

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD  
WRIT PETITION NO.5305 OF 2017**

Shaikh Wasim Shaikh Salim  
Age, 30 yrs, Occ.Nil,  
R/o, Lala Sardar Nagar, Lane No.1  
Deopur, Dhule

.. Petitioner

Versus

- 1) Haji Lookman Social & Education  
Association, Haji Lookman Nagar,  
Vita Bhatti, Deopur, Dhule.
- 2) The President,  
Haji Lookman Social & Education  
Association, Haji Lookman Nagar,  
Vita Bhatti, Deopur, Dhule.
- 3) The Principal,  
Haji Lookman Social & Education  
Association, Haji Lookman Nagar,  
Vita Bhatti, Deopur, Dhule.
- 4) The Education Officer (Primary),  
Zilla Parishad, Dhule

.. Respondents

...

**CORAM : SMT. BHARATI H. DANGRE, J**

**Reserved on :- 18<sup>th</sup> February, 2022**

**Pronounced on :- 24<sup>th</sup> February, 2022**

**JUDGMENT:**

1 The petitioner is aggrieved by the action of the respondent management, thereby terminating his services w.e.f. 24.07.2016, without following due procedure of law and the said order of termination being upheld by the School Tribunal, Nashik, on an appeal being instituted by him under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short “the MEPS Act”).

2 Heard the learned counsel Shri Subodh Shah, for the petitioner, the learned Senior Counsel Shri V.D.Hon, instructed by Shri P.D.Bachate for respondent Nos.1 to 3/ Management and the learned counsel Shri R.S.Pawar for respondent No.4/ Education Officer (Primary).

3 By an order dated 02.01.2020, the petition was directed to be listed for final disposal at the stage of admission and accordingly, it was circulated. Since the respective counsel advanced their submissions towards final hearing, I deem it fit to issue RULE. Rule is made returnable forthwith. Heard finally by the consent of the parties.

4 The respondent No.1 is a society and trust registered under the Bombay Public Trusts Act and runs the Respondent No.3 primary school, which is named and styled as, “Hazi

Leookman Urdu Primary School”, Vitabhatti, Deopur, District Dhule. The Respondent No.2 is the President of the said Trust and the Respondent No.3 is the Principal of the school. The Trust is conferred with the linguistic and religious minority status.

5           The petitioner claims that he was appointed as an Assistant Teacher in the Hazi Leookman Urdu Primary School w.e.f. 11.01.2013 and his appointment being on probation of two years. Though the order of appointment is not placed on record, the pleading in the petition is to effect that the Education Officer (Primary), Zilla Parishad, Dhule, conferred it's approval, to the appointment of the petitioner in pay scale of Rs.5200-20200+2800 Grade pay i.e. pay scale applicable to the Assistant Teacher, and the approval was granted for the period commencing from 11.01.2013 to 10.01.2015 on “No Grant” basis. The approval is conferred vide order dated 12.02.2013, on the proposal being forwarded by the Management, along with necessary documents pertaining to his education qualification as well as his order of appointment. It is the claim of the petitioner that he was appointed against open category.

6           It is pleaded in petition that on successful completion of the period of probation, the Management forwarded his proposal for continuation, to the Education Officer and the petitioner plead that, on completion of two years, he is deemed to

be confirmed and has attained the status of permanent Assistant Teacher w.e.f. 27.04.2016.

Despite this, in his deemed confirmation, the services of the petitioner were terminating by order 27.04.2016, on the basis of the resolution passed by the Managing Committee on 10.04.2016. The termination order projected the appointment of the petitioner as an assistant teacher on temporary basis, on no grant (now partially grant basis) and the basis of termination is the complaints received against the petitioner about his functioning, which resulted into various notices and memos being issued to him and these accusations being admitted by the petitioner, is one of the ground for termination. Another ground, which is projected in the termination order is that the petitioner along with another assistant teacher in the school remained absent from 25.01.2016 and from reliable sources, as per the school Management, both of them were absconding and even the school received complaints to that effect. It is alleged that when an explanation is sought about said conduct, the reply given is that on account of marriage being performed, he remained absent, but till date two are not married. This conduct of the petitioner is alleged to have affected the reputation of the school and the parents have complained to the school to that effect and since this conduct of the petitioner was detrimental to the interest of students and since the school is now likely to receive 100% grants, the Management arrived at the conclusion that it is not in the

interest of the school that he should be retained in service.

Accordingly, based on the resolution passed by the Management, his services came to be terminated from the date of issuance of the order and as compensation, he was held entitled for one month's salary to the tune of Rs.16,054/-, which was paid to him by a cheque. The Termination order direct him to be relieved forthwith.

