

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION 2260 OF 2010

1. Late Sanjay Gandhi Shikshan
Prasarak Mandal, Wangi,
Tahsil District Washim,
through its President
Shri Sakharam Malhari Kakade,
r/o. Toe, Tahsil District Washim.
2. Shri Rajeshwar Secondary School
and Junior college, Wangi,
Tahsil District Washim through its
Principal Shri Anant Tryambakrao Pathak **PETITIONERS**

VERSUS

1. The Deputy Director of Education,
Amravati Division Amravati
2. Subhash s/o. Rambhau Billari,
aged about 33 yrs, occ. Agriculturist,
r/o. Haral, Tahsil Risod,
District Washim **RESPONDENTS**

Mr. Pushkar Deshpande, counsel for the petitioners.
Ms. T.H. Khan, AGP for respondent 1/State.
Mr. A.Z. Jibhkate, counsel for respondent 2.

CORAM : ROHIT B. DEO, J.
DATED : 19th APRIL, 2022

JUDGMENT :

Petitioner 1 – Late Sanjay Gandhi Shikshan Prasarak Mandal (“Society, for short) is managing petitioner 2 – Shri Rajeshwar Secondary School & Junior College. Petitioners shall be collectively

referred to as the Management.

2. The Management is questioning the judgment dated 29.3.2010, rendered by the Presiding Officer, School Tribunal, Amravati ("Tribunal") in Appeal 98/2009, whereby the appeal preferred by respondent 2 – Mr. Subhash Rambhau Billari ("employee"), challenging the termination dated 16.8.2008 is allowed and the Management is directed to reinstate the employee on the post of junior college lecturer/teacher and to pay 50% (Fifty Percent) back wages for the period 16.8.2008 till the date of reinstatement alongwith other service benefits.

3. The Management contends that the employee was appointed on 25.10.2004 to teach English on clock work basis. The employee was not possessing the eligibility qualification as he did not hold Masters Degree in second division, and that the appointment or engagement was an adhoc arrangement. The Management contends that since an eligible and otherwise suitable candidate to teach English subject in the junior college was not found, the employee continued to work on clock work basis, till he abandoned the employment and did not report for duty after 8.5.2008, although the employee did attend the school to attend certain functions including the flag hoisting ceremony on 15.8.2008.

4. According to the Management, Mr. R.A. Wakudkar, who was holding the prescribed qualification, and was otherwise suitable, was appointed initially on clock work basis on 26.6.2008 and was subsequently given regular appointment as Shikshan Sevak from 1.7.2009. The Management claims that the employee preferred appeal before the Tribunal falsely contending that he was orally terminated, and the fact that Mr. R.A. Wakudkar was appointed in the interregnum, was suppressed. In response to the notice received from the Tribunal, the Management highlighted the factual position noted supra. However, the appeal preferred by the employee is allowed for reasons which are unsustainable in law. The Management contends that the Tribunal did not appreciate that the appointment of the employee was not in accordance with section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ("Act", for short) nor was the employee qualified to teach subject of English. The Management contends that the Tribunal erred in discarding the order of appointment on the premise that the said order does not disclose the date of issuance. The Management further contends that the Tribunal failed to appreciate that the employee was not terminated as is alleged, and that he voluntarily abandoned duty, and Mr. R.A. Wakudkar was duly appointed in place of the employee to teach the subject of English.

5. The learned counsel for the Management Mr. Pushkar Deshpande canvassed submissions consistent with the stand of the Management before the Tribunal, and further relied on certain decisions, to which a reference shall be made at an appropriate stage, to the extent necessary.

