Kulkarni for the  
Petitioner.

Mr.S.J. Panicker, a/w. Ms.Bhavika Pitale, Ms.Poonam Panicker for  
Respondent nos.1 and 2.

Mr.A.G.Kothari for the Intervener.

Mr.A.R.Metkari, A.G.P./State.

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**CORAM : R.D. DHANUKA, J.**  
**RESERVED ON : 25<sup>th</sup> July 2016**  
**PRONOUNCED ON : 18<sup>th</sup> October 2016**

**Judgment :-**

. By this petition filed under Article 226 of the Constitution of India, the petitioner seeks to impugn the order and judgment dated 28<sup>th</sup> August, 1997 passed by the learned Presiding Officer, School Tribunal, Mumbai dismissing the appeal filed by the petitioner under section 9 of the Maharashtra Employees of Private Schools (Condition of Service) Regulation Act, 1977. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. It was the case of the petitioner that the petitioner had obtained degree of B.A. from Pune University, M.A. from Bombay University and B.Ed. from Anna Malai University and was appointed as an assistant teacher against clear vacancy in respondent no.2 school w.e.f. June 1990. The petitioner belongs to the open category. The petitioner was continued in the next academic year in the same post in the respondent no.2 school.

3. On 23<sup>rd</sup> March, 1992 the petitioner was issued a letter terminating her services w.e.f. the end of the academic year 1992-93. It is the case of the petitioner that she was however told that her services would be continued in the next year. On 25<sup>th</sup> June, 1992 the petitioner challenged the termination by filing an appeal (BOM/158/1992) before the school tribunal, Bombay Region, Bombay under section 9 of the said MEPS Act. The management opposed the said appeal filed by the petitioner by filing the written statement on 13<sup>th</sup> December, 1992 on

several grounds including on the ground that the post against which the petitioner was appointed was specifically reserved for S.C., S.T. It was contended that even in the advertisement issued by the management in response to which the petitioner had applied for the said post it was made clear that the post advertised was reserved for S.C., S.T. etc.

4. It was the case of the management that since the suitable candidate from the reserved category was not available, the petitioner was appointed on temporary basis and the proposal to that effect was sent to the Education Department in view of the school getting the grant-in-aid from the Education Department. The appointment of the petitioner was approved by the Education Department as temporary appointment. It was the case of the management that since in the next academic year, the suitable candidate from the reserved category was available, the services of the petitioner were to be discontinued. It was also contended by the management before the school tribunal that the performance of the petitioner was not at all satisfactory and that there were complaints against her and several warnings were issued to her by the management. It was the case of the management that the petitioner was in fact was not a qualified teacher in as much as the B.Ed.degree obtained by the petitioner from Anna Malai University was not a recognized by the State of Maharashtra.

5. The school tribunal framed three issues which are extracted as under :-

“1. Whether the impugned order of termination dated 23<sup>rd</sup> March, 1992 is contrary to the provisions of M.E.P.S.Act, 1977 and Rules 1981 or is otherwise illegal or improper within the meaning of section 11(2) of M.E.P.S.Act ?

2. Whether the appellant is entitled to get any relief ?
3. What order ?”

Insofar as issue nos. 1 and 2 are concerned, the school tribunal answered those two issues in negative and accordingly dismissed the said appeal by an order dated 28<sup>th</sup> August, 1997.

6. In the said order and judgment, the school tribunal rejected the said appeal with the following reasons:-

- (a) The appointment letter by which the petitioner herein was appointed to the said post as assistant teacher was not produced by either of the party. It was thus not possible to determine the exact terms and conditions on the basis of the original appointment order and therefore it became necessary to look into the other evidence which had been produced by the management by way of certified copies of the proposal sent to the Education Department for approval.
- (b) On perusal of the copies of the advertisement issued by the management, it was clear that the posts which were advertised were reserved for S.C., S.T. The said post against which the petitioner was appointed was reserved for S.C., S.T. etc.
- (c) In the proposal sent by the management to the Education Department, it was specifically informed that the petitioner was re-appointed from 19<sup>th</sup> June, 1991 to 30<sup>th</sup> April, 1992 against a reserved category. The management had sent the proposal only for one academic year to the Education Department.
- (d) The management had produced the list of teachers who belonged to S.C., S.T. serving in the school run by the management and supplied the said list to the social welfare officer and other Government

Departments for the purpose of getting the candidates of the reserved category which list showed that the posts were reserved for various reserved categories.

- (e) The petitioner through her advocate had admitted that the B.Ed.degree obtained by the petitioner from Anna Malai University was not recognized as valid by the State of Maharashtra.
- (f) The petitioner was an untrained graduate and thus could be appointed only on temporary basis. The appeal filed by the petitioner was accordingly dismissed.

The impugned order passed by the School Tribunal, Bombay is impugned by the petitioner in this petition on various grounds.

7. Mr.Desai, learned senior counsel for the petitioner submits that the petitioner was appointed on probation on a clear and permanent vacancy and thus her services could be terminated in the manner specifically provided for termination of services of a probational under the provisions of M.E.P.S.Act and Rules. He submits that merely because the approval to the appointment of the petitioner was granted only for one year, that could not be a valid ground for termination of services.

8. It is submitted by the learned senior counsel that the school tribunal could not have held that the petitioner was a untrained teacher on the ground that the B.Ed. degree possessed by the petitioner from Anna Malai University was not held as recognized university by the State of Maharashtra. In support of this submission, learned senior counsel placed reliance on the judgment of this court in case of **Ramkrishna Chauhan**

***and Ors. vs. Seth D.M. High School, Deputy Director of Education, The Bharat Jatiya Sangh and State of Maharashtra and ors. (2013) 2 Mah.L.J. 713*** and in particular paragraphs 2, 7 and 28.

9. It is submitted by the learned senior counsel that the posts on which the petitioner was appointed was a clear and permanent vacancy. He submits that if the reserved candidate is not available for a reserved post, a candidate from the open post can be appointed on a temporary basis till the candidates from the reserved category is available. He submits that the management has to produce the records about the roster before the school tribunal which was not produced. In support of this submission, learned senior counsel placed reliance on the judgment of this court in case of ***Baburao Amrutrao Kharekar vs. The State of Maharashtra and Ors., 1997(2) Bom.C.R. 447*** and in particular paragraphs 9 and 10.

10. It is submitted by the learned senior counsel that the petitioner was wrongly shown against the reserved post, the management did not produce any material before the school tribunal to show as to why the petitioner was shown against the alleged reserved post. He submits that the petitioner was thus appointed on probation and her services could be terminated only if her work was unsatisfactory during the probation period under Section 5 of the MEPS Act.