7           This action of the Management constrained the petitioner to approach the School Tribunal, Nashik, by instituting an appeal vide Appeal No.49/2016 and the School Tribunal vide it's judgment dated 16.03.2017, upheld the order or termination by recording that the procedure prescribed by Section 5 of the MEPS Act and Rule 9 of the MEPS Rules was not followed by the Management, while appointing the petitioner and the petitioner has failed to produce any document on record to demonstrate that an advertisement was issued to fill in the vacant post or any selection process was conducted before his appointment. The School Tribunal, therefore, inferred that his appointment was not effected by following due process of law.

The School Tribunal also rendered the finding that it is not in dispute that the petitioner worked in the school run by the Management from the date of his appointment till his termination, but his work and conduct was not satisfactory and several memos were issued to him, though the petitioner denied

the receipt of such memos and in the reply to memo, which was produced by the Management, he had assured to the Headmaster that he is ready to improve his work, though the reply is undated. In another reply, he has admitted that the presence of students was less in his class, but he shall make an attempt to increase the attendance. The exchange of memos and response of the petitioner thereto, led the School Tribunal to derive a conclusion that the work of the petitioner was not satisfactory.

Another reason recorded in the impugned order passed by the School Tribunal is the absence of the petitioner from the school from 25.02.2016 without any application and the period of absence is recorded from 25.02.2016 to 13.03.2016. The School Tribunal concluded that the petitioner remained absent during the said period without any intimation being given to the Headmistress.

As far as the approval granted by the Education Officer to the appointment of the petitioner, the School Tribunal, by relying upon the decision of the High Court, recorded the finding that if the appointment itself is illegal, merely because the Education Officer has granted approval to such an appointment, the illegality cannot be cured.

Net result of the reasoning of the School Tribunal is dismissal of the appeal filed by the petitioner employee.

Aggrieved by this order, the petitioner has approached this Court.

8           I have heard the learned Advocate Shri Subodh Shah, who would submit that the entire focus of the Management as well as the School Tribunal is flawed and according to him, it is not in dispute that the school is a minority school and therefore, the provisions of Section 3(2) of the MEPS Act, comes into play, by which, the procedure prescribed in the Act which is applicable to all private schools in the State of Maharashtra, whether, receiving grants in aid from the State Government or not, is not applicable to the recruitment of the head of minority school and other persons (not exceeding three), who are employed in such minority school.

Shri Shah would, thus, submit that the prescribed procedure to fill up the vacancy in a private school by issuance of advertisement and the appointment to be effected on probation period of three years and the confirmation there upon, is not applicable to the case of the petitioner, since he is appointed in the school run by the minority institution. The learned counsel would submit that the School Tribunal has failed to consider the said aspect and has wrongly reached the conclusion that the appointment is illegal since it is made without following due procedure as prescribed under the MEPS Act and rules framed thereunder.

Another submission of the learned counsel Shri Shah is to effect that the petitioner has completed his period of

probation and therefore, he assumed the status of permanent employee and therefore, before terminating his services, necessary procedure prescribed under Section 29 of the MEPS Act must have been adhered to. He would submit that on completion of probation, the Management forwarded his proposal for continuation of approval from 11.01.2015 along with one Mr. Shaikh Riyazuddin Sattar, who was also appointed on probation of two years and who received the approval from the Education Officer, but abruptly on 29.02.2016, the Management chose to withdraw the approval of the petitioner and accordingly, the Respondent No.4/ Education Officer returned the said proposal and accompanying documents, by intimating the Headmistress of Respondent No.3 school that the petitioner shall not be granted continuity approval.

As per the learned counsel, the Management did not permit the petitioner to resume his duties and sign the muster roll, but instead issued the show cause notices as to why action should not be taken against him for his unauthorized absence and even indicating that his performance was not satisfactory, which amount to misconduct and contemplated an inquiry as per Rule 28(1) of the MEPS Rules.

9            Learned counsel Mr. Shah has invited my attention to various notices/ memos issued to him and in particular, the show cause notice issued on 21.03.2016, asking the petitioner to show

cause as to why an inquiry should not initiated against him and why an action of removal of services should not be taken against him by invoking Rule 28(1) of the MEPS Rules.

The said show cause notice placed at exhibit I make reference to the memos issued to the petitioner and it also makes a reference to the approval granted by the Education Officer, on the period of probation. The show cause notice attributes misconduct to the petitioner as regards his unauthorized absence and it alleged violation of Rule 16(3) and contemplate a disciplinary action. He is also accused of dereliction of duties and therefore, he is held liable to violation of Rule 22(1), which prescribe the duties and code of conduct for the teachers.

