

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

WRIT PETITION No. 8046 OF 2021

1. Sarvajanik Education Society Through
Its Secretary having its office at Cama
Lane Ghatkopar (W), Mumbai-400 086.
2. Smt. S.T. Mehta Women's Junior College
of Art's Through its Principal having office
at Cama Lane, Ghatkopar (W),
Mumbai 400 086.Petitioners

Versus

1. State of Maharashtra, Through
the Secretary, School Education
Department, 4th Floor, Mantralaya,
Mumbai-32.
2. The Deputy Director of Education
Mumbai Region, Mumbai, having
Office at Jawahar Bal Bhavan, Netaji
Subhash Marg, Charni Rd,
Mumbai – 400 004.
3. Vibha S. Rai Age- 31 yrs,
R/o. 1-D, Dream CHS Bhandup West,

**TALLE
SHUBHAM
ASHOKRAO**

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TALLE SHUBHAM
ASHOKRAO
Date: 2023.08.09
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Mumbai 400 708.

4. Sonal Mehta Assistant Teacher

S.T. Mehta Women's Jr. College of Arts,

Cama Lane, Ghatkopar (W),

Mumbai 400 086.

....Respondents

Mr. Shailesh Naidu a/w. Mr. V. Mannadiar i/by Mr. Shaikh Masih, for the Petitioners.

Mr. P.P. Pujari, AGP for Respondent/State.

Mr. Chetan Mali, for Respondent No. 3.

CORAM : M.M. SATHAYE, J.

RESERVED ON : 22nd June, 2023

PRONOUNCED ON : 9th August, 2023

JUDGMENT

1. Rule. Learned AGP waives service for Respondent Nos. 1 and 2. Learned Counsel appearing for contesting Respondent No. 3 waives service. In this matter, notice for final disposal was issued on 27th September, 2022 and according to the office note, Respondent No. 4 is also duly served. In that view of the matter, Rule is made returnable forthwith. Taken up for final disposal with consent.

2. This petition is filed under article 226 of the Constitution of India, *inter alia* seeking a writ of certiorari or any other appropriate writ to quash and set aside the Judgment and Order dated 25th February, 2020 passed by School Tribunal Mumbai, in Appeal No. 8 of 2019. By said Order, appeal filed by the Respondent No. 3 ('Teacher' for short) against the present Petitioners ('Management' for short) was allowed, thereby directing the Management to reinstate Teacher on the post of Assistant Teacher (part-time post) in Sociology with continuity in service and full back wages. The Management is further directed to also consider the Teacher for the full-time post, if eventually it so becomes available. Further direction is given to the Management to make all the necessary correspondences with Education Department for the compliance of the said Order. This Order is hereinafter referred as to "the impugned Order".

3. The record shows that by Order dated 2nd February, 2022 of this Court, the Teacher was directed not to proceed with the execution of the impugned Order until further Orders, on condition that the Management deposits the entire back-wages from 30th January, 2018 till 28th February, 2022 in this Court within a stipulated time. The record further shows that the Management has

complied with that Order and an amount of Rs. 13,69,339/- has been deposited in this Court. It is in these circumstances that the matter has been taken up for final hearing.

CASE OF THE PETITIONERS/MANAGEMENT

4. It is the case of the Petitioners that Petitioner No. 1 is a trust conducting several Educational Institutes, including Petitioner No. 2 Junior College, where the Respondent No. 3 was working on probation. The Petitioner No. 2 is a private recognized and aided secondary school. Following the selection procedure as prescribed, it issued an advertisement in local newspaper inviting applications for the post of lecturers for English, Sociology and Psychology. Respondent No. 3/Teacher applied pursuant to the said advertisement and was selected. On 4th August, 2014, an appointment Order was issued to Respondent No. 3 appointing her on probation for a period of 3 years on the post of Assistant Teacher-probationer (*Shikshan Sevak*) for the subject of Sociology on a full-time basis (hereinafter referred to as “the first appointment Order”). It is further submitted that in view of reduction of workload for the subject of Sociology, as per sanctioned staff schedule, the post held by Respondent No. 3 was converted to part-time and accordingly, a

fresh appointment Order dated 10th August, 2015 (hereinafter referred to as “the second appointment Order”) was issued.

