

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

...

WRIT PETITION NO. 9673 OF 2017

MAHARASHTRA EDUCATION SOCIETY JALNA
THROUGH IT'S CHAIRMAN AND SECRETARY AND
ANOTHER
VERSUS
KURESHI SHAIKH JAHIR AHMED SHAikh ISMAIL
AND OTHERS

...

Advocate for Petitioners : Mr Godbole R.J.
AGP for Respondents 2,3 : Mr S P Tiwari
Advocate for Respondents : Mr Dixit S. V. For R/1,
Mr Shantanu A Deshpande for respondent No.4.

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CORAM : V.K. JADHAV, J.

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Reserved on : April 26, 2018
Pronounced on : June 04, 2018

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ORDER :-

1. Petitioners in this writ petition are challenging the legality and validity of the judgment and order passed by the Presiding Officer of School Tribunal, Aurangabad Division, Aurangabad dated 8.3.2017 in appeal no.28/2009 whereby the appeal preferred by respondent no.1 has been partly allowed and directed the petitioners to reinstate respondent no.1 as an Assistant Teacher.

2. Brief facts, giving rise to the present writ petition, are as follows :-

a] Respondent No.1 was appointed as an untrained teacher for one year from 1.12.2004 to 30.10.2005 as temporary employee. Respondent no.1 thereafter worked as an additional untrained teacher and he was never selected by following procedure of law. It is the case of the petitioners that respondent no.1 in collusion with the then Head master succeeded in getting his name forwarded for B.Ed. Course. Respondent No.1 completed his B.Ed. course on 4.7.2007. Thus, till 4.7.2007 respondent no.1 was untrained teacher. It is further case of the petitioners that, respondent no.1 was never selected by following the procedure prescribed by law. Respondent no.1's service was only up to 30.4.2007. Respondent No.1 was never orally terminated. It is further contended that, respondent no.1 had preferred an appeal before the School Tribunal bearing appeal no.28/2009 and prayed for setting aside the oral termination dated 20.3.2007. Petitioners appeared in that appeal and filed their written statement and also annexed documents i.e. appointment order appointing

respondent no.1 as untrained teacher for the specific period. Petitioners specifically pleaded that respondent no.1 was never appointed by following due procedure of law and respondent no.1 being untrained teacher has no right to claim the post of Assistant Teacher in perpetuity. Petitioners further state that the theory of oral termination dated 20.03.2007 put forth by respondent no.1 is false.

3. After hearing both the parties, the learned Presiding Officer of the School Tribunal was pleased to partly allow the appeal of respondent no.1 and directed the petitioners/Management to reinstate him in service as Assistant Teacher. Hence this writ petition.

4. Learned counsel for the petitioners submits that, respondent no.1 was appointed as an untrained teacher only for one year i.e. from 1.12.2004 to 30.10.2005 as a temporary employee. Respondent no.1 thereafter worked as an additional untrained teacher and never selected by following due procedure of law. Respondent no.1 in collusion with the then Head Master succeeded in

getting his name forwarded for completion of B.Ed. course. Learned counsel submits that, petitioner no.1 has never given any undertaking as alleged by respondent no.1. Respondent no.1 appears to have completed his B.Ed. course on 4.7.2007. Thus, till 4.7.2007 respondent no.1 was untrained teacher. Respondent no.1 never selected after 4.7.2007 by following procedure prescribed by law. Learned counsel for petitioners submits that, respondent no.1 was never terminated orally and even respondent no.1 in his representation dated 29.3.2007 has not averred about it. The appointment order of respondent no.1 indicates that he was appointed as an untrained teacher for a specific period and never appointed by following due procedure of law. Thus, respondent no.1 being untrained teacher has no right to claim the post of Assistant Teacher in perpetuity. Learned counsel for the petitioners submits that, it is well settled that for claiming status of permanency a teacher who has not gone through the regular process of selection against permanent vacant post cannot claim permanency on the ground that he had worked for two years or more in a

particular school. Respondent no.1 has failed to produce on record the documents to prove that he was selected by following due process of law nor he has raised a specific ground in his appeal memo that he was selected as per the advertisement on probation by following the procedure prescribed under section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, "MEPS Act"). The learned Presiding Officer of the School Tribunal ignored the ratio laid down by this Court in various cases and has given undue importance to the undertaking given by then Head Master to the effect that respondent no.1's services would be continued after completion of B.Ed. Course. Learned Presiding Officer of the School Tribunal misread the undertaking and ignored the certificate issued by the Head Master dated 16.7.2005 in which the same Head Master had given promise to respondent no.1 that he would be continued in service only till completion of B.Ed. course. Learned Presiding Officer of the School Tribunal failed to interpret Rule 6 of the MEPS (CS) Rules, 1981 in its proper perspective. Said rule 6 is qualified rule subject