In the wake of serious lapses attributed, the petitioner, is asked to show cause as to why an action as per Rule 28(1) shall not be initiated. It is the case of Mr.Shah that the petitioner submitted his response to the said show cause notice, which resulted in the termination order being issued on 27.04.2016.

10           According to Shri Shah, the order of termination contain serious accusations of misconduct and dereliction of duty and the same being not a termination simplicitor, but the reasons resulting in action of termination are stigmatic, as he is attributed of misconduct and for lowering reputation of the school and causing adverse impact on students. Considering imputations levelled in the termination order and the conclusion being

recorded that his alleged misconduct as an assistant teacher does not deserve his continuation, in the interest of the school, he is sought to be terminated. The aforesaid allegations and disclosures in the order of termination, according to Shri Shah, are stigmatic and the termination order effected without conducting any departmental inquiry, is argued to be bad in law.

In support, the learned counsel, has placed reliance upon the decision of the Hon'ble Apex Court in the case of *Dipti Prakash Banerjee Vs. Satvendera Nath Bose National Centre for Basic Sciences, Calcutta, AIR 1999(3) SC 60*, wherein the Hon'ble Apex Court has even extended the safeguards to a teacher on probation and the argument of Shri Shah is to effect that here is a teacher, who is a confirmed employee and the impugned termination order undisputedly casts a stigma upon him. He has also placed heavy reliance on the decision of the learned Single Judge of this Court in the case of *Jeevan Shikshan Mandal, Umared Vs Umesh Gangadhar Mohol, 2019 (6) Mh.L.J. 728*, in support of his submission.

11 Per contra, the learned senior counsel Mr.V.D. Hon, would support the order passed by the Tribunal by submitting that the appointment of the petitioner was not in accordance with the procedure prescribed under the MEPS Act and Rules and since Section 5 of the Act of 1977, contemplate every permanent vacancy to be filled in, in the manner set out in the said Section

and further Rule 9 of the MEPS Rules 1981, which has to be imperatively followed before effecting the appointment by the Management. The submission is to the effect that the appointment of the petitioner fall short on the said grounds.

The learned counsel would further allege that the petitioner has not produced a single document to show that his appointment was on a clear and permanent vacant post in the School and he has not even produced the staff schedule and list of employees to depict that there was a vacant post in the school. In absence of any such material being placed on record, according to Mr.Hon, the Tribunal has rightly concluded that the appellant has failed to prove that there was a clear and permanent vacant post in the School, on which he is appointed by following the procedure prescribed. Recording that there is a breach of Section 5 and Rule 9 of MEPS Act, the School Tribunal has rightly answered the issue and failed to grant any relief, since his appointment itself was held to be illegal and the such an illegal appointment, cannot create any right in the petitioner over the said post, is the submission.

12           The learned senior counsel would rely upon the decision of this Court in case of Prakash Babarao Shingane Vs. Janta Education Society, Chausala & ors, 2022(1), Mh.L.J.243, and also on a decision in the case of Priyadarshini Education Trust and Ors Vs. Ratis (Rafia) Bano d/o Abdul Rasheed & ors,

2007(6) Mh.L.J. 667.

13 In the wake of the rival contentions, I have perused the copy of the petition along with its annexures, including the impugned order passed by the School Tribunal.

14 The Maharashtra Employees of Private Schools (Conditions of Service) Regulation, Act, 1977, is an Act to regulate recruitment and conditions of service of employees in certain private schools.

'Employee' within the purview of the said Act, means any member of the teaching and non-teaching school and includes Assistant Teacher (Professional). A private school is a recognized school established or administrated by the Management other than Government or local authority.

It is not in dispute that the respondent no.3 School run by respondent nos.1 and 2 is a private school. It is pertinent to note that the said School has been conferred with minority (Linguistic and Religious) status by the competent authority/Principal Secretary of the Minority Development Department of the State on 11<sup>th</sup> December 2009.

In the backdrop of this undisputed fact, the applicability of the provisions of the MEPS Act and the Rules is to be construed.

15           Section 5 of the Act cast obligations on the management of private school to fill up every permanent vacancy by appointment of a person duly qualify to fill such vacancy in the manner prescribed and Rule 9 prescribe the procedure for appointment of staff. There cannot be any dispute about the position, that every private School Management is bound to adhere to the procedure prescribed. However, perusal of sub-Section 2 of Section (3) carve out an exception and the learned counsel Mr.Shah has placed reliance on the same, where the generality of the provisions contained in the Act and the Rules is not to be applied to recruitment of the teachers in minority cases.