5. It is contended that from the date of second appointment Order to 27th January, 2016, Respondent No. 3 worked as part-time Teacher and thereafter she worked on clock-hour basis for different subjects. It is further contended that on 27th January, 2016, the services of the Respondent No. 3 were terminated and it is specific case of the Management that the said letter dated 27th January, 2016 is a termination letter. It is further contended that from 10th August, 2017 to 30th January, 2018, Respondent No. 3 was working on clock-hour basis. It is submitted that despite receiving termination letter, Respondent No. 3 volunteered to continue her services and also provided services on casual basis in the interregnum. It is contended that during such time, when Respondent No. 3 was working on either clock-hour basis or casual basis, she was not required to sign on muster or any other attendance record.

6. It is Management’s further case that it sought approval for appointment of Respondent No. 3 as a part-time teacher and also made representation. It is contended that the Education

Department declined to consider the said representation. It is further contended that on 23rd May, 2017 the Education Department declined to grant approval for appointment of Respondent No. 3, raising 2 issues viz., recruitment procedure as per concerned G.R. was not followed and as per staff schedule for the concerned academic year, full-time workload was not available. It is contended that therefore in the facts of this case, the Education Department has rejected approval of Respondent No. 3 even as part-time teacher. It is Petitioners' further case that *vide* letter dated 2nd February, 2018, the management again took up the matter of approval of Respondent No. 3 with Education Department, however, the same was not responded.

7. It is further contended that on 18th July, 2018, the Management issued fresh advertisement for the post of lecturer in Sociology. It is contended that by e-mail dated 28th July, 2018, Respondent No. 3 acknowledged the college-letter dated 30th January, 2018 whereby she was informed of her discontinuation. The Respondent No. 3 however, sought to contend that she has completed 3 years' tenure as the Assistant Teacher probationer and therefore she has become permanent. It is contended that in this e-mail, Respondent No. 3 expressed her desire to work in the college

as part-time Sociology Teacher. It is further contended that on 22nd September, 2018, the Management *vide* its e-mail, called upon Respondent No. 3 to appear for an interview on 24th September, 2018, and according to the Petitioners, Respondent No. 3 actually appeared for the interview along with two others contenders. It is further contended that the selection committee however, found Respondent No. 4 as a more suitable candidate and therefore the Respondent No. 4 was selected and appointed as part-time teacher for Sociology w.e.f. September-2018.

8. It is Petitioners' further case that Respondent No. 3 approached the School Tribunal by filing an appeal along with application for condonation of delay and by Order dated 30th April, 2019, the School Tribunal was pleased to condone the delay. It is contended that the Petitioner-Management filed its written statement before the School Tribunal, to which Respondent No. 3 filed Affidavit-in-rejoinder, to which the Petitioner-Management filed Affidavit-in-sur-rejoinder. It is contended that when its Writ Petition No. 10008 of 2019, filed challenging the condonation of delay Order, was pending, the School Tribunal passed an Order to expedite the hearing of appeal. It is contended that while disposing of the said Writ Petition No. 10008 of 2019, this Court directed that

any observation made by the Tribunal while passing the Order of delay condonation shall not be construed as observations on merits.

9. It is contended that parties went on to contest the matter on merits the impugned Order has been passed.

CASE OF THE RESPONDENT NO. 3

10. The Respondent No. 3/Teacher has filed an Affidavit-in-reply, affirmed on 11th March, 2022 opposing the present Petition on various grounds. It is contended that the scope of the present Petition under Article 226 of the Constitution of India is limited. It is contended that Respondent No. 3 has participated in the appointment process and after a duly constituted committee interviewed her, she has been selected based on merits. It is contended that in the academic year 2015-2016, the concerned post shown as part-time was based on incorrect data about students and subject, which was a mistake on the part of the Management and the post ought not to have been shown as part-time, as there was enough workload to make it full-time. It is further contended that in the academic year 2016-2017 and 2017-2018 the said post was shown as part-time despite increase in student-strength.

11. It is contended that during the period from re-appointment till her illegal termination, she was not paid regularly and was only paid Rs. 20,000/- for the entire year during her service. She contended that she was not paid full salary on the ground that her approval was pending before the Education Department, however she continued working on the post and has completed the probation period of 3 years. She contended that once the post becomes part-time from full-time, as a teacher, she has no role in sending proposal and it was solely in the hands of the Management, who has not done it properly. She contended that once a person is appointed on full time post, he or she does not cease to continue on the post, even if the post becomes part-time. She has seriously disputed the alleged letter of termination dated 27th January, 2016, which according to her, is issued without following legal procedure. She has contended that services of a probationary teacher can be terminated by the Management, only if work or behavior of such probationary teacher, during the probation, is found not satisfactory and in that case one month's notice is necessary. It is contended that these obligations of the Management under Section 5(3) of the said act are not discharged by the Management. It is contended that she was given to understand that the alleged termination letter dated 27th January,

2016 was only a formality and she was asked to give reply stating that she would continue working on the post without insisting salary. It is contended that she followed the instructions of the Management to save her job and continued on the post. It is contended that thereafter she was not allowed to sign on muster. She contended that a letter dated 30th January, 2016, was taken from her so that she does not insist for salary from the Management. She contended that the *modus operandi* of the Management shows unfair practices followed to exploit situation of Teachers like Respondent No. 3.