to conditions mentioned in the said rule. Learned counsel for the petitioners submits that, untrained teacher appointed on year to year basis has to apply in response to it and only when duly qualified teacher does not surface, he can be selected. Even after acquiring training qualification, for their permanent selections and appointment on probation, they have to compete with others. Learned counsel submits that, the Presiding Officer of the School Tribunal ignored the letter forwarded by respondent no.1 dated 29.3.2007 in which there is no whisper about oral termination order dated 20.3.2007. In staffing pattern of 2015-2016, 2016-2017, two posts have already been cancelled and as such, there is no vacancy available to reinstate respondent no.1 in service. Thus, the impugned judgment and order passed by the learned Presiding Officer of the School Tribunal to the extent of directing the petitioner Management to reinstate respondent no.1 as an Assistant Teacher is illegal and liable to be quashed and set aside.

5. Learned counsel for the petitioners, in order to substantiate his contentions, placed his reliance on following cases :-

1. Sanjay Lalbahadur Divedi vs Shrikrishna Vyayam Shala & Ors., reported in 2010 (3) Bom. C.R. 604,
2. Ramkrishna Chauhan & Ors vs Seth D. M. High School & Ors., reported in 2013 (2) Bom.C.R. 481,
3. Priyadarshini Education Trust & Ors. Vs Ratis (Rafia) Bano d/o Abdul Rasheed & Ors., reported in 2007 (6) Mh.L.J. 667,
4. Chadramani Devraj Tiwari vs Secretary, Smt. R. B. Tiwari, reported in 2008 (3) Mh.L.J.,
5. Krishna Dnyandeo Lad vs Chairman, Rahimatpur Panchkrushi Shikshan Mandal & Ors., reported in 2008 (4) Mh.L.J. 309,
6. Hindustan Education Society & Anr. Vs Sk. Kaleem Sk. Gulam Nabi & Ors., reported in (1997) 5 SCC 152,
7. Ashok s/o Balaji Biradar vs Mahesh Shikshan Prasarak Mandal, Udgir & Ors., reported in 2010 (1) Mh.L.J. 211 and

8. Anna Manikrao Pethe vs Presiding Officer, School Tribunal, Amaravati & Aurangabad Division, Amravati & Ors., reported in 1997 (3) Mh.L.J. 697.

6. Learned counsel for respondent no.1 submits that, at the time of appointment of respondent no.1 he was possessing qualification of B.A., B.P.Ed. and as per the sanctioned staffing pattern of Aayesha Urdu High School, four posts of Assistant Teacher were available. At the time of appointment of respondent no.1, the post of Assistant Teacher was vacant and it was permanent. Learned counsel submits that the procedure as contemplated under the Rules was followed and respondent no.1 came to be appointed as an Assistant Teacher with petitioner no.2 school. Respondent no.1 was working in the school from 01.12.2004 and he was orally terminated on 20.3.2007. Such an oral termination is not contemplated under any provisions of law and the same was arbitrary. Thus, respondent no.1 approached the School Tribunal by filing the appeal challenging his oral termination and the learned Presiding Officer of the School Tribunal, after

considering all the relevant documents and pleadings, allowed appeal no.28/2009. Learned counsel submits that, respondent no.1 is appointed against a permanent and clear vacancy and he was also possessing qualification of a trained graduate teacher. Even after joining services, respondent no.1 had obtained qualification of B.Ed. as in-service candidate. Respondent no.1 was admitted to the said course on an undertaking given by the Management to the effect that the Management will permit respondent no.1 to join the course and continue him after completion of the said course. Learned counsel submits that the Management has not come with the case that respondent no.1 was removed from service because a trained teacher was available pursuant to the recruitment process. There is no termination order, notice, memo to show cause or charge sheet or any enquiry to terminate respondent no.1. Learned counsel submits that, section 5 of the MEPS Act requires the Management to fill in every permanent vacancy in the private school by appointment of a person duly qualified. Rule 10 of MEPS Rules provides two categories i) permanent and ii) non-

permanent. Non-permanent employees includes temporary and on-probation employees. A temporary employee is one who is appointed to a temporary vacancy. In view of the provisions of section 5 of the MEPS Act, if the Management wants to claim that respondent no.1 was temporary employee, then it was incumbent upon the petitioner Management to prove that respondent no.1 was appointed against a vacancy which was temporary in nature. Findings recorded by the learned Presiding Officer of the School Tribunal in respect of the nature of the post is based on the documentary evidence produced before it and any interference in findings of the fact under Article 227 of the Constitution of India is not desirable. Learned counsel submits that the petitioners have nowhere disputed the continuous service of respondent no.1 from his initial appointment till oral termination. Learned counsel submits that, the Head Master had given undertaking to the open university for in-service B.Ed. course and, it is thus difficult to believe that the Management was unaware of the actions of the Head Master. Learned counsel submits that respondent no.1