11. It is submitted by the learned senior counsel that since the appointment of the petitioner was on a clear and permanent vacancy, the appointment of the petitioner could be only on probation and not for a

temporary period under Section 5 (2) of the MEPS Act. Learned senior counsel for the petitioner placed reliance on the judgment delivered by the learned Single Judge of this Court in the case of **Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.** decided on 22<sup>nd</sup> January 2007 in Writ Petition No.315 of 2006. He submits that in view of conflicting views taken by this Court in several orders and judgments on the issue whether an appointment on a permanent and clear post could be made on temporary basis or not, learned Single Judge of this Court referred the following issue for consideration of a larger bench :-

*“Would it be open to the School Tribunal to hold that an employee would be deemed to be on probation within the meaning of Section 5(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 on the ground that the appointment was made in a clear and permanent vacancy, notwithstanding the fact that the letter of appointment specifically stipulated that the appointment has been made in a temporary capacity ?”*

12. Learned senior counsel invited my attention to the judgment delivered by the Full bench pursuant to the reference made by the learned Single Judge of this Court in the case of **Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.** in Writ Petition No.315 of 2006. The question referred to a larger bench is set out in paragraph 2 of the said judgment delivered by the Full bench. Learned senior counsel placed reliance on paragraphs 11, 17 and 24 and would submit that Full bench has categorically held that whether an appointment of an employee is made on temporary basis or probation against permanent vacancy, it is a question of fact to be pleaded and proved in the appropriate proceedings, on case to case basis. It is held that there is no legal fiction or deeming provision that every appointment made against the permanent vacancy, is deemed to be on probation, though the Management makes that

appointment on temporary basis, having found that the candidates appeared in the selection process were unsuitable. It is submitted by the learned senior counsel that the judgment of the Full bench has to be read in its entirety and not only the question specifically referred to the Full bench and the issue answered by the Full bench in the said judgment. He submits that the decision taken by the Full bench in paragraphs 11, 17 and 24 also have to be read as a ratio and not as an obiter.

13. Learned senior counsel placed reliance on the judgment delivered by the learned Single Judge of this Court in the case of ***Abdul Rafique Abdul Hamid Vs. Yavatmal Islamia Anglo Urdu Education Society & Ors.***, reported in ***2014 (3) Mh.L.J. 99*** and in particular paragraphs 2, 10, 11, 13, 14 and 16 to 19 and would submit that after advertizing to and interpreting the judgment of the Full bench of this Court in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.(supra)***, it is held by the learned Single Judge that power of the management to appoint a person on temporary basis in a permanent vacancy cannot be disputed but power of the school tribunal under Section 9 of the MEPS Act to find out as to whether such appointment should be treated as one on probation, in these facts and circumstances of case, cannot be questioned. It is the burden of an employee to come before the school tribunal with a definite case that he was selected and appointed to fill in the permanent vacancy and he was duly qualified for being appointed in a post in question.

14. It is held by the learned Single Judge that it is for the employee to make out a case for lifting of veil or arbitrary or unreasonable or capricious exercise of discretion by the employer in

making an appointment on temporary basis or for a fixed period in a permanent vacancy to defeat the object and purpose of the Act, that is to provide security and stability in the employment. It is held that in such a case, the burden will shift upon the management which will have to point out the valid and tangible reasons to make such appointment and to justify the action by producing the relevant material on record. It is held that if the school tribunal is not satisfied about the genuineness and validity of such reasons and material, it will have a jurisdiction to pass all such orders as are necessary to protect and provide security and stability to the employer concerned to attain the object of enactment.

15. Learned senior counsel submits that the learned Single Judge of this Court has interpreted the judgment of the Full bench in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors. (supra)*** and has held that the power of the school tribunal under Section 9 of the MEPS Act are not taken away to decide the issue whether appointment of an employee could be made on temporary basis though there was a permanent and clear vacancy and whether such appointment is contrary to Section 5(2) of the MEPS Act.

16. Learned senior counsel placed reliance on the judgment of this Court in the case of ***Shamin Azad Education Society, Giroli and Ors. Vs. Presiding Officer, School Tribunal, Amravati & Ors.***, reported in ***2014 (4) Mh.L.J. 723*** and in particular paragraphs 7, 8, 27, 28, 30 to 32 in support of his submission that the school tribunal can hold the issue on case to case basis and have to determine whether an appointment was actually made on probation or not. He submits that an appointment on temporary basis can be made in case of leave vacancy,

in case of work-load and in case of reserved post if reserved category candidate is not available for the time being.

17. In support of this submission, learned senior counsel placed reliance on Rule 9 (9)(a) of the MEPS Rules. He submits that in this case, the management could not show that the petitioner was appointed on temporary basis on the reserved post and that the reserved category candidate was not available. He submits that burden was on the management to prove that the appointment of the petitioner was made on temporary basis in view of the fact that the post was alleged to be reserved for reserved category candidate and that reserved category candidate was not available.

18. Learned senior counsel for the petitioner placed reliance on the judgment of the Division bench of this Court in the case of ***Shri Baburao Amrutrao Kharekar Vs. The State of Maharashtra and Ors.***, reported in ***(1997) 2 Bom CR 447*** and in particular paragraph 9 and would submit that if it was the case of the management that post was reserved and the appointment of the petitioner was made against the reserved vacancy, it was necessary for the management to produce the relevant record and to prove that there was a vacancy for a reserved category candidate or that there was a backlog in respect of the vacancy but suitable candidates under the reserved category were not available.

19. Learned senior counsel for the petitioner placed reliance on the judgment delivered by Special Bench comprising of five Judges of this Court in the case of ***State of Maharashtra and Ors. Vs. Murarao Malojirao Ghorpade & Ors.***, reported in ***2009 (6) Mh.L.J. 788*** and

more particularly paragraphs 22 to 25 on the issue as to what would be the 'obiter dictum' or what would be the 'Ratio decidendi' in the judgments of Supreme Court and the High Court. He submits that even if an obiter may not have an effect of a binding precedent but it cannot be denied that it is of considerable weight.

20. Learned senior counsel placed reliance on the judgment of the Supreme Court in the case of ***State of Punjab Vs. Salil Sabhlok & Ors.***, reported in ***(2013) 5 SCC 1*** on the scope of larger bench to adjudicate upon the issues which are referred to it by the learned Single Judge or the Division bench beyond the questions referred to.

21. Learned senior counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of ***Government of A.P. and Anr. Vs. B. Satyanarayan Rao (dead) by Lrs. & Ors.***, reported in ***(2000) 4 SCC 262*** and in particular paragraph 8 and would submit that the judgments delivered by the learned Single Judge of this Court in the cases of ***Shamin Azad Education Society, Giroli and Ors. (supra)*** and ***Abdul Rafique Abdul Hamid (supra)*** cannot be considered as per incurium, since the learned Single Judge of this Court has considered the full bench judgment and has interpreted the said judgment.

22. Learned senior counsel placed reliance on the judgment of the Division bench of this Court in the case of ***Mercedes Benz India Pvt. Ltd. Vs. Union of India & Ors.***, reported in ***2010 (4) Mh.L.J. 528*** and in particular paragraphs 17 and 18 in support of the submission that if the learned Single Judge of this Court in this matter is not in agreement with the views expressed by another learned Single Judge of this Court

in the cases of ***Shamin Azad Education Society, Giroli and Ors. (supra)*** and ***Abdul Rafique Abdul Hamid (supra)***, the recourse open to the learned Single Judge is to refer the issue to a larger bench and the learned Single Judge in this matter cannot take a contrary view. Reliance is also placed on the judgment of Supreme Court in the case of ***Commissioner of Central Excise, Mumbai Vs. Mahindra and Mahindra Limited***, reported in ***(2015) 13 SCC 441*** and in particular paragraph 3 and the judgment of Supreme Court in the case of ***Century Textiles Industries Limited Vs. Deepak Jain & Anr.***, reported in ***(2009) 5 SCC 634*** and in particular paragraph 23 in support of the aforesaid submission.