6. The employee has filed a brief affidavit in response. The employee asserts that the certified copy of the roster duly verified by the Commissioner, Amravati Region, Amravati, which the employee obtained under the Right to Information Act, reveals that three posts of teachers were vacant, one in the high school and two in junior college, out of which one post is reserved for Scheduled Tribe and two are for Open Category. The affidavit further states that one post is occupied by Mr. S.L. Gote and the appointment is duly approved, and the post which the employee occupied is shown held by Mr. R.A. Wakudkar and the appointment is not approved, since his appointment is without any advertisement and compliance of the required procedure. It is further asserted in the affidavit that the post of lecturer in junior college is held by Ms Sunita Bhendekar from 1999, and her appointment is not approved. The attempt is to demonstrate that as on the date of the affidavit dated 2.8.2010, three posts of teachers are vacant and available.

7. The employee has, in addition to the affidavit referred to supra, filed elaborate written submissions dated 14.6.2010. The employee asserts that he was appointed against sanctioned permanent vacant post on the basis of the application preferred by the employee. The employee asserts that after he was initially appointed on 25.10.2004, he was allotted the workload of full time lecturer during the academic sessions 2004-05 and 2005-06. While the employee admits that he passed the Masters Examination in third division, he emphasizes that he subsequently obtained Masters Degree in History in first division in March-April 2006 and was eligible and qualified to hold the post of lecturer in junior college from 21.6.2006. The employee then contends that he worked in the academic sessions 2006-07 and 2007-08 and taught History, English and Environment. The employee contends that he was orally terminated w.e.f. 16.8.2008 and the Tribunal rightly held that the termination is illegal. In response to the contention of the Management that the appointment of the employee was not in accordance with the provisions of section 5 of the Act, the employee contends that since the post was not reserved and the junior college was unaided at the relevant time, advertisement was not statutorily necessary. The employee contends that he was deemed to be confirmed employee as on the date of the termination, and therefore, the Management could not have terminated his services without holding departmental enquiry.

8. The learned counsel for the employee Mr. A.Z. Jibhkate has supported the judgment impugned and has relied on certain decisions, to which reference shall be made to the extent the decisions hold the field and are relevant.

9. The Tribunal has held that the employee was appointed in vacancy which was clear and available. Considering the submission of the Management that the prior permission of the authority was not obtained, the post was not advertised and the appointment was not made in accordance with the statutory provisions, the Tribunal held that the statutory provisions invoked by the Management are not applicable to appointment from Open Category. The Tribunal relied on the decision in *Jagdamba Education Society, Nagpur vs. Rajendra s/o. Baburao Golhar and Others*, 2009(2) Mh.L.J. 522. Wherein Their Lordships observed that Rule 9(2) provides the procedure of appointment by giving advertisement is restricted to filling the post of teaching and non-teaching staff from backward category candidates. The said provision does not applicable to appointment of the candidates from open category. The submission of the Management that the employee was not qualified to hold the post, the Tribunal has held that while the employee was not qualified as on the date of the appointment, he subsequently obtained the eligibility qualification by

passing Masters Degree Examination in History in first division on 26.6.2006. It is on such premise, that the Tribunal held that the appointment of the employee shall be deemed to be regular and permanent from 26.6.2006 when he acquired the eligibility qualification. The Tribunal further held that the employee did not abandon duty and was prevented from working, and was “otherwise terminated”.

10. The learned counsel for the Management Mr. Pushkar Deshpande is relying on the following decisions:

1. Priyadarshini Education Trust and Others vs. Ratis (Rafia) Bano d/o. Abdul Rashid and others, 2007(6)Mh.L.J. 667 (“Priyadarshini Education Trust”),

2. Mushtaq Shah s/o. Meheboob Shah vs. Haidariya Urdu Educaiton Society, Kapustalani and others, 2008(4) Mh.L.J. 734,

3. Krishna Dnyandeo Lad vs. Chairman, Rahimatpur Panchkrushi Shikshan Mandal, and others, 2008(4) Mh.L.J. 390,

4. Jamdar High School Education Society, Nagpur vs. Sunil Wasudeorao Bhoyar and ors, 2009(6) Mh.L.J. 678,

5. Parmanand Maharaj Bahu – Uddeshiya Sewa Bhavi Sanstha and ors..vs.. Gajanan s/o. Ashok Rahate (Writ Petition 1316.2010),