12. It is further contended by Respondent No. 3 that the Management has not come before the Court with clean hands and has tried to mislead the Courts, both before the Tribunal as well as this Court. She contended that the Assistant Teacher Probationer (*Shikshan Sevak*) who has completed service of 3 years, cannot be terminated even if the approval is rejected by Education Department for whatever reasons. She contended that the approval by the Education Department is a matter between concerned department of the State and the Management and it necessarily relates to the burden on the State for payment of salaries to teachers, but the same has no effect on the statutory mandate of deemed confirmation of

Petitioner. So far as the case of the Management that Respondent No. 3/Teacher was working on clock hour basis, is concerned, she has contended that she was asked to work as such, till the management gets approval for her appointment and she was assured that necessary follow-up with the Education Department was being taken. It is contended that she was shocked to receive a letter dated 30th January, 2018 sent by Management, wherein it was stated that due to rejection of proposal, her services were not required. It is contended that this communication further shows complete malafides on the part of Management. She further contended that she thereafter personally met the Management personnel who promised that her proposal would be placed before the Education Department in May, 2018 for approval and her services will be continued. She contended that however her proposal was again rejected by the Education Department by Order dated 24th April, 2018. She contended that she has filed Writ Petition(L) No. 1409 of 2021 challenging rejection of approval by Education Department and the said petition is pending before Division Bench of this Court. It must be noted here itself, that by Order dated 5th September, 2022 passed in said Writ Petition (L) No. 1409 of 2021 (Writ Petition No. 759 of 2021), it is observed that the Management may get present Writ Petition circulated first before the Single Judge

and it would be appropriate to consider the said other petition subsequently before Division Bench.

13. It is contended that pursuant to first appointment letter dated 4th August, 2014, on completion of probation period of 3 years, she has been confirmed under deeming provisions of section 5(2A) of the Maharashtra Employees of Private Schools (Condition of Service) Regulation Act, 1977 (for short “MEPS Act” or “the said Act”), and she could not have been terminated. It is contended that by e-mail dated 28th July, 2018, she objected to the action of the Management of issuing fresh advertisement and inviting applications for fresh appointment on her post. The Respondent No. 3 has categorically stated that she never applied for the said post, pursuant to the said advertisement. It is also specifically contended by Respondent No. 3 that on 24th September, 2018 i.e., on the date of fresh interview, she went to the Management personally and requested them not to conduct the interview for appointment on her post however, Management did not pay any heed and continued with their illegal process. She has contended that she was not allowed to meet the concerned Management personnel, but was allowed entry in the cabin, only upon her signature on the entry-sheet and this signature has been now shown by the Management as

signature suggesting participation of the Respondent No.3 in the interview. She contended that this conduct further shows malafides of the Management. It is contended that the action of Management of appointing Respondent No. 4 on her post is objected by her e-mail dated 7th October, 2018. On these grounds inter alia, Respondent No. 3/Teacher has opposed the present Petition.

14. Despite due service of notice of final hearing, Respondent No. 4 has chosen not to appear before the Court and not to file any reply.

SUBMISSIONS

15. Heard Ld. Counsel Mr. Naidu appearing for the Petitioners/Management. He has made oral submissions as well as filed written submissions, which are summarized below.

15.a) It is submitted that Respondent No. 3 has not challenged the termination Order/Letter dated 27th January, 2016.

15.b) It is submitted that for the deeming fiction under Section 5(2A) of the Maharashtra Employees of Private Schools (Condition of Service) Regulation Act, 1977 to operate

in favour of Respondent No. 3, factual existence of her post (Full-time for the subject sociology) is a *sine qua non*. For this proposition, Judgment of ***St. Ulai High School & anr. Vs. Devendraprasad Jagannath Singh***¹ is also relied upon. It is submitted that this full bench Judgment clearly considers that the appointment is “to the post” and therefore the post of full-time teacher for the subject of sociology must continue to exist factually otherwise the deeming provision cannot apply. It is submitted that after the initial appointment of the Respondent No. 3 under the appointment Order/letter dated 4th August, 2014, the post has been changed to ‘part time’ due to reduction in workload and as such the factual existence of her post is missing for the statutory period of three years for the deemed permanency provision to apply. It is therefore submitted that Respondent No. 3 could not have been appointed and confirmed as a teacher. In support of this submissions, the learned Counsel for the Petitioners also relied upon the case of ***Bhavnagar University vs. Palitana Sugar Mills (P) Ltd.***²

¹ 2007(1) Mh.L.J.597

² AIR 2003 SC 511

15.c) It is further submitted that services of Respondent No. 3 can not relate back to full-time appointment in view of termination letter and acceptance of part-time appointment vide second appointment letter dated 10th August 2015.