          Though Mr.Shah may not be correct in claiming that the entire staff of minority school is exempted from applicability of the provisions of the 1977 Act and the Rules, reading of sub-section (2) of Section 3 would reveal that the provisions of the Act shall not apply to recruitment of the Head of the minority schools and other persons (not exceeding three), who are employed in such schools and whose names are notified by the Management to the Director or, as the case may be, the Deputy Director for this purpose.

          The submission on behalf of the petitioner is, Section 5 of the MEPS Act and Rule 9 of the Rules of 1981 do not govern his post and therefore, the procedural formality of inviting applications and obtaining prior permission of the Education Department is dispensed in case of the petitioner.

16           Perusal of the documents which are placed on record, would reflect that on the minority status being conferred on the respondent Society and the School run by it, the Education Officer (Primary) Zilla Parishad, Dhule, granted approval to the teaching and non-teaching staff of the school, class wise, depending upon the strength of the students and one such document placed on record in the compilation of documents placed before me, is a letter addressed by the Education officer to the Head Master of the School dated 21<sup>st</sup> March 2013 and it is issued in response to the letter from the Management, seeking revised approval to the staff in terms of the modified directions of the State Government dated 30<sup>th</sup> January 1996. As per the letter, the approval has been granted to the teaching/non-teaching staff from Std.I to Std.VII on receipt of 20% grant-in-aid and this cover seven (7) posts of Assistant Teachers and one post of Graduate Primary Teachers. The Education Officer has granted approval to eight (8) posts of teachers in a school which was running classes from Std. I to VII, as against the available strength of the students.

17           The petitioner who possess the prescribed qualification of HSC D.Ed, claim to be appointed on the basis of his educational qualification as Assistant Teacher in primary school on 11<sup>th</sup> January 2013. The appointment order is however, not placed on record nor was it placed before the School Tribunal,

but the fact of his appointment can be inferred from the approval granted to his appointment by the Education Officer (Primary) Zilla Parishad, Dhule on 12<sup>th</sup> February 2013 and the said document placed as Annexure-A to the petition, do reflect that the proposal was received from the Head Master of the Haji Lookman Primary School, which is a recognized as a minority school and upon receipt of such proposal, the appointment of the petitioner came to be approved on 'no grant basis' from 11/1/2013 to 10/1/2015 on probation.

The terms and conditions subject to which the appointment came to be approved is indicative, that the appointment is made on the sanctioned post and the approval is granted on the basis of the necessary documents forwarded by the President of the Society/Head Master of the School. Copy of the approval order has been forwarded to the Superintendent, Pay Unit, Zilla Parishad, Dhule.

18 In absence of the appointment order being placed on record, the approval letter is by the Education Officer fortify the appointment of the petitioner with effect from 11/1/2013 on probation of two years and it is not in dispute that the petitioner worked in the respondent School, for the entire period and completed his period of probation on 10/1/2015. Pursuant thereto, on 4/7/2015, a proposal for continuation of his approval was forwarded to the Education Officer by the Management.

It is pertinent to note that at the same time, when the petitioner was appointed, an employee Mr. Shaikh Riyazuddin Sattar, was also appointed by the Management, subject to the same terms and conditions and his appointment was also approved by the Education Officer on a period of probation from 11/1/2013 to 10/1/2015. The proposal for confirmation approval of the petitioner as well Shri Shaikh Riyazuddin Sattar came to be forwarded to the Education Officer, but the proposal of the petitioner came to be recalled, by the Management by a communication addressed to the Education Officer on 29th February 2016, when a request was made to the Education Officer to return the proposal and pursuant thereto, on 6th March 2016, the Education Officer returned the proposal of the petitioner to the Management, along with the papers that were forwarded for processing the approval and it was clarified that the petitioner cannot be granted continuity in service.

The other employee, Shaikh Riyazuddin Sattar, however, was granted continuity in service and it is informed that even today, he is working on the post of Assistant Teacher.

19        It is the contention of the petitioner that from 24.02.2016, he was restrained from signing the muster roll and he was not permitted to discharge his duties, despite the approval by the Education Officer and this constrained him to raise a grievance to the Chairman of the Society on 8th March 2021,

seeking his indulgence. His repeated correspondence did not yield any result, and on 10th March 2010, he was issued a show cause notice by the Chairman of the Trust, admitting the fact, that the petitioner is working as Shikshan Sevak in the School, but he is alleged to have remained absent without preferring any application from 25/2/2016 and his explanation submitted on 8<sup>th</sup> March 2016 is found to be misleading and held responsible for violating the rules and discipline of the school and he is held responsible for academic loss caused to the students. Not only this, on 11<sup>th</sup> March 2016, the Head Master communicate to the petitioner, that by remaining unauthorizedly absent from 25<sup>th</sup> February 2016, he has made himself liable for disciplinary action as contemplated under Rule 16(3) by treating his absence without an application for leave, as breach of discipline.