23. Mr.Desai, learned senior counsel for the petitioner submits that the services of the petitioner could not be terminated by the management on the ground that the Education Officer had refused to grant approval to the appointment of the petitioner. In support of this submission, learned senior counsel placed reliance on the judgment of the Full bench of this Court in the case of ***St.Ulai High School and Anr. Vs. Devendraprasad Jagannath Singh and Anr.***, reported in ***2007 (1) Mh.L.J. 597*** and in particular paragraph 13 thereof.

24. Mr.Panickar, learned counsel appearing for the management invited my attention to the advertisement issued by the management on 3<sup>rd</sup> April 1991 in the newspaper Times of India and would submit that it was clearly mentioned therein that the post was reserved for Scheduled Caste, Scheduled Tribe, DT & NT and other backward classes. He also produced a copy of letter of appointment issued by the management to the petitioner for the academic year 1990-91 which is duly acknowledgment by the petitioner thereon. Learned senior counsel for

the petitioner, on instructions from his client who is present in Court, does not dispute her signature on the letter of appointment. He submits that in the letter of appointment issued by the management, it was clearly mentioned that the appointment of the petitioner was made on temporary basis and would be terminated with effect from next academic year.

25. Learned counsel for the management invited my attention to the averments made in the appeal memo filed by the petitioner and more particularly in paragraphs 4 and 6 thereof. He submits that the onus was on the petitioner to prove which onus she failed to discharge before the school tribunal. It is submitted that it was to the knowledge of the petitioner that the management had already appointed another suitable candidate on the said post which was temporary held by the petitioner. The petitioner even did not challenge the appointment of the said reserved category candidate to the said post in the appeal filed by the school tribunal. In support of his submission, the learned counsel invited my attention to the rejoinder filed by the petitioner before the school tribunal and more particularly paragraphs 5 and 7. It was admitted in paragraph 5 of the rejoinder that the post was reserved for SC, ST, DT & NT and other backward classes. In paragraph 7 of the rejoinder, it was averred by the petitioner that from the appointment letter given to Mrs.P.T. Bobade, it appeared that she had applied for the post of teacher vide her application dated 15<sup>th</sup> April 1992 i.e. on the same date of publication of advertisement in Times of India. He submits that the petitioner was thus fully aware of the said appointment made by the respondent but did not take any steps to challenge the said appointment.

26. It is submitted by the learned counsel for the management that the work of the petitioner was not satisfactory and the petitioner was issued various warning letters from time to time. In so far as degree obtained by the petitioner from Anna Malai University is concerned, learned counsel for the management fairly did not raise this issue in view of the judgment of this Court in the case of **Anjuman Khairul Islam & Ors. Vs. Mrs. Zulekha Mazhar Hussain & Ors.**, reported in **2001 (1) Bom CR 556**.

27. In so far as the issue as to whether the appointment of the petitioner was made on temporary basis or on probation or as to whether terms and conditions of the appointment mentioned in the letter of the appointment would be binding on the parties or not, the learned counsel for the management placed reliance on the judgment of the Supreme Court in the case of **Hindustan Education Society & Anr. Vs. SK. Kaleem SK. Gulam Nabi and Ors.**, reported in **AIR 1997 SC 2126** and in particular paragraphs 5 and 6 and would submit that Supreme Court after construing Section 5(2) of the MEPS Act and after considering the letter of appointment which recorded that appointment of the employee was purely temporary and for a limited period, has held that the appointment of the employee could not be considered to be a permanent appointment.

28. Learned counsel for the management placed reliance on the judgment of the Supreme Court in the case of **Bhartiya Gramin Punarrachna Sanstha Vs. Vijay Kumar & Ors.**, reported in **(2002) 6 SCC 707** and more particularly paragraph 7 and would submit that the

Supreme Court in the said judgment has taken the same view after interpreting Section 5(2) of the MEPS Act as taken in the case of ***Hindustan Education Society & Anr. (supra)***.

29. Learned counsel for the management placed reliance on an unreported judgment of this Court delivered on 7<sup>th</sup> July 1999 in Writ Petition No.3488 of 1999 and would submit that after adverting to the judgment of the Supreme Court in the case of ***Hindustan Education Society & Anr. (supra)***, this Court has held that the management was competent to make a temporary appointment even against the clear vacancy under Section 5(2) of the MEPS Act. In the said judgment, learned Single Judge of this Court however granted leave under Article 133 read with Article 134 A of the Constitution of India to appeal of the Supreme Court in view of there being a question of wide public importance having involved in the said matter. Learned counsel for the management also invited my attention to the order passed by the Supreme Court on 22<sup>nd</sup> November 1999 in the case of ***Pandurang Maruti Dhumal Vs. Siddharth Charitable Trust and Anr.*** in Special Leave to Appeal (Civil) No.14795 of 1999 i.e. the matter in which the learned Single Judge of this Court had granted leave under Article 133 read with Article 134 A of the Constitution of India. By the said order passed by the Supreme Court, the special leave petition came to be dismissed in limine.

30. Learned counsel for the management placed reliance on an unreported judgment of this Court delivered on 28<sup>th</sup> November 2005 in the case of ***Kazi Safiruddin Muzaffaruddin Vs. State of Maharashtra***

**& Ors.** in Writ Petition No.2268 of 2005 and in particular paragraphs 3 and 4 and would submit that the learned Single Judge of this Court after adverting to the judgment of the Supreme Court in the case of ***Hindustan Education Society & Anr. (supra)*** and the judgment of this Court in the case of ***Shikshan Prasarak Manal, Wani Vs. Presiding Officer, School Tribunal, Amravai & Anr.***, reported in ***2005 (4) Mh.L.J. 485*** has held that only because the petitioner was given service appointment for two consecutive years on temporary basis, it would not amount to a permanent appointment treating him probationary as contemplated under Section 5(2) of the MEPS Act.

31. Learned counsel for the management placed reliance on the judgment of the Supreme Court in the case of ***Kalpataru Vidya Samasthe (R) & Anr. Vs.S.B.Gupta & Anr.***, reported in ***(2005) 7 SCC 524*** and in particular paragraphs 7 and 8 and would submit that if an employee has accepted the terms and conditions recorded in the letter of appointment, he cannot challenge the terms and conditions of the appointment after the period on which he was appointed to have lapsed by efflux of time.

32. Learned counsel for the management invited my attention to an unreported judgment delivered by the learned Single Judge of this Court on 22<sup>nd</sup> January 2007 in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.(supra)*** in Writ Petition No.315 of 2006 and more particularly paragraphs 7 and 9 and would submit that after interpreting the judgment of the Supreme Court in the case of ***Hindustan Education Society & Anr. (supra)***, a specific issue was referred to the

larger bench. He also invited my attention to the judgment of the Full bench in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.(supra)*** and would submit that the said issue referred by the learned Single Judge of this Court has been answered by the Full bench in paragraph 28 of the said judgment in negative and it is held that it is not open to the school tribunal to assume as of fact that the appointment was made against a clear and permanent vacancy or deemed to be on probation, within the meaning of Section 5(2) of the MEPS Act. The school tribunal cannot disregard the terms and conditions of the letter of appointment, if it expressly provides that the appointment is on temporary basis, for a limited term.