6. Hindustan Education Society and anr vs. Sk. Kaleem Sk. Gulam nabi and Ors, (1997)5 SCC 152,

7. M.S. Patil (DR.) vs. Gulbarga University and Others, (2010) 10 SCC 63,

8. Ramkrishna Chauhan vs. Seth D.M. High School and

Ors, 2013(2) Mh.L.J. 713,

9. Pragati Mahila Samaj and Another vs. Arun s/o. Laxman Zurmure and ors, (2016) 9 SCC 255,

10. Gelus Ram Sahu and Ors. vs. DR. Surendra Kumar Singh and Ors, (2020) 4 SCC 484,

11. Bhartiya Adiwasi Shiv Shikshan Sanstha Garada and Ors vs. Premdip s/o. Sahdeo Bodele and Ors, 2010(6) Mh.L.J. 461.

11. The learned counsel for the employee Mr. A.Z. Jibhkate pressed in service the following decisions:

1. President, Mahila Mandal, Sinnar and another vs. Sunita Bansidhar Patole, 2007(2) Mh.L.J. 105,

2. Matoshri Ramabai Ambedkar Vidyarthi Vasatigruh Trust and Ors. vs. Bharat D.Hambir and another, 2009(2) Mh L.J. 121,

3. National Education Society High School and Junior College vs. Lulomool Monachary, 1987 Law Suit(Bom 114,

4. Hindi Vidya Bhavan, Mumbai and Ors vs. Presiding Officer, School Tribunal, Mumbai and Ors, 2007(6) Mh.L.J. 563 (“Hindi Vidya Bhavan”),

5. Nita Ramesh Danale vs. Dombivali Mitra Mandal and Others, 2009(1) Mh.L.J. 796,

6. Nagpur Shikshan mandal and another vs. Varsha Vinod Sayam and Ors, 2014(5) Mh. L.J. 550,

7. Sudhakar Balaji Motghare vs. Adarsha Mahila Mandal and ors, LPA 241.2013 in WP 3619/2012(D),

8. Chandrashekhar Anandraoji Rewatkar vs. Navjeevan Shikshan Sanstha and Ors, (2018) 18 SCC 775.

12. The seminal issue which is involved is whether the employee is entitled to draw support from the provisions of section 4(6)

of the Act, without establishing that the post was advertised after obtaining the approval of the authority and that the employee was appointed by the Management after following the due process including interviews conducted by duly constituted Selection Committee.

13. In my considered view, the issue is not *res integra*.

14. The Tribunal has held that an advertisement was not necessary since the post to which the employee was appointed was not a reserved post. The Tribunal relied on the decision in ***Nita Ramesh Danane vs. Dombivali Mitra Mandal and ors, 2009(1) Mh.L.J. 796*** ("***Nita Ramesh Danane***"). The said decision is rendered by a learned Single Judge after recording the submission of the Management on the basis of the Division Bench decision in ***Priyadarshini Education Trust and Others vs. Ratis (Rafia) Bano d/o. Abdul Rashid and others, 2007(6)Mh.L.J. 667*** ("***Priyadarshini Education Trust***"). The learned Single Judge, who decided ***Nita Ramesh Danane*** reasoned that in accordance with Rule 9(8) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Rules, 1981 ("Rules", for short), the requirement of advertisement applies only if the post is reserved and if the appointment is to a post in the Open Category, there is no requirement of issuing an advertisement.

15. With due respect to the learned Single Judge, who decided ***Nita Ramesh Danane***, I am not persuaded to agree with the view that it is not necessary to advertise the post in Open Category. Such a view clearly militates against the observations in Division Bench decision in ***Priyadarshini Education Trust***.