The petitioner submitted his explanation on 17<sup>th</sup> March 2016, reiterating his grievance that he is not permitted by the Management to discharge the duties and he cannot held liable for any disciplinary action and he also forwarded the material available with him, reflecting that till 25<sup>th</sup> February 2016, he was discharging his duties in the school.

20           The petitioner came to be served with a show cause notice on 21<sup>st</sup> March 2016, asking him to show cause as to why an action shall not be initiated against him under Rule 28(1) of the MEPS Rules, 1981 read with Section 5(3). The said order, itself,

record that the appointment of the petitioner was effected in the Haji Lookman Urdu Primary School, Pune and he was working on the said post as Assistant Teacher on 'no grant basis' and his appointment was approved by the Education Officer for the probation period, on 12<sup>th</sup> February 2013.

A reference is made to the unauthorized absence of the petitioner and to the letter dated 11<sup>th</sup> March 2016 and his response which is found to be unsatisfactory and charges are levelled against him to the effect that he remained on leave, unauthorizedly. It is also alleged, that he has absconded along with another Assistant Teacher in the school from 25<sup>th</sup> March 2016, and on account of the sudden absence, there is a talk about morality in the students and their parents, which had adverse effect on the administration of the School and the parents are proposing to remove their pupils from the school. The misconduct is, therefore, attributed to the petitioner by defaming the School. He is also attributed of violation of Rule 16(3) and therefore, liable for disciplinary action. The show cause notice also accuse him of dereliction of duty and specify that for the years 2013-14 to 2015-16, the petitioner has not taken any pains to advance the academic graph of the school and his performance is unsatisfactory, and on being put to notice about unsatisfactory performance, he admitted it.

In the wake of the aforesaid serious allegations, the petitioner was held liable for a disciplinary action, in view of

breach of Rule 22(1). A show cause notice is, therefore, issued to him under Rule 28(1) asking him to show cause as to why his services shall not be terminated without assigning any reason after giving one calendar month's notice for paying the salary in lieu of notice. The explanation from the petitioner was sought within a period of 10 days.

21 By his response, submitted in writing dated 31<sup>st</sup> March 2016, the petitioner offered an explanation, by stating that the allegations are baseless and particularly, the allegation about moral turpitude was denied by submitting that he was engaged to the lady Assistant Teacher in the School in the presence of their relatives and they were to get married. About the dereliction of duty, the allegation was specifically denied as incorrect and baseless.

22 Without considering the response submitted by the petitioner, on 27<sup>th</sup> April 2016, his services came to be terminated and the question that arise for consideration is, whether the termination order is stigmatic or it is a termination simplicitor on the performance of the petitioner being found to be not satisfactory.

23 The order of termination dated 27<sup>th</sup> April 2016 refer to a resolution passed by the Managing Committee in it's meeting dated 10<sup>th</sup> April 2016. The order set out that the appointment of

the petitioner was effected on the post of Assistant Teacher on 'no grant basis' but there were many complaints about his working and for that purpose, various memos and notices were issued to him and he even admitted his fault. The order of termination accuse him of remaining unauthorizedly absent, along with his co-employee, another lady teacher working in the said school from 25<sup>th</sup> February 2016, and as per the information of the school, they both had absconded. Complaints were received by the School to that effect and when he was questioned, an explanation was offered, that for performing the marriage, they remained absent, but till date, they are not married. This act of the petitioner was stated to have resulted in defaming the school, as the parents have preferred complaints to the school. This conduct of the petitioner was described as adversely impacting the admission of the school which is now on the verge of receiving 100% grant.

24            In the backdrop of the aforesaid facts, a decision was taken not to retain the services of the petitioner in future and that he should be removed. On the basis of the resolution passed by the Society, his services were terminated from the date of issuance of the order and by way of compensation, one month salary came to be deposited in his account.

              It is this order of termination which came to be challenged before the School Tribunal.

25           The fact that the petitioner was appointed in the respondent no.3 School as an Assistant Teacher, from 11<sup>th</sup> January 2013, is not disputed. It is also not disputed that this appointment was approved by the Education Officer from 11/1/2013 to 10/1/2015 on probation of two years. From the approval, approval order granted by the Education Officer, it is apparent that it is granted pursuant to the proposal placed/forwarded by the respondent Management.