33. It is submitted by the learned counsel for the management that the Full bench has held that the power to make a contractual appointment on temporary basis is implicit in the power to make an appointment on probation after following the prescribed selection procedure to fill in a permanent vacancy, unless the statute under which the authority is exercised expressly or impliedly forbids the making of such appointment.

34. In so far as the observations made by the Full bench in paragraphs 17 and 24 of the said judgment which is relied upon by the learned senior counsel for the petitioner is concerned, it is submitted by the learned counsel for the management that the said observations made in the said judgment are not to be read as ratio decidendi but at most can be considered as obiter dictum. A specific issue was referred to a larger bench by the learned Single Judge of this Court in the order dated 22<sup>nd</sup> January 2007 in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High***

***School & Ors.(supra)*** which has been specifically answered by the learned Single Judge in negative in paragraph 28 of the said judgment of the Full bench.

35. It is submitted by the learned counsel for the management that the Supreme Court had already taken a similar view in the case of ***Hindustan Education Society & Anr. (supra)*** and in the case of ***Bhartiya Gramin Punarrachna Sanstha (supra)*** prior to the judgment of the Full bench in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.(supra)***. The Full bench of this Court has followed the principles laid down by the Supreme Court in the cases of aforesaid two judgments. He submits that Full bench of this Court having interpreted the judgment of the Supreme Court in the above referred judgments is binding on the learned Single Judge of this Court.

36. Learned counsel distinguishes the judgments in the cases of ***Shamin Azad Education Society, Giroli and Ors. (supra)*** and ***Abdul Rafique Abdul Hamid (supra)*** delivered by the learned Single Judge of this Court and strongly relied upon by the learned senior counsel for the petitioner on the ground that the learned Single Judge was bound by the judgment of the Supreme Court in the cases of ***Hindustan Education Society & Anr. (supra)*** and ***Bhartiya Gramin Punarrachna Sanstha (supra)*** and also the judgment of the Full bench of this Court in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.(supra)*** and several other judgments having taken the same view and thus could not have taken a different view.

37. It is submitted by the learned counsel that the contract between the petitioner and the management regarding the terms and conditions of her appointment were concluded and accepted by the petitioner unconditionally and had to be given supremacy. He submits that in this case, the petitioner has challenged the validity of appointment letter only after expiry of the contractual period. The petitioner was put to knowledge of her temporary appointment and was also put to the knowledge subsequently that the Scheduled Caste candidate was subsequently available and was appointed to the said post. In support of this submission that the judgment of the Supreme Court is binding on all the Courts under Article 141 of the Constitution of India, learned counsel for the management placed reliance on the following judgments of the Supreme Court :-

- (i) ***M.S. Sandhu & Another Vs. State of Punjab & Ors., reported in 2014 (6) SCC 514 (paragraph 30);***
- (ii) ***South Central Railway Employees Co-op. Credit Society Employees Union V/s. B.Yashodabai & Ors., reported in 2015 (2) SCC 727 (paragraphs 16 to 19) and ;***
- (iii) ***Union of India & Ors. Vs. Major General Shri Kant Sharma & Another, reported in 2015 (3) Scale 546.***

38. It is submitted by the learned counsel for the management that since the Full bench of this Court in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.(supra)***. has answered the issue referred to it by the learned Single Judge based on the judgment of the Supreme Court in the case of ***Hindustan Education Society & Anr. (supra)*** and other Supreme Court judgments already having taken a

same view, the judgments of the learned Single Judge of this Court in the cases of ***Shamin Azad Education Society, Giroli and Ors. (supra)*** and ***Abdul Rafique Abdul Hamid (supra)*** being contrary to the ratio of the Supreme Court and the Full bench of this Court, are per incurium and cannot be relied upon by the petitioner and is not binding on the learned Single Judge in this matter. The issue is thus not required to be referred to a larger bench by the learned Single Judge of this Court. In support of this submission, learned counsel for the management placed reliance on the judgment of this Court in the case of ***State of Maharashtra and Ors. Vs. Murarao Malojirao Ghorpade & Ors. (supra)*** and in particular paragraphs 13 to 16 thereof.

39. In view of the parties having raised important question of law, this Court has permitted Mr.A.G. Kothari, learned counsel also to address to this Court on the issue raised by the parties.

40. Mr. Kothari, learned counsel invited my attention to the judgment of this Court delivered by the learned Single Judge in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.(supra)*** referring the specific issue for determination by a larger bench and also placed reliance on paragraph 28 of the judgment of the Full bench in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors. (supra)*** and would submit that Full bench has answered the specific question referred to the Full bench by the learned Single Judge. The other observations made by the Full bench in the said judgment thus cannot be relied upon as ratio decidendi but at the most can be considered as obiter dictum.

41. It is submitted that in view of the principles laid down by the Full bench, the school tribunal cannot disregard the terms and conditions of the letter of appointment. Learned Single Judge cannot hold that the school tribunal can disregard the answer to the specific issue referred by the learned Single Judge to the Full bench which is rendered in paragraph 28 of the said judgment. He submits that the school tribunal cannot lift the veil and cannot disregard the terms and conditions of the letter of appointment which is contrary to the view taken by the Supreme Court and the Full bench. It is submitted that the learned Single Judge cannot cull out the ratio of the Full bench and take a contrary view. He submits that the Full bench has not qualified the answer to the question referred by holding that the school tribunal can lift the veil and decide contrary to the terms and conditions of the letter of appointment.

42. Learned counsel led emphasis on the word “however” in paragraph 26 of the judgment of the Full bench in which it is categorically held that “however we are bound by the exposition of the Apex Court in the case of ***Hindustan Education Society & Anr. (supra)*** which had occasion to consider Section 5 of the Act”. In that case, the appointment of the respondent no.1 therein was against a clear vacancy but on purely temporary basis, for a limited period of eleven months. The Court after considering Section 5(1) and (2) of the MEPS Act opined that the said respondent could not be treated to be appointed as a permanent employee or that he was appointed on probation. It is submitted by the learned counsel that Full bench of this Court has not taken any view contrary to the view already taken by the Supreme Court in the case of ***Hindustan Education Society & Anr. (supra)*** and other

judgments rendered by the Supreme Court. Learned Single Judge has to consider the flaw of the entire judgment and not few paragraphs thereof. He submits that in any event, few observations made in paragraphs 17 and 24 of the judgment of the Full bench are contrary to the judgment of the Supreme Court in the case of ***Hindustan Education Society & Anr. (supra)*** and other judgments and thus no reliance on those paragraphs can be placed even otherwise by the petitioner.

43. In so far as the judgments of the learned Single Judge of this Court in the cases of ***Shamin Azad Education Society, Giroli and Ors. (supra)*** and ***Abdul Rafique Abdul Hamid (supra)*** relied upon by the learned senior counsel for the petitioner are concerned, it is submitted by Mr.Kothari, learned counsel that Full bench has not held what is interpreted by the learned Single Judge in the said two judgments. The full bench has not qualified the ratio by stating anything in the said judgments which is sought to be interpreted by the learned Single Judge in the said two judgments. He submits that no reliance thus can be placed on those two judgments relied upon by the learned senior counsel for the petitioner in view of the same being per incurium and being contrary to the ratio of the Supreme Court judgment in the case of ***Hindustan Education Society & Anr. (supra)*** and other judgments and also contrary to the principles of law laid down by the Full bench of this Court in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors. (supra)***.