was a trained graduate teacher at the time of his appointment as per the provisions of the MEPS Act and the Rules made thereunder. The alleged appointment orders claimed to have been issued by the Management are bogus. Learned counsel submits that the last appointment order was till 30.3.2007 and the oral termination of respondent no.1 is prior to it and as such, respondent no.1 was not allowed to complete the period as referred in such appointment order. Learned counsel submits that the instant case is a classic example of exploitation by the private Managements having minority status. Such Managements appoint the teachers, exploit their services by paying meager remuneration till the school has got grants and as soon as grants are receivable to the school, to terminate the services of such teachers orally and further resist the appeals filed for reinstatement by such employees by claiming lack of compliance of the process for appointment of such employees. Thus, the petitioner Management is precluded from raising the ground of illegal appointment after a span of several years of service. Learned counsel submits that, in terms of the

provisions of section 5 (2) of the MEPS Act, 1977, if the appointment of an employee is against permanent, clear vacancy, then such appointment is liable to be on probation for two years. Learned counsel submits that the writ petition is thus liable to be dismissed.

7. Learned counsel for respondent no.1, in order to substantiate his submissions, placed his reliance on following cases.

1. Hindi Vidya Bhavan, Mumbai and Ors. vs Presiding Officer, School Tribunal, Mumbai and Ors., reported in 2007 (6) Mh.L.J. 563,
2. Prakash Shalikram Kadu vs Gandhi Shikshan Sanstha and Ors., reported in 2014 (3) Mh.L.J. 692,
3. Trimurti Balak Mandir Shikshan Sanstha and Ors. vs Vithabai Bhikan Desale and Ors., reported in 2017 (2) Bom.C.R. 672,
4. Shikshan Prasarak Mandal vs Presiding Officer, School Tribunal and Anr., reported in 2005 (4) Mh.L.J. 485 and
5. Yogeshwar Vikas Sanstha and Ors. vs Rajendra T. Shinde & Anr., reported in 2007 (6) Mh.L.J. 698.

8. I have also heard the learned A.G.P. for respondent nos. 2 and 3.

9. Learned counsel appearing for respondent No.4 submits that respondent no.1, being untrained teacher, has no legal right to claim post in perpetuity on the basis of some so called undertaking. Learned counsel submits that this Court in a case of Sanjay Lalbahadur Divedi vs Shrikrishna Vyayam Shala & Ors., reported in 2010 (3) Bom. C.R. 604, has held that untrained teachers, even after acquiring training qualification, for their permanent selections and appointment on probation, have to compete with others. After getting B.Ed. qualification, legislation does not permit them to avoid competition with the trained teachers when the post is sought to be filled in permanently. Respondent no.1 admittedly was untrained teacher at the time of appointment and, as such, has no legal right to claim the post in perpetuity without getting selected by following the procedure of law as contemplated under section 5 of the MEPS Act of 1977. Learned counsel for respondent no.4 has thus adopted the submissions

made on behalf of the petitioner Management.

10. I have heard the learned counsel appearing for the parties. With their able assistance, I have carefully perused the pleadings and grounds taken in the petition, annexures thereto, replies filed by the respective respondents and the authorities cited by the counsel appearing for the respective parties. On careful perusal of the memo of appeal no.28/2009 preferred by respondent no.1 before the School Tribunal, Aurangabad, it appears that respondent no.1 has approached the School Tribunal with the specific pleadings that he had completed his education and he had got degree of B.A., B.P.Ed. There was a vacant post and clear vacancy of the post of Assistant Teacher in the said school and the petitioners/Management has appointed him as an Assistant Teacher in the said school by order dated 1.12.2004 bearing outward No.13/2005. On perusal of the said appointment order exh.B (page 36 of the memo), it appears that, respondent no.1 was appointed on temporary basis for the period of 1.12.2004 to 30.10.2005. Learned

Presiding Officer of the School Tribunal has also observed that the post of B.P.Ed. holder candidate was not at all a sanctioned available post and in view of the same, respondent no.1 would not have been appointed against the post of Physical Education Teacher for want of post as a Physical Education teacher. In paragraph no.12 of the impugned judgment and order, the learned Presiding Officer of the School Tribunal has made following observations :-

“12. The next point which required to be taken into consideration is that the appellant specifically came with a case that he was not appointed against the post of Physical Education teacher, but he was appointed on the post of Assistant Teacher under the category of Trained Graduate Teacher. It is his case that so far as this post is concerned he was untrained teacher and after the appointment in the school, he underwent the training course of B.Ed., through the respondent no.2, with the permission of the Sanstha.”