          The facts, on record, divulge that the petitioner discharged his duty and completed his period of probation on 10/1/2015, and during this period, no grievance was made by the Management about his performance. The Management forwarded his proposal for individual approval to the Education Officer on 4<sup>th</sup> July 2015, but without any rhyme or reason, the proposal came to be withdrawn and the request for extending the approval, was recalled. The other employee appointed in the similar manner as the petitioner received the continuation approval and still continue to work with the respondent Management.

26           In the backdrop of the aforesaid position emerging, it was not open for the Management to take a stand before the School Tribunal that the appointment of the petitioner was not on a clear and permanent vacancy and it was without following

the procedure prescribed u/s.5 of the MEPS Act and Rule 9 of the MEPS Rules. It do not lie in the mouth of the respondent Management to contend so, particularly, when on their proposal, approval was granted to the appointment of the petitioner on probation of two years, and though it is not clear whether the name of the petitioner along with Shri Shaikh Riyazuddin was forwarded in furtherance of sub-section (2) of Section (3), seeking exemption as a minority school, since it is permissible to exempt the Head of the school and three other persons who are employed in the School from the applicability of the provisions of MEPS Act and Rules. In any case, it is on the proposal of the Management the appointment of the petitioner is approved but without citing any reason, his proposal for continuation approval when the School was in receipt of grant, was suddenly withdrawn and as the learned counsel Mr.Shah has submitted that since the Management was desirous of appointing some other teacher in his place, the entire facade of unsatisfactory performance has been followed to oust him,

This argument has to be tested in light of the events that had transpired and placed on record.

27           For the period of two years, i.e. from 11<sup>th</sup> January 2013 to 10<sup>th</sup> January 2015, there is no grievance of the Management about the performance of the petitioner as Assistant Teacher. For the first time, a notice is issued to him on 10<sup>th</sup>

March 2016 i.e. after completion of his period of probation, alleging that he had unauthorizedly remained absent from 25<sup>th</sup> February 2016, whereas the case of the petitioner is from 24<sup>th</sup> February 2016, he was restrained from signing on the Muster Roll and he make this grievance before the Chairman/Head Master. The Management, on 11<sup>th</sup> March 2016, decided to initiate the action against the petitioner for breach of Rule 16(3) of the MEPS Rules, which contemplate a disciplinary action, after due enquiry. It is necessary to reproduce sub-rule (3) of Rule 16 which reads thus :

16(3) In the case of a permanent employee who, without sufficient cause, fails to apply for leave within 7 days from the date of absence, it shall be treated as breach of discipline and he shall be liable for suitable disciplinary action after due inquiry. A permanent employee who is absent from duty [without leave continuously for a period exceeding three years] or more, shall be deemed to have voluntarily abandoned his services.

Since the Management indicated an action under the aforesaid Rule, it give rise to two inferences that the petitioner is treated by the Management as permanent employees and he is accused of not submitting the application within 7 days from his absence which is liable to be treated as breach of discipline, and therefore, a suitable disciplinary action is contemplated.

28           When the petitioner submitted his explanation, a show cause notice is issued to him on 21<sup>st</sup> March 2016, and now the Management proposes an action against him by invoking Section 5(3) of the MEPS Act coupled with Rule 28(1).

Sub-section (3) of Section 5 reads thus :

“5(3)       If in the opinion of the Management, the work or behaviour of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month’s notice”

Similarly, sub-rule (1) of Rule 28 which has been invoked, read as under :-

“28(1)   The services of a temporary employee other than on probation may be terminated by the Management at any time without assigning any reason after giving one calendar month’s notice or by paying one month’s salary (pay and allowances, if any) in lieu of notice.

In the case of an employee entitled to vacation, the notice shall not be given during the vacation or so as to cover any part of the vacation or within one month after vacation.”

29           By issuance of the show cause notice by relying upon the aforesaid two provisions, the Management is now taking a stand that the performance of the petitioner during the period of his probation was not satisfactory and gave a cause to the Management to terminate his services by giving one month’s notice.

The cause of action of the Management suffer from misconception since sub-section (3) of Section 5, contemplate termination of services of any probationer, during his period of probation, after giving one month's notice or salary in lieu of notice. This power can be exercised if the work or behaviour of any probationer during the period of probation, is not satisfactory.

On the contrary, Rule 28(1) permit the Management to terminate the services of a temporary employee other than on probation, without assigning any reason, on giving one month's calendar notice or by paying one month's salary in lieu of notice.

The two provisions stand exactly opposite to one another, as one contemplate termination of services during the period of probation whereas the other contemplate services of a temporary employee other than on probation.