44. Mr.Kothari, learned counsel placed reliance on the judgment of the Supreme Court in the case of ***Chatrapati Shivaji Shikshan***

**Prasarak Mandal & Ors. Vs. Dattatraya Rupa Pagar & Ors.** delivered on 13<sup>th</sup> April 2012 in Civil Appeal No.3563 of 2012 and in particular paragraph 3 thereof. He submits that the Supreme Court in the said judgment has taken a view similar to the view taken by the Supreme Court in the case of **Hindustan Education Society & Anr. (supra)** after interpreting Section 5 of the MEPS Act.

45. Mr.Kothari, learned counsel placed reliance on the judgment of the Karnataka High Court in the case of **Panchaxari Shidramappa Yeligar Vs.Shiggaon Taluka Shikshana**, reported in **2000 (5) KarLJ 174** and in particular paragraph 11.4 and would submit that while a decision rendered per incurium by a co-ordinate bench may not be binding as a precedent, a Court in a lower tier cannot refuse to follow the ratio decidendi of a decision rendered by the Court in a higher tier by stating that such decision is rendered per incurium. It is held that the Full bench can overrule, reverse or modify the decision or view of a Division Bench or a Single Judge but a Single Judge, a Division bench or a Full bench are all constituents of the High Court and each is the High Court and a Single Judge is not 'subordinate' to the Division bench or Full bench.

46. Mr.Kothari, learned counsel placed reliance on an unreported decision of the Supreme Court delivered on 19<sup>th</sup> July 2011 in the case of **Fida Hussain & Ors. Vs. Moradabad development Authority & Anr.** in Civil Appeal No.5448 of 2006 and other connected matters and in particular paragraphs 14 and 20 on the law of precedent under Article 141 of the Constitution of India and submits that if the Court determines

a certain issue for a certain set of facts, then that issue stands determined for any other matter on the same set of facts.

47. Mr.Desai, learned senior counsel for the petitioner in rejoinder submits that the learned Single Judge of this Court in the cases of ***Shamin Azad Education Society, Giroli and Ors. (supra)*** and ***Abdul Rafique Abdul Hamid (supra)*** having interpreted the judgment of the Supreme Court in the case of ***Hindustan Education Society & Anr. (supra)*** and the judgment of the Full bench in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.(supra)***, the said judgment is binding on the learned learned Single Judge of this Court. This Court cannot disregard the judgment of the learned Single Judge and if proposes to take a different view in the matter, has to refer the issue to a larger bench under Rule 7 of the High Court (Appellate Side) Rules and clause 36 of the Letters Patent. He placed reliance on various paragraphs of the judgment of the Full bench and would submit that the entire judgment of the Full bench has to be read in proper perspective to cull out the ratio and not the issue specifically referred to the full bench and a specific answer thereto. He placed reliance on the judgment of the Special Bench of this Court in the case of ***State of Maharashtra and Ors. Vs. Murarao Malojirao Ghorpade & Ors. (supra)***.

48. Learned senior counsel makes an attempt to distinguish various judgments referred to and relied upon by Mr.Panickar, learned counsel for the management and Mr.Kothari, learned counsel on the ground that the issues and facts in those judgments are totally different. He submits that the learned Single Judge in the cases of ***Shamin Azad Education Society, Giroli and Ors. (supra)*** and ***Abdul Rafique Abdul***

**Hamid (supra)** has not omitted the judgment of the Full bench in the case of **Ramkrishna Chauhan Vs. Seth D.M. High School & Ors. (supra)** and thus cannot be considered as per incurium. He placed reliance on the judgment of the Supreme Court in the case of **State of Punjab Vs. Salil Sabhlok and Ors.**, reported in **(2013) 5 SCC 1** and in particular paragraphs 137 and 145 and would submit that since the full bench has answered other subsidiary questions while dealing with the issue referred to the learned Single Judge in the case of **Ramkrishna Chauhan Vs. Seth D.M. High School & Ors. (supra)**, answers of the subsidiary questions also have to be considered as ratio.

**REASONS AND CONCLUSIONS :-**

49. I shall first decide the issue whether the petitioner was appointed as an assistant teacher on temporary basis in the post reserved for the Scheduled Caste, Scheduled Tribe, D.T. & N.T. and other backward classes or was appointed on probation in a clear and permanent post. The issue also arises for consideration of this Court is whether the school tribunal could have gone behind the terms and conditions stated in the letter of appointment and could have declared the appointment of the petitioner on probation within the meaning of section 5(2) of the MEPS Act or not.

50. Learned counsel for the management produced a copy of the letter of appointment issued by the management to the petitioner for the academic year 1990-1991 which was duly acknowledged by the petitioner thereon. The petitioner who was present in Court during the course of hearing of this petition, when was shown the copy of letter of

appointment admitted her signature on the letter of appointment. A perusal of the letter of appointment issued by the management clearly provides that the appointment of the petitioner was made on temporary basis and that it was to be terminated with effect from the next academic year. A perusal of the appeal memo filed by the petitioner before the school tribunal also indicates that it was the case of the petitioner that she was continued during the academic year 1991-1992, however continuation letter given to the petitioner by the management was misplaced.

51. The petitioner was also issued a letter by the management informing her on 23<sup>rd</sup> March, 1992 that her appointment was approved by the Education Inspector (West Zone), Greater Bombay for the academic year 1991-1992 only as the said post was reserved for the Scheduled Caste / Scheduled Tribe. A perusal of the rejoinder filed by the petitioner clearly indicates that in paragraph 5 thereof, the petitioner has admitted that the advertisement was issued by the management for inviting the applications for the post of trained teachers to teach English, Social Studies, Maths, Science in standard VIII to X through English medium, Marathi in standard VIII to X, Hindi, P.T. and Marathi in lower classes. The post was reserved for the Scheduled Caste / Scheduled Tribe, D.T. & N.T. and other backward classes. The petitioner admitted the contents of the advertisement issued by the management. The petitioner admitted that her name was not included in the roster. Mrs. Pratibha Tulsidas Bobde was appointed, who belonged to Scheduled Caste.

52. A perusal of the impugned order passed by the school tribunal also clearly indicates that the tribunal has rendered a finding of

fact that the advertisement was issued by the management for the posts which were reserved for Schedule Caste and Scheduled Tribe. The petitioner was appointed in the post reserved for Scheduled Caste and Scheduled Tribe etc. In the proposal sent by the management to the Education Department, it was subsequently informed that the petitioner was reappointed from 19<sup>th</sup> June, 1991 to 30<sup>th</sup> April, 1992 against a reserved category. The management had sent a proposal only for one academic year to the Education Department. The management had produced the list of teachers who belonged to Scheduled Caste/ Scheduled Tribe etc. in the school run by the management and had supplied the said list to the Social Welfare Officer and other Government departments for the purpose of getting the activities of the reserved category which list also showed the posts reserved for various reserved categories. The school tribunal also has held that the petitioner was an untrained graduate and thus could be appointed only on temporary basis.