11. The learned Presiding Officer of the School Tribunal in paragraph nos.15 and 16 of the judgment has referred the staffing pattern of sanctioned five posts

of teachers out of which one was of the Headmaster and four posts were of the Assistant Teachers and observed that though, it was taken that there was no clear, vacant and sanctioned post available for the Physical Instructor, but, there was a clear, vacant permanent post available for the post of Assistant Teacher under the category of Trained Graduate Teacher, i.e. person holding B.Ed qualification. In the backdrop of these observations and also by giving weightage to the undertaking given by the then Headmaster, the learned Presiding Officer of the School Tribunal held that respondent no.1 was appointed after following due procedure of law against clear, vacant, sanctioned and approved post and accordingly answered the point no.2 in the affirmative.

12. In a case of ***Ramkrishna Chavan & others*** ***[supra]*** relied upon by the learned counsel for the petitioners, the larger Bench was constituted under the orders of the Honourable Chief Justice to answer the following question :-

“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 appointment has been made in a temporary capacity?”

13. In the case cited above, the writ petitioner possesses M.A. B.Ed. degrees and he was fully qualified to teach in secondary school. The initial appointment order indicated that he was appointed only for the academic year, though the appointment was against a clear, open and permanent vacancy. The larger Bench of this Court on referring the provisions of section 5 of the Act of 1977, and rule 9 and 10 of the Rules, 1981 in paragraph nos.15, 16 and 24 of the Judgment has made following observations :-

15. We may now turn to Sub-section (2) of Section 5 of the Act, which is the core provision for answering the controversy. No doubt, the opening sentence of this provision gives an impression that every person,

appointed to fill a permanent vacancy, shall be on probation for a period of two years. However, this provision cannot be construed as taking away the implicit power of the Management to make a contractual employment while making a regular permanent appointment. This provision is only an enabling provision that if the Management intends to fill a permanent vacancy, has to appoint a person duly qualified on probation for a period of two years. This part of Sub-section (2), cannot be construed as a deeming provision or a legal fiction to treat every appointment made against a permanent vacancy must be on probation, notwithstanding the express terms contained in the appointment order that the appointment is contractual and temporary basis for a limited period. The deeming provision or legal fiction is found in the second part of Sub-section (2). That applies to a person, who, in fact, has been appointed on probation and completes probation period of two years. That person is deemed to have been confirmed. The second part of this sub-section cannot come to the aid of an employee who was in fact appointed on purely temporary basis for a limited period.

16. The question is, whether the Management has unbridled power and authority to appoint a duly qualified person on temporary basis against a permanent vacancy? As aforesaid, the Management is, primarily, under an obligation, in law, by virtue of Section 5(1), to fill in the permanent vacancy as soon as possible. To wit, if a permanent vacancy is caused by any reason, before the commencement of the new academic year, the Management must take immediate steps to fill in that vacancy, by appointing a duly qualified person, after following the prescribed procedure, on probation, for a period of two years. That means, the selection process must be held to, as far as possible, culminate with selection of a duly qualified person, before the commencement of the new academic year. However, for some fortuitous or tangible reason, such selection process cannot be commenced or for that matter completed, there would be nothing wrong if the Management were to appoint a duly qualified person on contractual or temporary basis, for a limited duration, so that, in the mean time,

the prescribed procedure to select a duly qualified person, to fill in the permanent vacancy is completed and the selected person can be appointed on probation, against the permanent vacancy. There may be situation where the Management makes efforts in right earnest to complete the selection process but, at the end of the process, it is confronted with a situation where the person who participated in the selection process, though duly qualified, in its perception is not suitable for appointment. In that event, it can certainly make an appointment on contractual or temporary basis, for a limited duration, so that new selection process can be commenced and concluded within a reasonable time.

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24. The other legal principle, which is indisputable, is that, if the parties accept the terms and conditions stipulated in the appointment order, later on, it is not open to the employee to challenge that appointment, being contrary to the Rules or on the ground that the terms and conditions stipulated therein were not legally valid. This legal position is restated in para 8 of Kalpataru Vidya Samasthe (supra). In the facts of the present case, it is noticed that the initial appointment of the Writ Petitioner, in the leading Writ Petition, was on temporary basis for a limited period. After his service was terminated, once again he was appointed in the following academic year, on the same post but, on temporary basis. When the said Petitioner was appointed in the succeeding academic years, he had become fully aware about the terms and conditions of his initial appointment, yet he continued to be in the employment, without any demurer. Suffice it to observe that if the appointment order mentions that the appointment is on temporary basis or for a limited period, it is not open to the employee to assume that he was appointed on probation against permanent vacancy, nor it is open to the School Tribunal or the Court of law to assume that fact. That is a question of fact to be pleaded and proved in appropriate proceedings, on case to case

basis. We hold 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.”

14. The larger Bench of this Court accordingly answered the issue in the negative and held that it is not open to the School Tribunal to assume as of 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 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.