15.d) It is next submitted that if at all the appointment of Respondent No. 3 as part-time teacher is to be taken as a basis under second appointment letter, then, being a part time post, a period of 6 years should be applied based on a Government Resolution dated 10th June, 2005 (Clause 9). Since the Respondent No. 3 has not completed those many years, she cannot be deemed to have been confirmed under Section 5(2A) of the MEPS Act and for this proposition learned Counsel for the Petitioner has relied upon the Judgment of this Court in the matter, ***Smt. Aaditi Ajay Shelar vs. Maharshi Varve Stree Shikshan Sanstha*** pronounced on 17.10.18 in Writ Petition No. 10574 of 2017.

15.e) It is next submitted that the participation of the Respondent No. 3 in the fresh selection process initiated by the Petitioners/Management for the post which became subsequently available after termination of her services. This

has dis-entitled Respondent No. 3 from claiming continuation in service. In support of this submission, the Judgment of ***Suneeta Agrawal vs. State of Haryana***³ is relied upon.

15.f) It is next submitted that the Order of reinstatement or regularization of an employee cannot be Ordered in the absence of a post. For this proposition, learned counsel for the Petitioners relied upon the Judgment of ***Mahatma Phule Krida Prasarak Mandal vs. Suresh T. Waghmode*** decided on 11th August, 1999 in Writ Petition No. 3993 of 1999

16. *Per contra*, learned Counsel Mr. Mali appearing for Respondent No. 3/Teacher has made the following submissions:

16.a) It is submitted that the Management has taken contrary stands across the proceedings. Even though the workload is reduced during the period of appointment, and though the post changed from full-time to part-time, the Respondent No.3's "service" has continued to exist. He submitted that Respondent No. 3 has continued working on the same post although as a part-time teacher at later stage. He submitted

³ 2000 SCC online SC 377

that reduction in workload cannot be equated with abolition of the post.

16.b) It is further submitted that the alleged termination letter dated 27th January, 2016 in fact refers to the first appointment letter dated 4th August, 2014 and therefore the second appointment letter 10th August, 2015 can be safely discounted. He submitted if the wording of the alleged termination letter is carefully perused, it cannot be construed as termination letter. Learned Counsel for the Respondent No.3 invited the attention of the Court to the language used in the said letter wherein it is stated - “... *In this situation, the management does not want to bear the burden of paying full salary till the end of the current academic year. In light of this, we regret to inform that your services will not be required by us from 1st February, 2016. As and when we get any instruction from the Education Department, we will inform you accordingly.*” It is submitted that if this letter indeed meant to terminate the services of Respondent No. 3, then there would not have been any reference to bearing the burden of paying salary and it could have certainly not referred to any future information based on instructions from

the Education Department. Learned Counsel for Respondent No. 3 has seriously disputed the alleged interpretation of the alleged termination letter as suggested by the Management.

16.c) It is further submitted that the provision of Section 5(2A) of the MEPS Act clearly shows that there is no requirement under law that the post must continue to exist, as contended by the Management. Only in 2 cases, the deemed confirmation will not operate, which are provided in sub section 3 and 4 of Section 5 of the said Act. He submitted that for the termination of services, there has to be clear material on record to show that in the opinion of the Management, the work or behavior of the probationer (*Shikshan Sevak*) during the period of his/her probation, is not satisfactory and even in such situation, only after giving one month's notice or salary, termination can be legally effected. It is pointed out that the alleged termination letter dated 27th January, 2016 does not make any reference to the opinion of the Management about the work or behavior of Respondent No. 3 as not satisfactory. There is no reference in the said letter about 1 month's notice or salary being offered. It is therefore urged that in view of

this factual position, the letter dated 27th January, 2016 must not be interpreted as a valid and legal termination letter.