16. It would be apposite to note the following articulation in ***Priyadarshini Education Trust***:

“11.....We are unable to appreciate, much less accept, such an argument. Referring to proviso to Sub-section (1) of Section 5 of the Act, it is evident that, as soon as there is vacancy, the management is required to communicate with the Education Officer, Zilla Parishad. The vacancy is to be filled in, from the list of surplus persons maintained by the Education Officer. This is the first indication of control of the State over the recruitment and appointment of staff, even of private schools. Even on reference to Sub-rule (3) of rule 9, the candidate eligible for appointment and desirous of applying for such post, is required to apply in writing, by giving full details. We are unable to visualise a possibility of deserving candidate knowing about the vacancies in any private schools, unless the school invites applications by advertisement. The persons, who may learn about vacancies without advertisement, may only be kith and kins or those in close contact with the management or at the most staff members. If argument of Advocate Shri Kazi is to be accepted, it will be tantamount to accepting that rule 9 is drafted in such a manner as to promote nepotism, so far as appointments of open category candidates to teaching and non-teaching posts in private schools are concerned. If the argument of Advocate Shri Kazi is to be accepted, rule 9 will have to be read in a fashion, where reserved category candidates are required to enter the service by competing amongst themselves, but an open category candidate may be in a position to seek an appointment without competing. Legislature could not have intended to prescribe a manner of recruitment which would discriminate between reserved and unreserved categories in respect of manner in which

they can seek appointments. A legislation making it easier for a reserved candidate, may be justified, in view of Article 15(4) of the Constitution. But, a reverse position cannot be justified by any line of argument.

Article 14 guarantees equality before law and Article 16 gives equality of opportunity in the matter of public employment. Article 16(1) reads :

“16. Equality of opportunity in matters of public employment. - (1)

There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.”

In case we are to accept the submission as advanced by Advocate Shri Kazi, Rule 9 not only creates a discrimination in the recruitment and appointments of candidates between reserved and unreserved categories (making it more difficult for the reserved categories), but it also denies equal opportunity for all citizens desirous of seeking employment/appointment. In the absence of any advertisement, only those favoured by nepotism will be able to seek employment/appointments at the cost of all equally placed and desirous candidates, who are ignorant of such vacancies. Any procedure for recruitment/appointment, which does not afford equal opportunity to all eligible and deserving candidates to compete for seeking appointment and employment, must be seen and termed as unconstitutional as being violative of Articles 14 and 16(1).

On reference to Rule 9 Sub-Rule (2), it can be seen that appointments of teaching and non-teaching staff are required to be done by the School Committee and only the short term appointments in leave vacancies, of a duration not exceeding three months are permitted to be done by the Head, if so authorized by the School Committee.

In this context, we may also refer to the text of Sub Section (2) of Section 5, which is already re-produced hereinabove. From the opening part "every person appointed to fill in permanent vacancy shall be on probation for a period of two years...", it is evident that once a person is selected in the manner prescribed and duly appointed, the Management or the School Committee has no option. Such a person must be appointed on probation. If there is a permanent vacancy and if a person duly qualified is selected in the manner prescribed and then duly appointed, the Management has no choice or option to

appoint him for a limited period such as one academic year or shorter than that.

Thus, although Sub-rule (3) of rule 9 does not specifically speak of requirement of publication of vacancies by an advertisement and inviting applications from candidates eligible and desirous of seeking appointment, as Sub-rule (8) speaks for the purpose of filling up the vacancies reserved under Sub-rule (7), requirement of such an advertisement must be read within the provisions for the reasons discussed hereinabove and which may be summarized, at the cost of repetition as follows.

(i) Statute is enacted for the purpose of regulating recruitment in private schools in the State.

(ii) Interpretation that sub rule (3) of Rule 9 does not prescribe publication of advertisement, when read in the light of sub rule 8, would be discriminatory and capable of promoting arbitrariness and nepotism.

(iii) Such an interpretation would be against the spirit of Articles 14 and 16 of the Constitution, and therefore, interpretation which would make Rule 9 unconstitutional will have to be rejected.

