

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

WRIT PETITION NO.6960 OF 2018

1. Maulana Azad Educational Trust,
Dr. Rafiq Zakaria Campus
Rauza Baugh, Aurangabad,
Through its President.
2. Model High School,
Navkhanda, Jubileepark
Taluka and District Aurangabad,
Through its In-charge Head Mistress. ... **Petitioners**

Versus

1. Syeda Amera Bano
Age 23 years, Occu. : Nil,
R/o Shaha Bazar, Behind Nashan,
Aurangabad.
2. The Education Officer,
(Primary) Zilla Parishad,
Taluka and District Aurangabad. ... **Respondents**

WITH

WRIT PETITION NO.6994 OF 2018

1. Maulana Azad Educational Trust,
Dr. Rafiq Zakaria Campus
Rauza Baugh, Aurangabad,
Through its President.
2. Model High School,
Navkhanda, Jubileepark
Taluka and District Aurangabad,
Through its In-charge Head Mistress. ... **Petitioners**

Versus

1. Mrs. Shaikh Meraj Bashir,
Age 27 years, Occu. : Nil,

R/o Mill Corner, Kotwal Pura,
Aurangabad.

2. The Education Officer,
(Primary) Zilla Parishad,
Taluka and District Aurangabad.
(*R.No.2 – Deleted*)

... **Respondents**

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Mr. A. N. Kakade, Advocate for Petitioners.

Mr. Vijay V. Deshmukh, Advocate for Respondent No.1.

Mr. A.N.Sayed Deshmukh, Advocate for Respondent No.2.

(Respondent No.2 deleted in WP/6994/2018 as per Hon'ble
Court order dated 03.12.2019.)

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CORAM : V. K. JADHAV, J.

RESERVED ON : 03.12.2019.

PRONOUNCED ON : 27.04.2020

JUDGMENT :-

1. Heard finally with consent at admission stage.

2. In both writ petitions the petitioner-Maulana Azad Educational Trust is challenging the judgment and order passed by the School Tribunal, Aurangabad dated 23.04.2018 in two separate appeals preferred by the respondents-employee. By impugned order dated 23.04.2018, in Appeal No.17 of 2017, the School Tribunal, Aurangabad allowed the appeal, quashed and set aside the oral or otherwise

termination dated 15.06.2017 and directed the petitioners to reinstate the appellant (respondent herein) in service within 40 days from the date of the order with the further direction that the appellant is entitled for 50 % of the back wages and arrears of salary from the date of oral or otherwise termination till the reinstatement along with all the consequential benefits, as prayed.

3. Being aggrieved by the same, the petitioner-Maulana Azad Educational Trust has preferred writ petition No.6960 of 2018 and being aggrieved by the judgment and order passed by the School Tribunal in appeal No.18 of 2017 preferred writ petition No.6994 of 2018.

4. Brief facts giving rise to the present writ petitions are as follows :

According to respondent No.1 in writ petition No.6960 of 2018, she has completed her H.Sc., D.Ed in the year 2014 and accordingly she had applied with the petitioners-institution for the post of Assistant Teacher. On 19.06.2014 after completing all the necessary formalities, respondent No.1 came to be appointed as Assistant Teacher (Primary) in petitioner

No.2-School on clear, vacant and permanent post, after following due procedure of law. It is further the case of respondent No.1 that despite her appointment as an Assistant Teacher after following due procedure of law, no appointment order came to be issued in her favour. It is the case of respondent No.1 / original appellant that from 19.06.2014 she was working continuously and without any break till the date of oral termination of her services till 15.06.2017. Her request for continuation in service was turned down by the petitioners time-to-time. Respondent No.1 therefore, constrained to challenge the order of oral and otherwise termination dated 15.06.2017 by filing an appeal No.17 of 2017 before the School Tribunal, Aurangabad Region, Aurangabad.

5. In writ petition No.6994 of 2018 respondent No.1 had also approached the School Tribunal by preferring appeal No.18 of 2017 with similar allegations against petitioners-Educational Trust. Respondent No.1 had completed her D.Ed. in the year 2012. She was appointed as Assistant Teacher by the petitioners on 15.06.2012 on clear, vacant and permanent post. It is also the case of respondent No.1-original appellant that she had continuously worked in the school without any

break till the date of oral termination of her services i.e. on 15.06.2017. She was constrained to approach the Tribunal by filing the aforesaid appeal No.18 of 2017.