15. In a case of **Priyadarshini Education Trust & Ors.** (supra) relied upon by the learned counsel for the petitioners, the Division Bench of this Court, in paragraph nos. 9, 10 and 12, has made following observations :-

9. The gist of various cases relied upon by both the counsel can be drawn as under :-

In order to claim benefit of deemed permanency,

a teacher must be duly selected, he must be appointed in clear permanent vacancy, his appointment must not be for a fixed/limited period, and preferably it ought to indicate that the appointment is on probation. If and only if these conditions are fulfilled, a teacher will be able to claim deemed permanency on completion of service of two years from the date of appointment on probation or at least by an appointment fulfilling all above conditions, even though the order may not specifically indicate that he is appointed on probation.

In the matter at hands, it is the claim of the teacher that she was appointed on probation and for that purpose, she has relied upon order dated 13.6.1992 at Exhibit D, although it is her claim that she is in continuous service since 1987. According to the management, the order is not an order regarding appointment on probation, but the same is an order of appointment purely on temporary basis for one academic year. It is also a question of debate whether the teacher was "duly appointed."

In order to demonstrate that the order was regarding appointment for a fixed period and also for claiming that it was an appointment on probation, both the learned Advocates have placed reliance upon Exhibit D. Advocate Shri Salunke for the appellant has pointed out that the order clearly indicates that it was for academic year 1992-93 and it does contain a clause that on expiry of the said period, the services of the teacher shall stand terminated without requiring any notice. As against this, Advocate Shri Kazi pointed out that clause in the order pertaining to appointment on probation, which is in the form as prescribed by schedule D, is not scored out and, therefore, it must be said that the appointment was on probation for a period of two years. As Advocate Shri Salunke pointed out that if the appointment was on probation, the teacher would not have accepted fresh order at the beginning of each academic year, Advocate Shri Kazi replied that no Page 1678 fresh appointment order was issued for academic year 1993-94 and, therefore, order

dated 13.6.1992 must be taken as an order of appointment on probation. Shri Kazi has also relied upon other documents, such as, experience certificate issued sometime in the year 1988 and also a certificate, indicating the management having accorded no objection to the teacher going for B. Ed. course and details regarding salary which indicate the teacher having been permitted to draw an increment.

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

10. Section 5, Sub-section (2), on the basis of which deemed permanency and, therefore, irregularity in the removal, is pleaded, and Sub-section (1) of the said Section which is required to be referred for the purpose of determining whether the teacher was "duly appointed", may usefully be reproduced herein below, including proviso to Sub-section (1). ". 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 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.

It is evident that, Sub-section (1) contains a clause, "...fill in, in the manner prescribed, every permanent vacancy in a private school..." . It is thus, evident that there is some manner prescribed and every permanent vacancy is required to be filled in by following the prescribed method. In fact, on reference to the proviso, it is evident that no appointment in a permanent Page 1679 vacancy will be without previous intimation to the Educational Inspector, Greater Bombay in the metropolitan city and to the Education Officer, Zilla Parishad, in other area of the State. The school is required to make a reference to the authorities concerned, before filling in any permanent vacancy, so that the persons declared surplus elsewhere, of which the account is required to be kept by the Education Officer, can be accommodated first.

Although Rule 28 of MEPS Rules was repeatedly relied upon by learned Advocate Shri Kazi for the teacher, we are of a considered view that, the said rule is not required to be considered for the purpose of present matter, in the light of factual claims by the parties. Relevant portion of Rule 28(1) reads thus;

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 calender month's notice

or by paying one month's salary (pay and allowances, if any) in lieu of notice.

It must be remembered that the teacher has come with a case that she was appointed on probation. If such an argument can be upheld, the teacher does not require assistance of Rule 28. If such a contention is not upheld, it is the claim of the management that she was appointed for a limited period and her appointment came to an end by efflux of time, on expiry of period for which she was appointed and the management is well supported in claiming that in such a case, notice under Section 28 (1) is not required, by the judgment of this Court in the matter of A.P. College v. Smt. Pramila Kutti 1997 (3) Mh.L.J. (supra).

Rule 9 of the MEPS Rules, is regarding appointment of staff. For the purpose of matter before us, we may reproduce Sub-rules 2, 3 and 8 of Rule 9 which read thus;

9. Appointment of staff: (1) xxxxxxxxxxxx (2) Appointments of teaching staff (other than the Head and Assistant Head) and those of non-teaching staff in a school shall be made by the School Committee;

Provided that, appointments in leave vacancies of a short duration not exceeding three months, may be made by the Head, if so authorized by the School Committee.

(3). Unless otherwise provided in these rules for every appointment to be made in a school, for a teaching or a non teaching post, the candidates eligible for appointment and desirous of applying for such post shall make an application in writing giving full details regarding name, address, date of birth, educational and professional qualifications, experience etc., attaching true copies of the original certificates. It shall not be necessary for candidates other than those belonging to the various sections of backward communities for whom posts are reserved under Sub-rule (7) to state their castes in their applications.