53. Insofar as the issue whether B.Ed. degree obtained by the petitioner from Annamalai University was recognized as valid by the State of Maharashtra or not, in view of the judgment of this Court in case of *Anjuman Khairul Islam & Ors. (supra)* delivered by this Court, the learned counsel for the management fairly agreed that the impugned finding of the school tribunal to the effect that the petitioner was untrained teacher does not hold good.

54. A perusal of the record produced by both the parties clearly indicates that the post on which the petitioner was appointed as an assistant teacher was a reserved post for Scheduled Caste, Scheduled

Tribe, D.T. & N.T. and other backward classes. Admittedly the petitioner belonged to an open category. The reserved category candidate was not available inspite of the advertisement issued by the management for the said post of the assistant teacher. The petitioner was accordingly appointed in the said post on temporary basis. It is a matter of record that the reserved category candidate was subsequently appointed when available to the said post of assistant teacher. The appointment of the said reserved category candidate assistant teacher was admittedly not challenged by the petitioner before the school tribunal. The petitioner herself has admitted in the pleadings filed before the school tribunal that the said post was a reserved post. In my view, the findings rendered by the school tribunal on the basis of the documents produced by both the parties, including roster being not perverse, cannot be interfered with by this Court in this writ petition filed under Article 226 of the Constitution of India.

55. Both the parties have also urged before this Court and have relied upon several judgment of the Supreme Court and this Court on the issue whether the parties as well as the school tribunal was bound by the terms and conditions recorded in the letter of appointment issued by the management or as to whether the school tribunal could lift veil and to take a view that the appointment of the petitioner was not made as provided in the letter of appointment but was made on probation in a clear and permanent post.

56. The Supreme Court in case of ***Hindustan Education Society and Another (supra)*** after considering the terms of the appointment

recorded in the appointment letter and after referring to section 5(2) of the MEPS Act held that the appointment of the teacher could not be considered to be permanent post and has set aside the direction issued by the High Court that the said teacher was appointed on probation as clearly illegal.

57. The Supreme Court in case of ***Bhartiya Gramin Punarrachna Samasthe (supra)*** took a similar view. The Supreme Court in case of ***Chatrapati Shivaji Shikshan Prasarak Mandal & Ors.(supra)*** after considering the terms and conditions of the letter of appointment which provided that the teacher was appointed for a fixed period and that there was nothing on record to show that the teacher had been appointed after regular selection procedure and was appointed on probation and thus the termination of the services of the teacher being strictly in accordance with the terms and conditions of his appointment could not have been interfered with by the school tribunal by holding that the said teacher had been appointed on probation and on completion of three years, he could not be deemed to have been confirmed.

58. A learned single Judge of this Court in a judgment delivered on 7<sup>th</sup> July, 1999 in Writ Petition No.3488 of 1999 considered the judgment of the Supreme Court in case of ***Hindustan Education Society (supra)*** has held that the controversy whether the appointment of the respondent was made on temporary basis because he was appointed against the post which was reserved for backward classes or not has lost significance now. This Court held that the Supreme Court in case of ***Hindustan Education Society (supra)*** has held that the appointment on

temporary basis can be made even against a clear vacancy and if the appointment is on the temporary basis, it can be terminated by a simple order of termination. This Court considered the appointment order in which it was specifically stated that the teacher had been appointed against the post reserved for the Scheduled Caste candidate and his appointment was purely on temporary basis for one academic year only.

59. This Court held that it was the consistent view taken by this Court that in case an appointment is being made against a clear permanent vacancy and a candidate is selected after following the procedure laid down by law for selecting the candidates for the appointment against the clear and permanent vacancies, then the management has no power to make an appointment on temporary basis and the appointment has to be on probation. It was held consistently that even if the management in the appointment order says that the appointment is on temporary basis, this Court assumes that the appointment to be on probation.

60. The learned single Judge in the said judgment held that however, the Supreme Court by its judgment in case of ***Hindustan Education Society & Anr. (supra)*** has taken a different view and it is clear from that judgment that the management can make an appointment even against a clear vacancy on temporary basis. This Court accordingly held that it is clear that according to the Supreme Court the judgment in ***Hindustan Education Society & Anr. (supra)*** case, now under the terms and conditions of the provisions of section 5 of the MEPS Act, an appointment on temporary basis can be made in clear vacancy and the

services of such a person can be terminated by simplicitor order of termination. This Court however, granted leave considering the question of wide public importance under Article 133 and Article 134-A of the Constitution of India.

61. A perusal of the order passed on 22<sup>nd</sup> November, 1999 in case of ***Pandurang Maruti Dhumal vs. Siddharth Charitable Trust and Anr. (supra)*** indicates that the Supreme Court has dismissed the said special leave petition *in limine* in which this Court had granted leave under Article 133 read with 134-A of the Constitution of India.

62. This Court in an unreported judgment in case if ***Kazi Safiruddin Muzaffaruddin (supra)*** after adverting to the judgment of the Supreme Court in case of ***Hindustan Education Society & Anr. (supra)*** and another judgment of this Court in case of ***Chatrapati Shivaji Shikshan Prasarak Mandal & Ors. (supra)*** has held in that case that though the petitioner was given service appointment for two consecutive years on temporary basis, it would not amount to permanent appointment treating him probationary as contemplated under section 5(2) of the MEPS Act.

63. The Supreme Court in case of ***Kalpataru Vidya Samasthe (supra)*** has held that if an employee has accepted the terms and conditions recorded in the letter of appointment, he cannot challenge the terms and conditions of the appointment after a period on which he was appointed to have expired by efflux of time. In this case also, the petitioner did not dispute the terms and conditions of the appointment till the appointment period expired.

64. In view of different views having been taken by this Court in number of matters, a learned single Judge of this Court in case of ***Ramkrishna Chauhan (supra)*** after adverting to the judgment of the Supreme Court in case of ***Hindustan Education Society & Anr. (supra)*** and in case of ***Bhartiya Gramin Punarrachna Samasthe (supra)*** and other judgments of this Court, directed the Registry to place the papers in those proceedings before the Hon'ble Chief Justice to enable the Hon'ble Chief Justice to constitute a Larger Bench in resolving the issue whether it would be open to the school tribunal to hold that an employee would be deemed to be on probation within the meaning of section 5(2) of the MEPS Act on the ground that the appointment was made in a clear and permanent vacancy, notwithstanding the fact the letter of appointment specifically stipulated that the appointment has been made in a temporary capacity.

65. The Hon'ble Chief Justice of this Court constituted a Full Bench to decide the said issue referred to the Larger Bench in case of ***Ramkrishna Chauhan (supra)***. The Full Bench of this Court in the said judgment in case of ***Ramkrishna Chauhan (supra)*** answered the said issue referred to the Larger Bench extracted in paragraph 9 of this judgment in negative and held that it is not open to the school tribunal to assume as a fact that the appointment made against a clear and permanent vacancy is deemed to be on probation, within the meaning of section 5(2) of the MEPS Act. The school tribunal cannot disregard the terms and conditions of the letter of appointment, if it expressly provides that the appointment is on temporary basis, for a limited term.