16.d) Inviting the Court's attention to a letter dated 15th May, 2017, 16th May, 2017 and 2nd February, 2018, learned Counsel for the Respondent No. 3 submitted that in these communications (made after alleged termination letter) with the Deputy Director of Education by the Management, no reference is made to any termination of her services or abolition or non-existence of the post, as sought to be argued before the Tribunal or this Court. This shows that even the Management did not treat the alleged termination letter as such, at the relevant time.

16.e) It is submitted that the format of the appointment letter is provided in the statute itself under Schedule-D of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (for short, 'MEPS Rules') and the Management is not at liberty to add or modify any terms and condition thereof. Therefore, in both the appointment Orders, be it for full time post or part-time posts, dated 4th August, 2014 and 10th August, 2015 respectively, the 'type-written part

added by the Management' stating - "*Your appointment is subject to approval from Dy. Director of Education*" and its alleged acceptance by the Respondent No. 3, is of no consequence under law, since it amounts to contracting out of the statutory provisions. In support of these submissions, learned Counsel for Respondent No. 3 also relied upon the Judgment of ***St. Ulai High School & Anr. Vs. Devendraprasad Jaggannath Singh*** (*supra*) which is a full Bench Judgment of this Court.

16.f) He further submitted that if the second appointment letter dated 10th August, 2015 is carefully perused, it clearly emerges that the probation period mentioned there was of 2 years, which means that the initial 1st year period on the full-time post was counted as part of the probation period of 3 years. This according to Respondent No. 3, supports the continuation of Petitioner's services although on part-time post. It is submitted that clause 9 of G.R. dated 10th June, 2005 relied upon by the Management cannot be used against Respondent No. 3, in as much as it does not apply to an individual appointed on full-time post, whose workload is reduced subsequently and therefore the post became part-

time during the period of probation. He further submitted that MEPS Act is a piece of beneficial legislation and for the absorption of teachers working on a part-time post, the said G.R. was passed. He therefore submitted that the said G.R. cannot be read beyond its literal meaning and thus can not apply to the facts of this case.

16.g) He lastly submitted that the statute itself does not discriminate between part-time and full-time posts so far as deemed confirmation is concerned. He submitted that had that been the intention of the legislature, then the provision under Section 5(2A), would have stated so. He submitted that what is not written in the statute, cannot be read into it, as suggested by the Management.

17. Ld. AGP appearing for the State has fairly submitted to the Orders of the Court. None appeared for Respondent No. 4 though duly served.

REASONS & CONCLUSION

18. I have carefully considered the submissions advanced before me and the caselaw relied upon and perused the record.

19. As far as the first submission of the Management that Respondent No. 3 has not challenged the termination letter dated 27th January, 2016, is concerned, it is necessary to consider submission of Respondent No. 3 that the said letter cannot be 'interpreted or construed' as a legal and valid termination. A perusal of the said letter shows that apart from mentioning in the subject that it is a termination letter, the letter nowhere, in terms terminates the service of Respondent No. 3. In fact, learned Counsel for Respondent No. 3 is right in his submission that the said letter mentions that as and when the Management gets instructions from Education Department, it will inform Respondent No. 3 accordingly. A complete reading of the said letter leads to necessary inference that the instructions that the Management was waiting for, were for approval from the Education Department for the appointment of Respondent No. 3. If the Management really intended to terminate the service of Respondent No. 3, it could not have stated anything about further information to be given to Respondent No. 3 in the said letter. Interestingly the said letter also makes a reference to the financial burden that the Management does not want to bear for paying salary to Respondent No. 3. This aspect of the matter will be adverted to in detail later on.

20. That apart, perusal of subsequent letters/communications by the Management with the Deputy Director of Education, dated 15th May, 2017, 16th May, 2017 and 2nd February, 2018, in fact shows that the Management was treating the Respondent No. 3 as probationer in continuation of the services and was ostensibly communicating with the Government Authority seeking its approval for Respondent No.3. Considering these aspects, in the opinion of this Court, the letter dated 27th January, 2016, cannot be construed as termination letter.

21. It would be beneficial to understand the provisions relating to the obligation of the Management provided in Section 5(2A) of MEPS Act. Sub-section (2A) provides that an Assistant Teacher (Probationary) shall be deemed to be appointed and confirmed as a teacher on completion of a probation period of 3 years subject to provisions of sub-Sections (3) & (4) of section 5. Sub-section (3) provides that if the Management is of the opinion that the work and behavior of the Probationer is not satisfactory during the period of probation, then the Management may terminate his services, 'after giving him one month's notice or salary or honorarium for one month in lieu of notice'. There is nothing on record in the present matter, to indicate that the Management has at

any time recorded its opinion as to the work and behavior of Respondent No. 3 not being satisfactory. If that be so, the Management cannot terminate the service of Respondent No. 3. Sub-section (4) provides that for taking into consideration the period of probation undergone by the Probationer if he/she is reappointed by the Management in the same school or other school belonging to the Management within a particular period. This is not applicable in the present case.