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8. For the purpose of filling up the vacancies reserved under Sub-rule (7) the Management shall advertise the vacancies in at least one newspaper having wide circulation in the region and also notify the vacancies to the Employment Exchange of the District and to the District Social Welfare Officer [and to the associations or organizations of persons belonging to Backward Classes, by whatever names such associations or organizations are called and which are recognized by Government for the purpose of this Sub-rule] requisitioning the names of qualified personnel, if any, registered with them. If it is not possible to fill in the reserved post from amongst candidates, if any, who have applied in response to the advertisement or whose names are recommended by the Employment Exchange or the District Social Welfare Officer [or such associations or organizations as aforesaid] or if no such names are recommended by the Employment Exchange or the District Social Officer [or such associations or organizations as aforesaid] within a period of one month, the Management may proceed to fill up the reserved post in accordance with the provisions of Sub-rule (9).

The constitution of school committee referred in Sub-rule 2 of Rule 9 is as provided in schedule A. It consists of four representatives of management, including president or his nominee to be the chairman, a member from amongst the permanent teachers and any member from amongst the non-teaching staff.

While referring to all these provisions of the Act and rules, we must remind ourselves the purpose in legislating the Act, which we find place in its preamble which reads;

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 to the pupils and their guardians in particular, and the institution and society in general, effectively and efficiently....

It is thus evident that one of the purposes for enacting MEPS (Conditions of service) [Regulation Act](#), is to regulate the recruitment and, therefore, the provisions either of the Act or Rules relating to recruitment/appointment must be read as a provisions enabling the State to control the actions of the private schools in that region.

12. In the matter of [Narendra Kumar v. State of Haryana](#) , which was a case of an employee physically incapacitated due to disease, while directing his absorption in another suitable post, the Hon'ble the Supreme Court has observed that [Article 21](#) protects the right to livelihood as the integral facet of right to life.

In the matter of [All India Statutory Corporation and Ors. v. United Labour Union and Ors.](#) , following observations Page 1683 regarding right to work in the light of [Article 21](#) read with [Article 14](#) of the Constitution find place in paragraph 50 of the judgment.

All essential facilities and opportunities to the poor people are fundamental means to development, to live with minimum comforts, food, shelter, clothing and health. Due to economic constraints, though right to work was not declared as a fundamental right, right to work of workman, lower class, middle class and poor people is a means to development and source to earn livelihood. Though, right to employment cannot, as a right, be claimed but after the appointment to a post or an office, be it under the State, its agency, instrumentality, juristic person or private entrepreneur, it is required to be dealt with as per public element and to act in public interest assuring equality, which is a genus of [Article 14](#) and all other concomitant rights emanating therefrom are

species to make their right to life and dignity of person real and meaningful.

The observations speak about right to employment, even as against private entrepreneur and not only regarding public employment. The fundamental rights guaranteed by Articles 14 and 16 cannot be denied to the citizens even by the private entrepreneur.

We are tempted to borrow the observations of the Apex Court in the matter of [Olga Tellis v. Bombay Municipal Corporation](#) , which are borrowed in [Delhi Transport Corporation v. D.T.C. Mazdoor Congress](#) , which are to the following effect.

[In Olga Tellis v. Bombay Municipal Corporation](#) pages 193-94, this Court further laid that an equally important facet of the right to life is the right to livelihood because no person can live without the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.... That, which alone can make it possible to live, leave aside which makes life liveable, must be deemed to be an integral component of the right to life.... The motive force which propels their desertion of their hearths and homes in the village is the struggle for survival, that is the struggle for life. So unimpeachable is the nexus between life and the means of livelihood. Right to life does not only mean physical existence but includes basic human dignity.

In the same paragraph 239 of the judgment in the matter of Delhi Transport Corporation, observations of the Hon'ble Chinnappa Reddy, J. in the matter of [State of Maharashtra v. Chander Bhan](#) (1983) 3 SCR 387 are also borrowed which read thus.

Public employment opportunity is a national wealth in which all citizens are equally entitled to share and Varadarajan, J. held that public employment is the property of the nation which has to be shared equally.

Page 1684 Lastly, we may refer to some observations of the Hon'ble Apex Court in the matter of [Secretary, State of Karnataka v. Umadevi](#) . We are referring these observations, which remind us of keeping in mind the interest of all citizens and equality guaranteed by Articles 14 and 16 i.e. equality before the law/equal protection of law and equality of opportunity in the matter of public employment. The observations also provide an answer to possible argument that the management is at fault in not appointing the teacher in the due manner and after having served for number of years, it is desirable that the teacher should be protected, because MEPS Act is enacted also for the purpose of providing security and stability of service to the teachers. The Hon'ble Apex Court has observed thus, in paragraph 51 of the judgment;

In the name of individualizing justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens.