(iv) When sub-section (2) of section 5 compels the Management to appoint eligibility, duly selected candidate only on probation, the backdoor entry of a person who alone knows about existence of vacancy cannot be accepted as palatable interpretation either of Rule 9 or Section 5 read with Rule 9.” (emphasis supplied)

17. The jurisprudential logic in reading the requirement of issuing an advertisement even while making appointments in Open Category, is to ensure that every eligible person is made aware of the vacancy available, which is the barest minimum requirement of the concept of equality enshrined in Articles 14 and 16 of the Constitution of India. The view in *Priyadarshini Education Trust* is subsequently followed in *Chandramani Devraj Tiwari vs. Secretary Smt. R.B. Tiwari*,

Sanskrutik Kendra and Ors, 2008(3) Mh.L.J. 274 and Shri Sant Gajanan Maharaj BahuUddeshiy Shikshan Prasarak Mandal, Khaparwada, through its President and Ors vs. Devendra Bhawani Matode and Others (Letter Patent Appeal 360/2008) in Writ Petition 1727/2007, decided on 4.8.2017.

18. Mr. A.Z. Jibhkate would rely on the decision of a learned Single Judge in *Hindi Vidya Bhavan* (supra) to buttress the submission that appointment of a person in a school other than in accordance with the procedure envisaged in the Act and the Rules would not render the appointment invalid if the employee is otherwise qualified. The learned Single Judge observes thus in paragraph 34, which is reproduced verbatim.

“34. In Umadevi’s case (supra) the Supreme Court was dealing with a case of the workers who were temporarily engaged on daily wages in the Commercial Taxes Department in some of the districts of the State of Karnataka. The Supreme Court in that judgment began with the following observation that: “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”. The Supreme Court has further observed that “any public employment has to be in terms of the constitutional scheme.” In my opinion, looking at the context in which the Supreme Court has observed that a person who has been appointed otherwise than in accordance with the relevant Rules and Regulations cannot claim permanency in service, that judgment is of no avail to

the petitioners. The Act, with which we are concerned in these petitions, was enacted by the State Legislature to regulate the recruitment and conditions of service in certain "Private Schools". The provisions such as the deeming provision in section 5(2) cannot be overlooked, which confers unfettered right on an employee to claim permanency having fulfilled all the conditions contemplated by the Act and the Rules. Appointment of a person in a school otherwise than in accordance with the procedure envisaged in the Act and the Rule would at the most give a ground for the education department not to sanction such appointment and release the grant-in-aid. The appointment of such an employee would not render invalid, if he is otherwise qualified and holds it for two or more years."

In view of the well entrenched position of law and the enunciation by the Division Bench, with which I am respectfully bound, I am not inclined to fall in line with the proposition which is, with due respect to the learned Single Judge, stated too broadly and generally.

19. Mr. A.Z. Jibhkate, then invites my attention to the decision of the Supreme Court in ***Chandrashekhar Anandraoji Rewatkar vs. Navjeevan Shikshan Sanstha and Ors, (2018) 18 SCC 775***. The said decision is of no assistance to Mr. A.Z. Jibhkate. The Tribunal recorded a finding that the employee served for more than 5 years and the appointment was after obtaining prior permission of the Education Department and in pursuance of selection after an advertisement. The High Court set aside the finding since the employee could not produce the advertisement. The Supreme Court observes that the finding could

not have been set aside only on the ground that the employee failed to produce the advertisement.

20. *President, Mahila Mandal, Sinnar and another vs. Sunita Bansidhar Patole, 2007(2) Mh.L.J. 105* cited by Mr. A.Z. Jibhkate holds that if the vacancy was permanent, once the appointment is made in terms of section 5(1), the appointment takes colour of appointment on probation. *Matoshri Ramabai Ambedkar Vidyarthi Vasatigruh Trust and Ors. vs. Bharat D.Hambir and another, 2009(2) Mh L.J. 121* may not be relevant since the ratio is that even if the yearly appointment on temporary basis is initially issued, if the employee was duly qualified and selected and appointed in clear and permanent vacancy, he is deemed to be permanent. In the present case, even if it is assumed that the vacancy was clear and permanent, the question is whether the employee, who was admittedly not qualified as on the date of the appointment, and who concededly was not appointed in pursuance to advertisement issued after obtaining the permission of the Education Department, is entitled to question the termination, assuming that the Tribunal is right in holding that the employee did not abandon employment.