6. In both the appeal the petitioners herein have put their appearance and resisted the appeals by filing reply-cum-written statement. According to the respondents, the services of the appellants were on temporary basis and it has come to an end of their respective academic years. According to them, there was no vacant post of assistant teacher and as such no advertisement was published, interviews were also not conducted and no permission from the Education Department was obtained. The appellants were appointed on temporary basis for one academic year. Thus, there is no question of issuing any appointment order.

7. In both the appeals, the learned Presiding Officer-School Tribunal, Aurangabad Region, Aurangabad by two separate orders in these two appeals dated 23.04.2018 allowed both the appeals, quashed and set aside the termination order dated 15.06.2017 in respect of both the appellants and thereby directed the petitioners herein to reinstate the respondent-

original appellants in service with 50 % of the back wages, arrears of salary from the date of oral or otherwise termination of the salary till the reinstatement along with all consequential benefits, as prayed. Hence, these two writ petitions.

8. The learned counsel for the petitioners submits that petitioner No.2-School is being granted permission on permanent non grant in aid basis. The school is having classes from 1st to 10th standard. As per the strength, sufficient staff being appointed on a permanent basis. The learned counsel submits that respondent No.1, in both the writ petitions, came to be appointed on temporary basis merely to assist the permanent teachers and to get the experience of teaching. The learned counsel submits that every year the list of the staff approval is sent to the Education Officer by petitioner No.2 and the name of respondent No.1 does not appear in the said list as she was appointed on temporary basis. The learned counsel submits that the petitioner-Educational Trust has started the school with an intention to provide good quality education to the downtrodden students from minority community and the institution runs the said school on meager fees. Even the management pays the salaries from their own funds. The

learned counsel submits that the findings recorded by the School Tribunal was totally perverse. It is for the respondent-original appellant to discharge the burden by producing on record the documents denoting her appointment as a legal, proper and through selection committee after following due procedure of law. Even the Education Officer has not approved the services of respondent No.1-original appellant. The learned counsel submits that it is also incorrect that respondent No.1 - original appellants were working continuously without any break till 15.06.2017. In every academic year after giving a break of 45 days or so on the respondent-original appellants came to be appointed afresh for the next academic year. The learned counsel submits that the last appointment for the academic year 2016-2017 came to an end in the month of April 2017 and the contribution of Provident Fund was rightly paid to them till April 2017. The learned counsel submits that as the respondents were not appointed on permanent basis, there is no question to pay the salary as per the scale of Assistant Teacher. The learned counsel submits that it is incorrect and false that both the respondents-original appellants acquired the status of deemed permanency after completion of probation of

two years from their initial appointment. It is well settled principle of law that back door entry is not permissible in the service. The appointment of the permanent employee has to be made by issuing advertisement with prior approval from the Education Officer and after conducting the interview and giving an opportunity to all similarly situated candidates to compete with. Therefore, mere temporary appointments issued on year to year basis, does not create any right to claim the status of permanency. Moreover, this Court in case of *Priyadarshini Education Trust and others Vs. Ratis (Rafia) Bano d/o Abdul Rasheed and others* reported in **2007 (6) Bom.C.R.79** held that, while making appointments, there is no back door entry. The appointment must not be for a fixed / limited period, and preferably it ought to indicate that the appointment is on probation, merely because the employee occupied a clear vacancy, that will not entitle her to claim deemed permanency. The learned counsel submits that in view of the facts and circumstances of the present case, the writ petitions may be allowed and the appeals may kindly be dismissed.

9. The learned counsel for the petitioners in order to substantiate his contention placed his reliance on following cases :

- (a) Priyadarshini Education Trust and others Vs. Ratis (Rafia) Bano d/o Abdul Rasheed and others reported in 2007 (6) Bom.C.R.79 .
- (b) Nagnath Devidasrao Padhye ; Balaji Bhimrao Tidke Vs. State of Maharashtra ; The Director ; The Dean ; The Secretary reported in 2017 (12) CPMH 67.
- (c) The State of Bihar and others Vs. Kirti Narayan Prasad reported in 2018 (11) CPSC 52.
- (d) Narendra Chandra etc. Vs. State of Jharkhand and others reported in 2008 (1) SCC 798.
- (e) T.M.A.Pai Foundation and others Vs. State of Karnataka and others, in Writ Petition (Civil) 317 of 1993, Supreme Court of India, dated 31.10.2002.