In spite of rejecting the argument that right to life protected by [Article 21](#) of the Constitution would include right to employment, the Supreme Court observed that it will be more consistent with that policy, if the courts recognize that an appointment to a post in government service, or in the service of its instrumentality can only be by way of proper selection in the manner recognized by the relevant legislation in the context of relevant provisions of the Constitution.

In para 5 of the reported judgment, the Supreme Court has observed;

...Equality for the handful of people who have approached the court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for

competing for employment ? When one side of the coin is considered, the other side of the coin has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the constitutional scheme, certainly tend to water down the constitutional requirements.

Helplessness of the person, who accepted the employment/engagement by irregular means, or of temporary nature, because he is not in a position to bargain and the claims, therefore, either for regularization or permanency, are dealt with as under, by observations in paragraph 45.

It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain-not at arm's length- since he might have been Page 1685 searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently.

By doing so, it will be creating another mode of public appointment which is not permissible.

The judgment in the reported matter opens with following observations in paragraph 2;

Public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated as equals.

No doubt, the observations borrowed by us from the matter of Umadevi (supra), as also [Article 16](#), speak about employment or appointment to any office under the State or its instrumentality. When we drew attention of learned Advocate Shri Kazi for the teacher to the observations of the Supreme Court in Umadevi's case, he could have argued that the management is neither "State" nor "instrumentality of State". However, it cannot be ignored that the school is a grant-in-aid school and, therefore, as is the practice in the State, it must be receiving entire amounts required for paying salaries and allowances to the teaching and non-teaching staff, by way of grants. It must also be enjoying non-salary grants. Although under the scheme in vogue in the State, the management is required to run the school without grant-in-aid for first three years and grants start flowing thereafter, initially 25 per cent, then 50 per cent, 75 per cent and thereafter 100 per cent, it may not be out of place to say here that after about 7 to 8 years since commencement of the school, financial assistance of the State by way of salary and non salary grants is so much that, it nearly meets almost entire expenditure. By virtue of Articles 41 and 45, as contained in the chapter for directive principles of State policy, it is the responsibility of the State to endeavor to provide free and compulsory education for all children until they complete the age of 14 years and make effective provision for securing right to education, although subject to financial constraints. It cannot be denied that as a social welfare State, it would be the responsibility of the State to ensure sufficient means for imparting proper education to children of all age groups and, therefore, to some extent, it must be said; the school performs function of public interest and shares responsibility, which is the responsibility of the State. Since the grant-in-aid is released by the State, the State exercises some control for ensuring proper utilization of grants by the management, although not very deep and pervasive. In view of these elements, even if an educational institution may not be "State", or "instrumentality of State" or "other authority" as

contemplated by [Article 12](#) of the Constitution, it will not be in a position to act as an autonomous body, having no responsibility to ensure protection of fundamental rights conferred by [Article 14](#) and [16](#) upon the citizens. The educational institutions shall not be able to treat themselves at par with private employer who pays salaries and allowances from his own pockets, even when initially the school is being run by the management with its own expenses, but in anticipation of receipt of grants-in-aid from 4th academic year as per permission to run the school is granted. In view of the provisions as contained in Section 5 of the MEPS Act and Rule 9 of MEPS Rules read with Articles 14 and 16 of the Constitution and the observations of the Hon'ble Apex Court in the reported judgment which guide us, we draw following conclusions;

(i). "duly appointed, in the manner prescribed" would be an appointment of a person who is eligible (qualified for the post) for appointment, who is selected by due process of selection i.e. by competition amongst all eligible and desirous candidates, and who is appointed on a permanent vacant post. In other words, inviting applications, as also holding of screening tests, enabling all eligible and desirous candidates to compete for selection and appointment, is a must.

(ii). Once an eligible candidate (duly qualified as required) is selected by selection process as above, for filling in a permanent vacancy, there is no option for the management and it is obligatory on it to appoint such person on probation for a period of two years. It is neither open for the management to appoint him for one academic year or any period shorter than two years probation period, nor it is open for Education Officer to grant approval for such shorter period. (in fact, in view of requirement as in Clause (i) above, the process of grant of approval by Education Officer should begin with examination of selection process and its validity.)

(iii). The candidate thus selected with due process and appointed on probation shall enjoy statues of deemed permanency on completion of

two years, unless extension of probation is informed, or termination is ordered.

(iv). The appointment of a person not belonging to reserved category, in a post reserved for a particular category, because the candidate of that category is not available, shall be absolutely temporary and on an year to year basis, governed by Sub-rule (9) of Rule (9), although in a permanent vacancy.