22. Therefore, it cannot be said that the alleged termination letter dated 27th January, 2016, is a legal termination letter. In that view of the matter, nothing would turn on the fact that Respondent No. 3 has not challenged the alleged termination letter.

23. The next argument of the Management that Respondent No. 3 has participated in the fresh selection process initiated by the Management and therefore she is dis-entitled for claiming continuation in service. It is the case of Respondent No. 3 that by her letter dated 28th July, 2018, she has objected to the action of the Management of issuing a fresh advertisement and inviting applications for fresh appointment on her post. It is categorically stated by Respondent No. 3 that she never applied for the post

pursuant to the said advertisement. It is also specifically contended by Respondent No. 3 that on the date of fresh interview, she tried her best to meet the Management personnel but she was not allowed to do so. It is specifically contended in her reply that only on signing the entry sheet, she was allowed to enter the cabinet of the concerned Management personnel. It is contended that the signature on the entry sheet has been used by the Management to suggest that she participated in the interview. Be that as it may. In any case, if one considers the date of the first appointment letter (4th August, 2014) and if the termination letter is found to be illegal, then by the date of fresh advertisement (18th July 2018) and fresh interview (24th September, 2018), already 3 years were completed by Respondent No. 3 and deeming provision u/s. 5(2A) had taken its effect, making Respondent No. 3 as a confirmed teacher. The Management has not produced any material to show that Respondent No. 3 had applied pursuant to fresh advertisement. The email dt. 28th July 2018 (page 44 of the petition) relied upon by the Management as application of Respondent No. 3, can hardly be called as application.

24. In that view of the matter, it is not necessary for this Court to enter into the disputed question of fact about whether

Respondent No. 3 appeared for the interview or had only signed on the entry sheet to get access to concerned Management personnel. Even otherwise, on the date of fresh advertisement, as explained above, the Respondent No. 3 had already become deemed confirmed, therefore the Management could not have issued fresh advertisement for fresh appointment in the place of Respondent No. 3. Therefore the process of fresh appointment itself is illegal. Therefore, principle of estoppel by conduct or acquiescence will not apply to Respondent No. 3 due to mere participation, even if such participation is assumed. For the same reason, it is not necessary for this Court to consider the Judgment relied upon by the Management in the case ***Suneeta Agrawal*** (*supra*), in support of its case that having participated in the fresh appointment, Respondent No. 3 cannot claim continuation of service.

25. The next argument of the Management is that for the deeming fiction under section 5(2A) of MEPS Act to operate in favour of the Respondent No. 3, actual existence of her post (full-time teacher for Sociology) is *sine qua non*. A perusal of section 5(2A) of said Act clearly shows that there is no such requirement in the law itself. The learned counsel Respondent No. 3 is right in his

contention that Court cannot read something that is not written by the Statute itself. Reliance is placed by the Management on the Judgment of ***St. Ulai High School & Anr*** (*supra*) to buttress its argument that the appointment is made 'to the post' and therefore, the post must continue to exist.

26. On careful consideration of the facts of the said Judgment, this Court does not find that 'actual existence of the post and its change from full-time to part-time' (as in the present case) was substantially in consideration before the Court in that matter. The said Judgment dealt with the issue of the jurisdiction of the Civil Court being impliedly barred in respect of the matter upon which appeal lies to School Tribunal. The said Judgment also dealt with the issue involving the decision of the Education Officer on the issue of inter se seniority under Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981, (for short '**MEPS Rules**'). The said judgment also considered an important aspect as to whether the grant of approval by the Education Officer is a condition precedent for valid Order of appointment, especially when the approval relates to disbursal of the grant by State. It considered whether absence of the approval invalidates an otherwise legal

appointment. It also considered effect of attempt by Management to contract out of rigors of law by incorporating a condition making approval necessary.