10. The learned counsel for the respondents-employees submits that the School Tribunal has rightly allowed both the appeals. There is no substance in both the writ petitions and both the writ petitions are liable to be dismissed. The learned counsel submits that the respondents-teachers working in the

petitioner's minority unaided school for three years and five years, respectively. The learned counsel submits that so far as respondent No.1 in writ petition No.6960 of 2018 is concerned, she was appointed on 19.06.2014 and thereafter she had continuously worked in the petitioner No.2-School without any break till the date of oral termination on 15.06.2017. The learned counsel submits that both the respondents in these two writ petitions have served for more than two years and therefore they have acquired the status of deemed permanency. The learned counsel submits that the petitioner-Educational Trust enjoying the minority status and as such having a free hand in making the appointments to the teaching and non teaching staff. The petitioner-management is not required to approach any statutory authority for creation of posts. It gives freedom to the petitioner-management to appoint teachers as per the requirement according to its own staffing pattern. The learned counsel submits that the contention of the petitioner-management that there was no vacant position is purely aimed to frustrate the claim of the respondents. It is the modus operandi of the petitioner-management in engaging the teachers for one or two academic

years and disengaging them after that academic year is over, so as to pave way for appointment of fresh teachers on temporary basis.

11. The learned counsel for the respondents in order to substantiate his contention placed his reliance on the following cases :

- (a) Ramkrishna Chauhan & others Vs. Seth D.M.High School and others reported in 2013(2) Bom.C.R. 481.
- (b) St. Ulai High School, through its Principal and another Vs. Devendraprasad Jagannath Singh and another reported in 2007 (1) Bom.C.R. 540.
- (c) Maulana Azad Educational Trust and others Vs. Uzma Khanam Mirza Mion Ullah Baig and another reported in 2016 (2) Bom.C.R. 747.
- (d) Yogeshwar Vikas Sanstha and others Vs. Rajendra T. Shinde and another reported in 2007 (6) Mh.L.J. 698.
- (e) Hindi Vidya Bhavan, Mumbai and others Vs. Presiding Officer, School Tribunal, Mumbai and others reported in 2007 (6) Mh.L.J. 563.

- (f) Trimurti Balak Mandir Shikshan Sanstha and another
Vs. Vithabai Bhikan Desale and others reported in
2017 (2) Bom.C.R.672.

12. In the instant cases, the petitioner-management submits that the respondents-assistant teachers came to be appointed on temporary basis time-to-time by giving the sufficient break and as such they are not acquired the status of deemed permanency. Per contra, it is the case of the respondents-assistant teachers that after following due procedure, they came to be appointed as assistant teachers, they possessed the requisite qualification to be appointed as assistant teacher (primary). It is also their case that they have continuously rendered their services as assistant teacher without any break for more than two years.

13. In case of an unaided minority educational institution, it is well settled that the regulatory measure or control should be minimal and in the matter of day-to-day Management, like appointment of staff, teaching and non teaching and administrative control over them, the Management should have the freedom and there should not be any external controlling agency. However, a rational procedure for selection

of teaching staff has to be evolved by the management itself. In the instant case, it appears that the petitioner-management has appointed the employees after following due procedure. It further appears from the evidence that even the Management has conducted the interviews and these two respondents-assistant teachers after competing with others came to be selected as assistant teachers. It is the modus operandi of the petitioner-management to give temporary appointments on record even though such assistant teachers have continuously rendered the services as an assistant teacher. It further appears that the break in service has been shown on record to avoid the future complications.

14. In a case of *Priyadarshini Education Trust* (*supra*) relied upon by the learned counsel for the petitioners, the Division Bench of this Court in paragraph No.14 has made the following observations :

"14. Learned Single Judge has found the judgment of the tribunal to be not sustainable, because he was of the view that the fact of subsequent selection of teachers from the candidates in response to advertisement issued in June 1994 and June 1995, has impressed the tribunal and the tribunal did not give consideration to the fact that the petitioner-teacher has continuously worked for more than

two years in a clear permanent vacancy. Learned Single Judge felt compelled to draw adverse inference against the management, because it did not produce service record of the teacher in spite of directions. We have demonstrated from the contents of the petition that there is no service record prior to 1992 and the appointment order dated 13.06.1992 is produced by the petitioner-teacher. It cannot be forgotten that the teacher having approached the court, initial burden of proof lies on the petitioner. Adverse inference, as drawn by learned Single Judge, could have been justified, only after satisfaction that the petitioner has discharged initial burden. The appointment order in the custody of the petitioner is the primary evidence and unless she could have made out a case of having acquired right to lead secondary evidence, neither management could have been invited to produce the document, nor any adverse inference could be drawn against it. Appointment order is a document, original of which ought to be in the custody of the candidate appointed. We are, therefore, unable to concur with the learned Single Judge that non-production of the documents by the management can provide a key for success to the teacher-petitioner."