30 In the present case, the Management has accepted that the petitioner was appointed on probation of two years and there is no extension of period of probation nor his services are terminated on completion of the period of probation, which culminated on 10<sup>th</sup> January 2015. During the period of two years, as approved by Education Officer, it is not the case of the Management, that his services during the period of probation is unsatisfactory.

In the show cause notice dated 21<sup>st</sup> March 2016, the petitioner is accused of misconduct and moral turpitude, as he is

alleged to have acted in violation of Rule 16 of the MEPS Rules, as he absconded with his co-teacher, raising the question of morality. The second charge of which he is accused, in the show cause notice, is dereliction in duties and it is admitted that his period of probation was from 11/1/2013 to 10/1/2015 and approval was accordingly granted, but it is alleged that during this period, he did not contribute to the development of the School, in any manner, and that his work was unsatisfactory and therefore, he is proposed to be terminated by invoking Rule 28(1) of the Rules of 1981 and Section 5(3) of the MEPS Act.

Thereafter, without conducting any inquiry, as was contemplated in the earlier notice, where he was accused of breach of discipline, which made him liable for suitable disciplinary action after due enquiry, his services came to be terminated without conduct of an inquiry.

31           The termination order when read, as it is, accuse the petitioner of defaming the school, since he had absconded with a female Teacher in the school and it accuse him of availing unauthorized leave on the pretext of marriage, but not performing the marriage. This conduct of the petitioner is projected as having an adverse impact on the progress of the School and therefore, in the interest of the School, his services are terminated. This order is definitely stigmatic as in order to amount to a stigma, the language used therein must impute

something over and above, mere unsuitability for job.

The Hon'ble Apex Court in case of Pavanendra Narayan Verma vs Sanjay Gandhi P.G.I. Of Medical Science & Anr, 2002(1) SCC 520, while referring to it's earlier decision of Constitution Bench, determined the issue as to whether the temporary government servant had a right to the post or the rank or whether he has been visited with evil consequences, has observed as under :-

14. If punishment were restricted to evil consequences, the Courts task in deciding the nature of an order of termination would have been easier. Courts would only have to scan the termination order to see whether it ex-facie contains the stigma or refers to a document which stigmatises the officer, in which case the termination order would have to be set aside on the ground that it is punitive. In these cases the evil consequence must be assessed in relation to the blemish on the employees reputation so as to render him unfit for service elsewhere and not in relation to the post temporarily occupied by him. This perhaps is the underlying rationale of several of the decisions on the issue.

In order to determine whether an order of termination is punitive, in Shamsher Singh & Anr vs State Of Punjab, 1974 AIR 2192, the Courts were asked to look behind in the form of the order to find out whether the termination was in substance punitive. It is this search for the substance 'behind the form' of the order of punishment, which has led to some apparently

conflicting decisions and in Pavanendra Narayan Verma (supra), conflict in view was taken note of and the test which was evolved was summarized as under :-

"21 One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was :-

- (a) a full scale formal enquiry
  - (b) into allegations involving moral turpitude or misconduct
  - (c) which culminated in a finding of guilt.
- If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld. The three factors are distinguishable in the following passage in [Shamsher Singh v. State of Punjab](#) (supra) where it was said:

Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency

or corruption, and if his services are terminated without following the provisions of [Article 311\(2\)](#) he can claim protection.

32 In case of *Dipti Prakash Banerjee Vs. Satvendera Nath Bose National Centre for Basic Sciences*, (supra) the termination order itself referred to three letters and one of the letters explicitly referred to misconduct on part of the employee and referred to an Enquiry Committee's Report, which report in turn, had found that the employee was guilty of misconduct, the termination was held to be stigmatic and set aside. Therefore, in paragraph no.20 and 21, the Apex Court laid down the test in the following words :-

20 This Court in that connection referred to the principles laid down by Krishna Iyer,J. in [Gujarat Steel Tube vs. Gujarat Steel Tubes Mazdoor Sangh](#) [1980 (2) SCC 593]. As to 'foundation', it was said by Krishna Iyer,J. as follows:

".....a termination effected because the master is satisfied of the misconduct and of the desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case, the grounds are recorded in different proceedings from the formal order, does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the inquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service, the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used."

and as to motive:

"On the contrary, even if there is suspicion of misconduct, the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge."