27. Interestingly in this matter, Respondent No. 3 has also relied upon the same Judgment of ***St. Ulai High School & Anr.*** (*supra*) in support of her submission that approval or dis-approval by the Education Department of an appointment on the post, is irrelevant insofar as deeming section 5(2A) of the said Act is concerned. Indeed, this Court finds that in the said Judgment, a Full Bench of this Court was considering this issue directly. In para 10.8 of the said Judgment, it is observed as follows:

“10.8 The question that arises is whether a condition of approval can be imposed by the management in the Order of appointment and if so whether a termination of services can be sustained on the ground that there has been a non-fulfillment of a contractual condition contained in the Order of appointment. The answer is that the terms and conditions of appointment are prescribed in the rules framed under sub-section (1) of Section 4. Rule 9(5) provides that a candidate appointed to a post has to be issued with a letter of appointment in accordance with the form prescribed in Schedule D. Schedule D, does not impose any condition providing for prior or post facto approval as a condition for continued employment. An Order of appointment cannot be at variance with the conditions prescribed in the rules which have

statutory force and effect in conjunction with section 4(1) of the Act. The mode of appointment and conditions of service of employees of recognised private schools are statutorily prescribed by the Act and the rules and it would, therefore, not be open to the management to impose a condition that the validity of the appointment would be subject to the grant of approval. The State Government as a delegate of the Legislature has not prescribed any such condition in the rules and the management cannot impose such a condition which has not been provided in the rules, as an overriding pre-requisite to the validity of an appointment.”

Also, in para 10.5 of the said Judgment, it is observed as follows:

“10.5 In several Judgments of learned Single Judges of this Court, the view that has been taken is that the necessity for the management to take the approval of the Education Officer is an incident of the management seeking grant-in-aid but approval is not a condition precedent to the validity of the appointment. In Mahatma Phule Krida Prasarak Mandal v. Suresh T. Waghmode (Writ Petition 3993 of 1999, decided on 11th August 1999), Mr. Justice D. K. Deshmukh, held thus:

The matter concerning grant of approval is between the management and the Education Officer and is relevant only for the release of grant by the State Government to the management. Therefore, the School Tribunal has to decide about the nature of appointment of Respondent Page 0098 No. 1 on the basis of the appointment Order, advertisement etc. and not on the basis of the approval granted by the Education Officer.

The same view was reiterated in a Judgment of Mr. Justice V.C. Daga in Ramchandrar Ramadhar Yadav v. Hyderabad (Sind) National Collegiate Board (Writ Petition 467 of 1994 decided on 23rd December 2005) where the Learned Judge held thus:

"So far as the impugned Order of the Tribunal considering the approval granted by the Education Officer to Respondent No. 1 is concerned, the Order of the Education Officer granting or refusing to grant approval is not relevant to decide the status of the Petitioner because the question of grant of approval is between the Education Officer and the management and the same is relevant only for the purposes of grant in aid by the State Government....."

(Emphasis supplied)

28. It is, therefore, clear that an Order of appointment cannot be at variance with the condition prescribed in the Rule which has a statutory force. The terms and conditions of the appointment are prescribed in the Rules framed under section 4(1) of the said Act. Rule 9(5) provides that a candidate appointed to the post "has to be issued" with a letter of appointment in accordance with the form prescribed in Scheduled 'D'. A perusal of schedule 'D' of the said rules, shows that it does not impose any condition providing for prior or post facto approval as a condition for

continued employment. Once that is position, the first appointment letter dated 4th August 2014 including type-written addition that the appointment is subject to condition of approval by the Education Department, is obviously in contravention of the law.

29. In that view matter, it cannot be said that since the Education Department did not grant approval to the appointment of Respondent No. 3, she will not become permanent under the deeming provision of Section 5(2A) of the said Act. It is clearly provided in para 10.10 of the said Judgment of the Full Bench, that the Tribunal can inquire into the legitimacy of the foundation upon which Order of termination is based. In the present case, the foundation upon which the alleged termination letter is based, is non-approval by Education Department to the appointment of Respondent No. 3 on the said post. Having found that the matter of grant of approval is between the Management and Education Officer and it is relevant only for the purpose of release of the grant by the State Government to the Management, it is obvious that the said consideration has no relevance for the deeming fiction to take effect under section 5(2A).

30. Even on facts, it is material to note that the second appointment letter dated 10th August, 2015 refers to period of only 2 years i.e from 11th August 2015 to 10th August, 2017, which shows that the earlier time spent by Respondent No. 3 under the first appointment Order dated 4th August, 2014 was duly considered. At the cost of repetition it is worth noting again that the first appointment letter refers to period from 10th August, 2014 to 10th August, 2017. This is clearly indicative of the fact that the Management also considered Respondent No. 3 as continuing in her original appointment.

31. Reliance placed by the learned counsel for the Management on the Judgment of ***Bhavnagar University*** (*supra*) to contented that once legal fiction is created, it must be given its full effect. This Judgment, on the face of it, will not advance the case of the Management for the simple reason that the existence of the post, as insisted by the Management, is not a requirement of the law, for the deeming fiction to operate. For that reason alone, it is not necessary to consider the said Judgment any further.