66. Learned counsel for the management and Mr.Kothari, learned counsel heavily placed reliance on various judgments of the Supreme Court delivered prior to the judgment of the Full Bench of this Court referred to aforesaid in case of ***Ramkrishna Chauhan (supra)*** and would submit that the judgment of the Supreme Court in case of ***Hindustan Education Society & Anr. (supra)***, in case of ***Bhartiya Gramin Punarrachna Samasthe (supra)***, in case of ***Chatrapati Shivaji Shikshan Prasarak Mandal & Ors. (supra)***, in case of ***Kalpataru Vidya Samasthe & Anr. (supra)*** which are adverted to and interpreted by the Full Bench of this Court and held that it would not be open to the school tribunal to hold that an employee would be deemed to be on probation within the meaning of section 5(2) of the MEPS Act on the ground that the appointment was made in a clear and permanent vacancy, notwithstanding the fact that the letter of appointment specifically stipulated that the appointment has been made in a temporary capacity and that the school tribunal cannot disregard the terms and conditions of the letter of appointment, if it expressly provides that the appointment is on temporary basis, for a limited term, holds to field and is binding on this Court.

67. In so far as the judgment delivered by the learned Single Judge of this Court in the case of ***Shamin Azad Education Society, Giroli and Ors. (supra)*** relied upon by the learned senior counsel for the petitioner in support of his submission that even if the letter of appointment specifically stipulated appointment to be in temporary capacity, jurisdiction of the school tribunal to hold that the appointment should be treated as one on probation on considering the facts of each case is concerned, a perusal of the said judgment delivered by the learned

Single Judge of this Court indicates that the learned Single Judge has adverted to the judgment of the Supreme Court in the cases of ***Hindustan Education Society & Anr. (supra)*** and ***Bhartiya Gramin Punarrachna Sanstha (supra)*** has held that the law laid down by the Supreme Court in those judgments cannot be disputed.

68. It is however held that it was not the case before the Apex Court as regards treating the appointment as one on probation, though the order stipulates that it is on temporary basis or for a fixed period. It is held that the aforesaid judgment of the Supreme Court cannot be considered to be an authority for the proposition involved in the case before the learned Single Judge. It is held that the power of the management to appoint a person on temporary basis in a permanent vacancy, cannot be disputed but the power of the school tribunal under Section 9 of the MEPS Act to find out as to whether such appointment should be treated as one on probation, in the facts and circumstances of the case, cannot be questioned.

69. Learned Single Judge has held that ratio of the decision of the Full Bench cannot be construed as creating absolute bar to the jurisdiction of the school tribunal under Section 9 of the MEPS Act to consider and decide the question as to whether in the given facts and circumstances of the case, an order of appointment on temporary basis or for a fixed period in a permanent vacancy cannot be treated as one on probation and the employee is entitled to protection in service, in a challenge to the order of termination. It is held that the question of law framed in paragraph 2 of the judgment of the Full Bench answered in negative in paragraph 28 therein and the connected observations made

in paragraphs 18 and 24 need to be construed in this manner. Any other interpretation will be contrary to the object and the purpose of the Act and the provisions of Section 5 and shall be in dilution of the ratio of the decision.

70. Learned Single Judge of this Court in the case of ***Abdul Rafique Abdul Hamid (supra)*** after adverting to the judgment of the Supreme Court in the cases of ***Hindustan Education Society & Anr. (supra)***, ***Bhartiya Gramin Punarrachna Sanstha (supra)*** and the judgment of the Full Bench of this Court in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.(supra)*** and various other judgments culled out the ratio in the judgment of the Full Bench in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors. (supra)*** and has held that it is not the ratio of the decision of the Full Bench that under no circumstances, the appointment was made on temporary basis in a permanent vacancy can be treated as an appointment made on probation. Learned Single Judge has also considered the judgment of this Court in the case of ***Matoshri Ramabai Ambedkar Vidyarathi Vasatigruh Trust and Anr.Vs. Bharat D. Hambir & Anr.,*** reported in ***2009 (2) Mh.L.J. 121*** in which the learned Single Judge Dr.D.Y. Chandrachud, J. as he was the then Judge of this Court after interpreting the provisions of the MEPS Act had taken a different view.

71. The question arises for consideration of this Court is whether two judgments of the learned Single Judge of this Court in the cases of ***Shamin Azad Education Society, Giroli and Ors. (supra)*** and ***Abdul Rafique Abdul Hamid (supra)*** which are delivered after adverting to the judgment of the Supreme Court and the judgment of the Full

Bench of this Court taking a different view is binding on the learned Single Judge of this Court as a precedent or not.

72. It is the submission of the learned counsel for the management and Mr.Kothari, learned counsel that the Full Bench of this Court in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.(supra)*** is delivered after adverting to various judgments of the Supreme Court interpreting the provisions of Section 5(2) of the MEPS Act has answered the specific reference made by the Full Bench and the learned Single Judge of this Court. It is their submission that the judgment of the Full Bench is in conformity with the views already expressed by the Supreme Court on the issue and thus other observations made in the judgment of the Full Bench cannot be construed as ratio but at most can be considered as obiter dictum. It is, however, the submission of the learned senior counsel for the petitioner that the judgment delivered by the Full Bench of this court has to be considered in toto and not what was specifically referred to the Full Bench and what is answered. It is also the submission of the learned senior counsel for the petitioner that since the learned Single Judge of this Court in the cases of ***Shamin Azad Education Society, Giroli and Ors. (supra)*** and ***Abdul Rafique Abdul Hamid (supra)*** has taken a view after adverting to the judgment of the Supreme Court and the judgment of the Full Bench of this Court and has interpreted those judgments and has expressed a particular view, the said judgments cannot be described as per incurium but is binding on the learned Single Judge of this Court.

73. A perusal of the judgment of the Supreme Court in the cases of ***Hindustan Education Society & Anr. (supra)***, ***Bhartiya Gramin***

***Punarrachna Sanstha (supra) and Kalpataru Vidya Samasthe (R) & Anr. (supra)*** indicates that Supreme Court has interpreted the provisions of Section 5(2) of the MEPS Act in those judgments. Learned Single Judge of this Court in the judgment delivered on 7<sup>th</sup> July 1999 in Writ Petition No.3488 of 1999 after adverting to the earlier view taken by this Court in catena of decisions and after adverting to the judgment of the Supreme Court in the case of ***Hindustan Education Society & Anr. (supra)*** has held that now in view of the judgment of Supreme Court, in terms of the provisions of Section 5 of the MEPS Act, an appointment on temporary basis can be made in a clear vacancy and the services of such a person can be terminated by simplicitor order of termination.

74. In so far as the judgment of this Court in the case of ***Baburao Amrutrao Kharekar (supra)*** relied upon by the learned senior counsel for the petitioner is concerned, the said judgment delivered by the Division Bench of this Court is delivered prior to the delivery of the judgment by the Full Bench of this Court in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.(supra)***. Reliance placed by the learned senior counsel for the petitioner is thus misplaced.