15. In the instant case, the initial burden of proof on the respondent assistant teacher has been discharged as it is not disputed by the petitioner-management about their appointment as an assistant teacher. Even in view of the ratio laid down by Division Bench of this Court, the adverse inference is liable to be drawn against the petitioner-management. In the instant case, though respondent-assistant

teachers came to be appointed as claimed by the petitioner-management, those appointment orders are not placed on record nor the relevant record to indicate that after giving break in service the fresh appointment came to be issued time-to-time. Furthermore, these particular matters pertains to the petitioner-minority institution and as such it was incumbent upon the management to place on record the relevant documents to substantiate his contention. In absence of that the learned Presiding Officer has rightly drawn the adverse inference.

16. In a case of ***The State of Bihar*** (*supra*) relied upon by the learned counsel for the petitioners, it is held that once an order of appointment itself had been bad at the time of initial appointment, it cannot be sanctified at a later stage. Facts of the case cited altogether different and cannot be made applicable to the facts and circumstances of the present case.

17. In a case of ***Maulala Azad Educational Trust*** (*supra*) relied upon by the learned counsel for respondent No.1-assistant teacher wherein this Court (Coram : Ravindra V. Ghuge, J.) in the petition filed by the same petitioner-

institution in the identical facts held that setting aside of order of termination of the respondent-teacher is proper. In paragraph No.27 and 28 has made the following observations :

"27. The petitioner has strenuously canvassed that there are no permanent vacant posts. Mere denial is not to be accepted as gospel truth. The petitioner is sure of the number of permanent teaching staff positions available with it. It was not precluded from bringing before the School Tribunal or even before this court as to how many permanent positions do they have and as to how many permanent positions have been filled in."

"28. As such, being an unaided institution and that too enjoying the minority status under the statute, rendering the petitioner a free hand in making appointments to the teaching and non teaching staff, leads to the conclusion that the petitioner/Management is not required to look to any statutory authority for creation of posts. Considering the number of strength of it's students and recognition obtained for imparting education to particular standards, gives freedom to the petitioner/Management to appoint teachers as may be required according to it's own staffing pattern. The contention of the petitioner/Management that there was no vacant position is, therefore, purely aimed at refuting and frustrating the claim of respondent No.1."

18. In a case of ***St. Ulai High School*** (*supra*), in paragraph Nos.12 to (iii) a Full Bench of this Court held that neither the MEPS Act, 1977, nor the Rules framed thereunder mandate the

grant of approval by the Education Officer as a condition precedent to a valid order of appointment.

19. In a case of ***Yogeshwar Vikas Sanstha*** (*supra*) it is held that if the appointment is against a clear permanent vacancy, even though the letter of appointment of the respondent-teacher mentions that the appointment is only for a specified period, the appointment must be considered as one on probation.

20. In a case of ***Hindi Vidya Bhavan*** (*supra*), this Court (Coram : D.B.Bhosale, J.) in paragraph No.26 has made the following observations :

"26. Admittedly, all the respondent-employees have rendered services for more than two years. As stated earlier they were engaged since there were various services required to be provided to the students and which could not be met with the personnel employed and sanctioned/approved by the Education Department. For such services the school had to engage the respondents-employees and they provided services to the said school akin to those of a Peon for the period ranging from 2 to 5 years. It appears that all the respondent-employees rendered services without interruption and continuously for more than two years. They were rendering the services of perennial nature for which there was no approved staff available in the school. The school appear

to have had engaged the respondent-employees through Mithila since the posts on which they were working were not sanctioned/approved by the Education Department. The school is required to have adequate staff, whether approved or not, having regard to the number of classes and the pupils. The schools cannot be heard to state that they would appoint members of the staff only if it is approved even if they require more persons having regard to the number of classes and the pupils. The requirement of approval relates only to disbursal of grant-in-aid. For want of approval an appointment of the 'member of the staff' would not render invalid. Similarly an institution cannot claim that services of non approved member/s of the staff is either temporary or on contract basis and is not covered or protected under the provisions of the Act and continue such member/s of the staff for years without giving him/them benefit of permanency under the provisions of of the Act. If they are allowed to do so, no member of the staff whose appointment has not been approved by the education department would ever be able to claim permanency and other benefits under the Act and the rules. It may also be noticed, as stated in the beginning, two of the respondent-employees were appointed by the school on temporary basis and almost after two years they had, for no reason, allegedly resigned and joined Mithila and then again joined the school as the employees of Mithila. Their appointment and the appointment of other respondent-employees through Mithila, according to the petitioners, was made on the posts which were not approved by the education department. At this stage it may be noted that no educational qualification for the posts, on which the respondent-employees were appointed, is prescribed

under the Act or the Rules. And, therefore, the precondition of the qualification in the present case was not an issue for conferring a status of permanent employees on the respondent-employees. I find support for the view in the decision of Full Bench in St. Ulai case (supra), wherein it has observed that approval by the Education Officer cannot be a condition precedent to a valid order of appointment. I have no hesitation in holding that there were permanent vacancies in the school on which the respondent-employees were working although those posts were not approved/sanctioned by the education department."