16. In a case **Sanjay Lalbahadur Divedi** (supra), relied upon by the learned counsel for the petitioners, this Court (Coram:B.P. Dharmadhikari, J.) in paragraph no.18 of the Judgment has made following observations :-

“18. From above discussion it follows that the government resolutions mentioned above and produced on record by petitioner Santoshkumar and relied upon by all three petitioners can not modify the legislative mandate. They can not claim any right to post and reinstatement by virtue thereof. Only concession made in their favour appears to be a separate quota for admission to that course and facility of in-service training. But then due to mandate of S. 5 of 1977 Act permanent vacancy with institution is liable to be filled in at the earliest by appointing qualified/trained person and by putting him on probation. Such permanent arrangement at the earliest is in the interest of students and ultimately the educational goals of State administration. Trained qualified teachers become available every year and keeping some of them out because some person appointed by way of concession is getting himself trained will not only be arbitrary but also loss of talent to Nation and will amount to failure to put the expertize to its due use. It may also be discriminatory. Therefore only legislature prescribed year to year appointment of

candidates like petitioners with express mandate of replacing the untrained teacher by trained one as soon as possible. Rule 6 of 1981 Rules as applicable here does not prescribe any time limit and does not protect services of untrained teacher. He, in his own interest, has to procure that qualification as early as possible & at his own cost. When permanent vacancy can be filled in through open competitive selections in which all eligible i.e. trained graduate aspirants must participate, untrained teachers getting appointment as a concession can not defeat that process by claiming any exemption from it. Management has to advertise the vacancy with it every year to find out whether trained teacher becomes available or not. Untrained teacher appointed on year to year basis has to apply in response to it and only when the duly qualified teacher does not surface, he can be selected. His/Their appointment is year to year and till the post is not filled in permanently through a duly selected trained teacher, they have no option but to face such selections. Even after acquiring training qualification, for their permanent selections and appointment on probation, they have to compete with others. After getting B.Ed. qualification, Legislation does not permit them to avoid competition with trained teachers when post is sought to be filled in permanently. In service training facility does not confer any precedence in their favour.

17. In the instant case, respondent no.1 was appointed as an untrained teacher on temporary basis for a specific period. The learned Presiding Officer of the School Tribunal held that respondent no.1 would be deemed to be on probation within the meaning of Section 5 (2) of the Act of 1977 on the ground that the

appointment was made against a clear and permanent vacancy ignoring the letter of appointment which specifically stipulated that the appointment of respondent no.1 has been made in a temporary capacity. In view of the ratio laid down by the larger Bench in a case of ***Ramkrishna Chauhan and others*** (supra), it is not open to the employee to assume that he was appointed on probation against permanent vacancy, nor it is open to the School Tribunal or the Court of law to assume that fact. 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. In such a contingency, the so called undertaking given by the then Head Master in favour of respondent no.1 would not be helpful to respondent no.1 and even after acquiring training qualification, respondent no.1 has to compete with others for his permanent selection and appointment on probation.

18. The learned counsel for respondent no.1 has placed his reliance on judgments in cases of i] *Shikshan*

Prasarak Mandal vs Presiding Officer, School Tribunal and Anr., decided on 03.05.2005 (supra) and ii] *Yogeshwar Vikas Sanstha & Ors. vs Rajendra T. Shinde*, decided on 13.9.2007 (supra) wherein this court held that merely because the appointment order uses the word 'temporary' or provides for automatic termination, it does not become a temporary appointment. What is required to be noticed is the character of such an appointment; whether the appointment has been made against a clear permanent vacancy or not. The use of the word "temporary" does not indicate that appointment is in fact a temporary appointment in terms of the rules 10 of the MEPS Rules, and therefore, such an appointment is to be viewed as an appointment on probation. However, in view of the ratio laid down by the larger Bench in a case of Ramkrishna Chavan and others Vs. Seth D.M.High School and others (supra), while answering the issue referred, observations made in the aforesaid cited case now cannot be made applicable to the present case. Further, the ratio laid down by this Court in Trimurti Balak Mandir Shikshan Sanstha and others Vs. Vithabai Bhikan Desale and

others (supra) and Hindi Vidya Bhavan, Mumbai and others Vs. Presiding Officer, School Tribunal Mumbai and others reported in 2007 (6) Mh.L.J. 563, cannot be made applicable to the facts and circumstances of the present case.

19. In view of the above discussion, in my considered opinion, the impugned judgment and order passed by the learned Presiding Officer of the School Tribunal, Aurangabad dated 8.3.2007 in Appeal no.28/2009 is not sustainable and the same is liable to be quashed and set aside. Hence, following order.

O R D E R

I. Writ Petition is hereby allowed.

II. The impugned judgment and order of the School Tribunal dated 8.3.2007 passed in appeal no.28/2009 is hereby quashed and set aside to the extent of reinstatement of the respondent no.1 as Assistant Teacher in the school namely Ayesha Urdu High School, Tembhorni, Tq. Jafrabad, District. Jalna.

III. In the circumstances, there shall be no order as to costs.

IV. Writ Petition is accordingly disposed of.

(V.K. JADHAV, J.)

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aaa/-