21. The other decisions which are pressed in service by Mr. A.Z. Jibhkate are not relevant in the context of the issues arising

since what is considered is the effect and implication of the vacancy being clear and sanctioned in the context of the nature of the appointment order or the recitals thereof.

22. In *Nagendra Chandra and Others vs. State of Jharkhand and others (2008)1 SCC 798*, the Supreme Court observes thus:

“9. In view of the foregoing discussion, we have no option but to hold that if an appointment is made in infraction of the recruitment rules, the same would be violative of Articles 14 and 16 of the Constitution and being nullity would be liable to be cancelled. In the present case, as the vacancies were not advertised in the newspaper, the appointments made were not only in infraction of Rule 663(d) of the Bihar Police Manual but also violative of Articles 14 and 16 of the Constitution, which rendered the appointments of the appellants as illegal; as such the competent authority was quite justified in terminating their services and the High Court, by the impugned order, was quite justified in upholding the same”.

23. In *State of Bihar and Ors vs. Chandreshwar Pathak, (2014)13 SCC 232*, the Supreme Court declined to show any indulgence to the employees who were appointed without issuing advertisement and without following the due process of selection, on the premise that such appointments are in the nature of backdoor entry.

24. The law declared in *Priyadarshini Education Trust* continues to hold the field. Mr. A.Z. Jibhkate has not brought to my notice any decision of a larger Bench or then of the Supreme Court

which takes a contrarian view. ***Priyadarshini Education Trust*** notes that even if educational institution is not State or instrumentality of the State, the Management cannot make appointments at their whims and fancies. In ***Priyadarshini Education Trust*** it is held that educational institutions are not at par with private employer even if initially the institution is unaided. The relevant observations in ***Priyadarshini Education Trust***, read thus:

“12. In the matter of [Narendra Kumar v. State of Haryana](#), 1994(4) SCC 460, 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 Others](#), reported in 1997(9) SCC 377, following observations 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*, reported in AIR 1986 SC 180, which are borrowed in *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101, which are to the following effect.

In Olga Tellis v. Bombay Municipal Corporation AIR 1986 SC 180 at 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.”

Lastly, we may refer to some observations of the Hon'ble Apex Court in the matter of Secretary, State of Karnataka v. Umadevi, 2006(4) SCC 1. 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 individualising 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 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 endeavour 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."

25. The irresistible and indeed the only conclusion which is reasonably possible, is that the employee did not have the right to hold the post, and can make no grievance nor can he claim any relief, even if it is assumed that he was terminated.

26. The Tribunal further committed grave error in assuming

that eligibility qualification to hold the post can be acquired subsequently. It is trite law that the employee must be eligible to hold the post as on the date of the appointment if not on the date of the advertisement, as the case may be. The fact that the employee who was appointed on 25.10.2004 acquired the requisite Masters Degree on 26.6.2006, is hardly significant. An employee, who was not qualified as on the date of the appointment, cannot be treated as regularly appointed with effect from the date on which he acquired the eligibility qualification, considering the scheme of the Act and the Rules framed thereunder.

27. The judgment impugned is manifestly erroneous. The employee was not appointed in accordance with the statutory scheme, he was further not qualified to hold the post as on the date of the appointment, and was not entitled to any relief in appeal.

28. While Mr. A.Z. Jibhkate does submit that the employee may be compensated to certain extent by invoking the provisions of section 11(2)(e) of the Act, I am afraid, the said provision will come into play only if the order of termination is held illegal or improper. Since such finding cannot be recorded in the factual matrix, it would not be permissible to direct the Management to pay compensation to the employee.

29. The judgment and order impugned dated 29.3.2010, rendered by the School Tribunal, Amravati, in Appeal 98/2009, is quashed.

30. Petition is allowed in the aforestated terms.

JUDGE

belkhede