As to motive one other example is the case of [State of Punjab vs. Sukh Raj Bahadur](#) [1968(3) SCR 234] where a charge memo for a regular inquiry was served, reply given and at that stage itself the proceedings were dropped and a simple termination order was issued. It was held, the order of simple termination was not founded on any findings as to misconduct. In that case, this Court referred to *A.S. Benjamin vs. Union of India* (Civil Appeal No.1341 of 1966 dt. 13.12.1966) (SC) where a charge memo was issued, explanation was received, an inquiry officer was also appointed but before the inquiry could be completed, the proceedings were dropped and a simple order of termination was passed, the reason for dropping the proceedings was that "departmental proceedings will take a much longer time and we are not sure whether after going through all the foundation, we will be able to deal with the accused in the way he deserves". The termination was upheld.

21 If findings were arrived at in inquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as 'founded' on the allegations and will be bad. But if the inquiry was not held, no finding were arrived at and the employer was not inclined to conduct an inquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to inquire into the truth of the allegations

because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid.

33 In the wake of the aforesaid position of law, flowing from the authoritative pronouncements of the Apex Court, if the facts in the present case, are adverted to, it is apparent that the petitioner is accused of moral turpitude, though it is argued by Mr.Shah by placing on record the marriage invitation card that he married his co-teacher and it cannot be said that it is a case of moral turpitude. The termination order also accuse him of defaming the School and his conduct having an adverse impact on the admissions in the school.

This recitation in the impugned order must necessarily be attributed to be stigmatic. A stigma is something that detracts from the character or reputation of a person. It is a blemish, a disgrace, an imputation, a mark or label indicating a deviation from the norm. The impugned order perfectly fit within the aforesaid parameter and the termination order is not a simple and innocuous order, since it do not only refer to the performance of the petitioner during probation, but it also record that the employee absconded with his co-teacher and remained absent from the school unauthorizedly, resulting into defaming the School and adversely impacting it's progress. This surely would mar the chances of the petitioner securing an employment in any

other establishment and the termination order can by no means be termed as innocuous.

By applying the aforesaid test, since the order of termination on the face of it, cast stigma on the employee, which reflect upon his character and conduct, and since it's foundation lie in the show cause notice issued to him, by lifting the veil and by applying the substance test, the termination order is ex-facie stigmatic. A Reference to the misconduct alleged in the termination order is bound to have an adverse impact on his future prospects and in absence of any adequate opportunity being given to the petitioner to explain the charges/accusation faced by him in the show cause notice, the termination of his service on the ground of misconduct and moral turpitude and a finding of guilt recorded in the order, without following the route of disciplinary proceedings, cannot be sustained at all and deserve to be set aside in exercise of jurisdiction of this Court.

34           The School Tribunal, in the Appeal filed by the petitioner, has failed to focus upon the said aspect of the matter and by merely recording that the appointment is not on a clear and permanent post and is in breach of Section 5 and Rule 9, has held him not entitled for the benefit of reinstatement.

35           The learned senior counsel Mr.Hon has stressfully placed reliance on the decision of this Court in case of Prakash

Babarao Shingane Vs. Janta Education Society, (supra), on perusal of the facts involved in the said case, the appointment of the applicant was made by President of the respondent no.1 the Education Society in violation of section 5 and Rule 9 and the appointment was held to be invalid and the finding rendered is that on termination of such an employee, by resorting to Rule 26 of MEPS Rules, the Division Bench has held that merely because the order was issued under the signature of the Principal, it cannot be inferred that the procedure contemplated for appointment has been followed.

In the present case, the approval has been granted to the appointment of the petitioner by the Education Officer and even the Management has treated him as a probationer, but since it was not sure whether it wanted to proceed against him departmentally in view of breach of discipline, being a permanent employee or wanted to terminate his services on account of his unsatisfactory performance during the period of probation, it had chosen to pass a stigmatic order, without conducting any inquiry or affording any opportunity to him to meet the accusations, and ultimately in an attempt in vain, to demonstrate that the order was of termination simplicitor, issued under Rule 28(1). Since the School Tribunal has failed to ignore this important facet of the case of the appellant, the impugned judgment passed by the Tribunal cannot be sustained and is liable to be quashed and set aside.

As a result of the above, the termination order issued by the Management on 27/4/2016 is set aside being stigmatic.

The judgment of the School Tribunal dated 16/3/2017 in Appeal No.49/2016, upholding the termination order is also set aside. The petitioner is held entitled to be reinstated in service as Assistant Teacher in respondent no.3 School, run by respondent no.1 and respondent no.2 from the date of his termination, with 50% back wages. It is also declared that he is entitled for continuity of service till the date of his reinstatement.

It will be open to the respondents to take such action against the petitioner as they deem fit in accordance with law.

The Management shall reinstate the petitioner in service within a period of eight weeks from the date of receipt of the writ of this Court.

Rule is made absolute. No order as to costs.

**SMT. BHARATI DANGRE, J**