32. Next argument of the Management is that services of

Respondent No. 3 cannot relate back to full-time appointment in view of acceptance of part time appointment under second appointment letter dated 10th August, 2015. This argument is only stated to be rejected. Perusal of the operative part of the impugned Order shows that the reinstatement Order is on the part-time post, not full-time. The reference to consideration by the Management if full-time post eventually becomes available, is a subject in the realm of speculation. The Order is only for 'consideration' by the Management and there is no mandate for appointment on the full-time post.

33. The next argument of the Management is that if at all the appointment of Respondent No. 3 is to be considered as part-time teacher then, for the deemed confirmation, a period of six years shall be applied based on Government Resolution dated 10th June, 2005, (for short "**the said GR**"). A perusal of the said GR and specifically clause 9 thereof clearly shows that it is applicable when the 'part-time teacher is to be given full-time post' due to change in workload and for such appointment, the part-time teacher who has worked for six years is to be appointed as full-time teacher. Obviously therefore the said GR and its clause 9 cannot be applied to the facts of the present case. In present case 'full time post was

changed to part-time' i.e. the reverse situation. In any case, in the present matter it is already held that Respondent No. 3 has continued to serve after being appointed as full-time teacher for a period of one year and then as a part-time teacher for a period of the remaining two years and therefore, the condition of section 5(2A) is squarely fulfilled. Therefore, there is no question of application of the said GR to the facts of this case.

34. Next, reliance placed by the Petitioners/Management on the Judgment of ***Smt. Aaditi Ajay Shelar Vs. Maharshi Karve Stree-Shikshan Sanstha*** (*supra*), is clearly misplaced. The facts of the said case were totally different. In that case, the teacher was appointed and worked on the full-time basis for complete three calendar years. Careful perusal of the said Judgment shows that there is no clear direction or interpretation of the said GR made in the said Judgment. In that view of the matter, the said Judgment will not advance the case of the Petitioners/Management.

35. The last submission made by the learned counsel for the Management, is that there cannot be an order for reinstatement, in the absence of the post and for this the Judgment of ***Mahatma***

Phule Krida Prasarak Mandal Vs. Suresh T. Waghmode

(surpa) is relied upon. As already observed above, the present impugned Order does not order reinstatement of Respondent No. 3 to any post which is not available or not in existence. Reinstatement is ordered on the part-time post which is clearly available. This fact of availability of part time post (Sociology) is indisputable because the Management's fresh advertisement was also for part-time post and appointment of Resp. No. 4 is also made to the part-time post. Therefore, on facts, the reliance placed on the said Judgment is clearly misplaced and hence, it does not advance the case of the Manager.

36. A perusal of the impugned Order dated 25th February, 2020, passed by the School Tribunal, shows that the view taken therein is based on material available on record. There is no perversity found in the conclusion drawn by the Tribunal. The Tribunal has not transgressed its jurisdiction while passing the impugned Order. In that view of the matter, this is not a fit case to interfere in the writ jurisdiction of this Court. For the same reason, there is no need to consider and discuss other judgments relied upon by the learned Counsel for the Respondent No. 3 in his written submissions.

37. For all the aforesaid reasons, there is no merit in this Writ Petition and the same is dismissed. Rule is discharged. No order as to cost.

38. Respondent No. 3 is at liberty to withdraw the amount deposited by the Petitioners/Management in this Court, along with accrued interest, if any.

39. All concerned to act on authenticated copy of this Order.

[M.M. SATHAYE, J.]

40. At this stage, learned Counsel for the Petitioners (Management) prays continuation of existing interim relief (as recorded in para 3 of the Judgment) for 6 weeks. Learned Counsel for the Respondent No. 3 has opposed this prayer in view of his client- Respondent No. 3 being unemployed and the money deposited in the Court, not being yet received by her.

41. Considering the fact that the Management was protected by an order of interim relief during pendency of the Petition and the Management had complied with the order of

deposit, the existing interim relief is continued for a period of 4 weeks.

42. Learned Counsel for Respondent No. 3 made an oral application for permission to withdraw the money as directed above. This request is opposed by the learned Advocate for the Management on the ground that the Management intends to challenge the order passed today and once the amount is withdrawn, it will be very difficult to recover it. Since the interim relief is extended by 4 weeks, it is directed that the Respondent No. 3 will be at liberty to withdraw the amount deposited by the Petitioners/Management in this Court, along with accrued interest, if any, after a period of 4 weeks.

[M.M. SATHAYE, J.]