75. This Court in an unreported judgment delivered on 28<sup>th</sup> November 2005 in the case of ***Kazi Safiruddin Muzaffaruddin Vs. State of Maharashtra & Ors. (supra)*** after adverting to the judgment of the Supreme Court in the case of ***Hindustan Education Society & Anr. (supra)*** and the judgment of this Court in the case of ***Shikshan Prasarak Manal, Wani (supra)*** has held that only because the petitioner was given service appointment for two consecutive years on temporary basis, it

would not amount to a permanent appointment treating him probationary as contemplated under Section 5(2) of the MEPS Act.

76. I am inclined to accept the submission made by the learned counsel for the management and Mr.Kothari, learned counsel that Supreme Court in the case of ***Hindustan Education Society & Anr. (supra)*** after interpreting Section 5(2) of the MEPS Act had taken a view which has been followed by the Full Bench of this Court in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors. (supra)***.

77. Supreme Court in the case of ***South Central Railway Employees Co-op. Credit Society Employees Union (supra)*** has held that when a higher Court has rendered a particular decision, the said decision must be followed by a subordinate or lower Court unless it is distinguished or overruled or set aside. It is held that if the litigants or lawyers are permitted to argue that something what was correct, but was not argued earlier before the higher Court and on that ground if the Courts below are permitted to take a different view in a matter, possibly the entire law in relation to the precedents and ratio decidendi will have to be re-written and that cannot be done. It is held that by not following the law laid down by the Supreme Court, the High Court or the Subordinate Courts would also be violating the provisions of Article 141 of the Constitution of India.

78. Supreme Court in the case of ***S.J.Coke Industries Pvt. Ltd. Vs. Central Coalfields Ltd.,*** reported in ***2015 (4) Mh.L.J. 88*** has held

that once the Supreme Court had decided similar issue in another judgment by passing a reasoned order, a fortiori, the ratio decidendi declared in the said decision was binding on all the Courts in the country for giving effect to it while deciding the lis of the same nature. Both the Courts were under legal obligation to have taken note of the said decision and then should have decided the writ petition/appeal in conformity with the law laid down therein.

79. Supreme Court in the case of ***Balwant Rai Saluja & Anr. Vs. Air India Ltd. & Ors.*** decided on 25<sup>th</sup> August 2014 in Civil Appeal Nos.10264-10266 of 2013 had held that the binding nature of a decision would extend to only observations on points raised and decided by the Court and neither on aspects which it has not decided nor had occasion to express its opinion upon. It is held that the observations made in a prior decision on a legal question which arose in a manner not requiring any decision and which was to an extent unnecessary, ought to be considered merely as an obiter dictum. It is held that a ratio of the judgment or the principle upon which the question before the Court is decided must be considered as binding to be applied as an appropriate precedent.

80. In the said judgment, Supreme Court adverted to its judgment in the case of the ***Commissioner of Income Tax Vs. Sun Engineering Works (P) Ltd.***, reported in (1992) 4 SCC 363 in which it is held by the Supreme Court that it is neither desirable nor permissible to pick out a word or a sentence from the judgment of Supreme Court divorced from the context of the question under consideration and treat it to be complete 'law' declared by the Supreme Court. The judgment

must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Supreme Court. It is held that a decision of the Supreme Court takes its colour from the questions involved in the case in which it was rendered and while applying the decision to the later case, the Courts must carefully try to ascertain the true principle laid down by the decision of the Supreme Court and not pick out words or sentences from the judgment, divorced from the context of the questions under consideration by the Supreme Court to support their reasonings.

81. In my view, the judgment of the Full Bench in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.(supra)*** thus will have to be considered in light of the view expressed by the Supreme Court in the judgments referred to aforesaid on the principles of ratio decidendi and obiter dictum.

82. Supreme Court in the case of ***Jai Kaur & Ors. Vs. Sher Singh & Ors.***, reported in ***AIR 1960 SCC 1118*** has held that the Full Bench decision may not say in so many words that these cases were wrongly decided; but when a Full Bench decides a question in a particular way every previous decision which had answered the same question in a different way cannot but has to be held to have been wrongly decided. The subsequent Division Bench cannot disagree with the previous decision of the Full Bench of the same Court. It is held that the concept of the of judicial decorum and legal propriety require that the decision of the Larger Benches must be accepted by the Judges of the Court and Division Benches must be accepted by the Judges of the Court and pleased not to deal with or consider by the Bench should be presumed to

have been considered by the Larger Benches while delivering the judgment. Supreme Court has held that the Full Bench can overrule, reverse or modify the decision or view of a Single Judge or the Division Bench but a Single Judge cannot overrule, reverse or modify the decision of the Division Bench or the Full Bench. I am thus not inclined to accept the submission of the learned senior counsel for the petitioner that if this Court is not in agreement with the views expressed by the learned Single Judge in the cases of ***Shamin Azad Education Society, Girolli and Ors. (supra)*** and ***Abdul Rafique Abdul Hamid (supra)***, the matter shall be referred to the Larger Bench. I am bound by the decisions of the Supreme Court and Full Bench referred to aforesaid.

83. In so far as the submission of the learned senior counsel for the petitioner that the management has been misapplying the judgments of the Supreme Court and Full Bench of this Court and adopts the approach of the hire and fire of the teachers and other employees by deliberately appointing them on temporary basis though the post is clear and permanent post is concerned, in my view, even if there is any substance in this submission of the learned senior counsel of the petitioner, being a Single Judge of this Court, I am bound by the principles of law laid down by the Supreme Court and the Full Bench referred to aforesaid in view of the facts therein being identical to the facts of this case by applying the law of precedent until a different view is taken by the Supreme Court than the view already taken by it or until the view taken by the Full Bench of this Court is overruled by the Supreme Court. I am unable to take any different view in the matter. I am respectfully bound by the judgment of the Supreme Court and the

judgment delivered by the Full Bench of this Court and not the judgment of the learned Single Judge of this Court in the cases of ***Shamin Azad Education Society, Giroli and Ors. (supra)*** and ***Abdul Rafique Abdul Hamid (supra)*** taking a different view.

84. I am thus not inclined to accept the submission of the learned senior counsel for the petitioner that the learned Single Judge of this Court in the aforesaid two judgments having interpreted the judgment of the Supreme Court and the judgment of the Full Bench, the view of the learned Single Judge would be binding on the learned Single Judge though the view of the learned Single Judge is contrary to the view taken by the Supreme Court and the Full Bench of this Court. I am therefore of the view that the view taken by the Supreme Court in the cases of ***Hindustan Education Society & Anr.(supra)***, ***Bhartiya Gramin Punarrachna Sanstha (supra)*** and ***Kalpataru Vidya Samasthe (R) & Anr. (supra)*** and interpreted and followed by the Full Bench of this Court in the case of ***Ramkrishna Chauhan Vs. Seth D.M. High School & Ors.(supra)*** holds the field. I am respectfully bound by those judgments. The ratio of the judgment of Full Bench will have to be considered on the basis of the issue referred to the Full Bench and the answer thereto. All other observations made therein are at most obiter dictum.

85. I appreciate the valuable assistance rendered by the learned counsel appearing in this matter including Mr.A.G.Kothari who made various important submissions for consideration of this Court on the issue raised by the petitioner. In my view, the petition is devoid of merits.

86. I therefore pass the following order :-

- (i) Writ Petition No.5247 of 1998 is dismissed;
- (ii) Rule is discharged;
- (iii) There shall be no order as to costs.

***R.D. DHANUKA, J.***