21. In a case of **Ramkrishna Chauhan** (*supra*), the Full Bench though answered the reference in the negative, in paragraph No.17 has made the following observations :

"17. Ordinarily, if the selection process is commenced and at the end of the selection process a person duly qualified is available and is found to be suitable, the Management is under an obligation to appoint him on probation, to fill in the permanent vacancy. This mandate flows from conjoint reading of Sub-section (1) and (2) of Section 5. The only exception is, where a person identified in the selection process is duly qualified but is not found suitable by the Management, the Management is free to exercise its inherent power of making a contractual or temporary appointment. Indeed, whether a person, who had participated in the selection process, is suitable for being appointed or otherwise, is the subjective satisfaction of the Management. Merely because a person is duly qualified, that per se is not enough. The person must not only be duly

qualified to fill the permanent vacancy but, must also be found to be suitable by the Management. However, the Management cannot be permitted to take cover under the pretext of successively rejecting the candidates in selection process on the ground of suitability; and keep on appointing same person or different persons on contractual or temporary basis for limited duration, against a permanent vacancy. In cases where the Management takes a conscious decision to appoint a duly qualified person on temporary basis, for a limited period against a permanent vacancy, it must contemporaneously record its subjective satisfaction in that behalf. For, if the appointment order on contractual basis were to be made subject matter of challenge before any Authority or Court of law, in such inquiry, it may be open to examine the controversy on the touchstone of permissibility of judicial review of such decision. If finding of colourable exercise of power by the Management is arrived at in that inquiry, appropriate direction can be issued against the Management. That will have to be examined on case to case basis."

22. The learned counsel for the petitioners has vehemently submitted that the temporary appointee has no right to continue in appointment and such temporary appointee cannot have advantage of deeming fiction under Section 5(2) of the MEPS Act, 1977. However, there is no dispute that the respondents-assistant teachers have worked for more than two complete consecutive academic years. It is not the case of the petitioner-management that the strength of the students of the

primary school has been decreased and hence the petitioner-management is required to reduce the strength of teaching and non-teaching staff. The petitioner is unaided minority education institution and there is no direct supervision and control by the Education Department over the teaching and non teaching staff. Even though the provisions of MEPS Act, 1977 and the MEPS Rules, 1981 are applicable to the petitioner-institution and even though the respondents-assistant teachers came to be appointed as an assistant teachers for more than two consecutive academic years, no appointment orders came to be issued. There is no adverse report as against the respondents-assistant teachers about their performance in service. It is reported by the incharge Principal as per the documents placed before the School Tribunal by the petitioners, particularly the approval of the appointment of the teaching staff submitted by the incharge Principal to the Chairman of the petitioner-trust. On perusal of the same, it appears that certain candidates are called for demonstration lesson. It is recorded that the performance of the present respondents-assistant teachers found to be good.

23. Section 5(1) and 5(2) of the MEPS Act, 1977 read as under :

"5. (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.

(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."

24. It is undisputed that the petitioner-institution is not required to approach the Government and seek permission of the Education Department for creation of post for which teachers are to be appointed. It further appears that though time-to-time the principle has recommended the respondent-assistant teachers considering their good performance, they have been paid an amount of Rs.4,500/- per month as an assistant teacher. The same is less even than the daily wages work.

25. I do not think any apparent error on the face of the record in the impugned judgment and order passed by the learned Presiding Officer, School Tribunal. I do not find that

the learned Presiding Officer of the School Tribunal has recorded any erroneous finding. The impugned judgment does not suffer from any perversity. This is a clear case of exploitation of the teachers like the respondent. This Court had an occasion to deal with the case of the assistant teachers appointed in the similar manner by the petitioner-institution, wherein the similar observations have been made. Thus, considering the entire aspect of the case, I do not find any substance in both the writ petitions. Hence, I proceed to pass the following order :

ORDER

Both the writ petitions are hereby dismissed.

(V. K. JADHAV, J.)

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