

(2000) 10 BOM CK 0054

In the Bombay High Court

Case No : Writ Petition No's. 1279 and 1154 of 1998

Chanda Shikshan Prasarak Mandal and Another

APPELLANT

Vs

Presiding Officer Addl. School Tribunal and Others

RESPONDENT

Date of Decision : 20-10-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Maharashtra Educational Institutions (Management) Act, 1976 — Section 3, 3(3), 4

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 9(2)

Citation : (2001) 3 BomCR 177

Hon'ble Judges : S.G. Mahajan, J

Bench : Single Bench

Advocate : Z.A. Haq and Pushkar Adbe, for the Appellant; J.J. Chandurkar, K.S. Dhote, A.G.P. for Respondent No. 2, Anand Parchure, for respondent No. 3 and, for the Respondent

Judgement

S.G. Mahajan, J.—This common judgment shall dispose of two writ petitions, namely (1) Writ Petition No. 1279 of 1998 and (2) Writ Petition No. 1154 of 1998.

2. Facts giving rise to the dispute in these cases are as below:

(a) The petitioner-Society Chanda Shikshan Prasarak Mandal, Chandrapur, administers a large number of institutions including colleges. Janata Vidyalaya, Ghuggus, Chandrapur, is one of those institutions. By the order dated 3rd August, 1998, the Director of Education took over the management of the schools run by the petitioner-Society, under the provisions of Maharashtra Educational Institutions (Management) Act, 1976 (for the sake of brevity, "The M.E.I. Management Act, 1976"). The Administrator was appointed to manage the affairs of the institution. This appointment was challenged by the petitioner-Society in Writ Petition No. 2239 of 1998 in the High Court. The Division Bench of this Court, by the judgment dated 28th February, 1991, allowed the writ petition and held that the appointment of Administrator was illegal. The order of Director

of Education was, therefore, set aside. The Government sought time to move the Supreme Court. The time was granted and the Administrator continued on the strength of that order upto September, 1991. Meanwhile, on 13th July, 1991, the Administrator issued the orders appointing Shri Murlidhar Kashinath Dange, respondent No. 3, in Writ Petition No. 1154 of 1998 as an Assistant Teacher and Shri Namdeo Govinda Shikhare, respondent No. 3, in Writ Petition No. 1279 of 1998, as a Peon. The appointment of respondent No. 3 in Writ Petition No. 1279 of 1998 took effect from 14th July, 1991 and that of respondent No. 3 in Writ Petition No. 1154 of 1998 took effect from 15th July, 1991. The Government of Maharashtra did not file any appeal to the Supreme Court for which earlier the time was sought in the High Court. The charge of all the 14 schools was, therefore, handed over to the petitioner-Society in September, 1991.

(b) After the charge of the schools run by the petitioner-Society was taken over by the Administrator as aforesaid, the Administrator terminated the services of several employees. Those employees filed civil suits. The Administrator had made the appointments of some 8 to 10 employees while he was holding the charge. After the charge was taken over by the petitioner-Society in September, 1991, the position of the above employees was reviewed. The petitioner-Society filed the pursis before the Civil Court stating therein that the employees whose services were terminated by the Administrator would be reappointed. The services of the employees, who were appointed by the Administrator during his tenure, were terminated by the petitioner-Society. Murlidhar Kashinath Dange, who is the respondent No. 3 in Writ Petition No. 1154 of 1998 and Namdeo Govinda Shikhare, who is the respondent No. 3 in Writ Petition No. 1279 of 1998, are among those employees whose services were terminated by the petitioner-Society as above. Both these respondents challenged their termination before the Additional School Tribunal, Nagpur (Chandrapur), by preferring the appeals bearing Nos. (1) Appeal No. STN/258/91 (by Murlidhar Kashinath Dange) and (2) Appeal No. STN, 256/91 (by Namdeo Govinda Shikhare). The Presiding Officer/ Additional School Tribunal, Nagpur (Chandrapur), by the order dated 20th February, 1998, allowed both the appeals, set aside the impugned orders of termination and directed the Management to reinstate the appellants (present respondents No. 3 in both the petitions) on the same post and to pay arrears of emoluments to them for the period from 10th October, 1991 till the date they would join their duties. These orders passed by the learned Presiding Officer, Additional School Tribunal, are under challenge in these writ petitions.

3. The learned Counsel for the petitioner-Society submitted that since the very appointment of the Administrator was illegal and was also held so by the High Court in Writ Petition No. 2239 of 1988, he could not be said to have an authority to make the appointments of the employees in the institutions and, therefore, the appointments of respondents No. 3 in both the writ petitions cannot be termed as valid and their services were rightly terminated by the Management, who took over the charge of the institutions after the Administrator was removed. It was further pointed out that the appointment of both these

respondents was made by the Administrator on 13th July, 1991, which was subsequent to the judgment delivered by the High Court holding the appointment of the Administrator as invalid.

4. It is difficult for me to agree with the learned Counsel for the petitioner-Society on this point. The appointments of the employees made by the Administrator cannot be held to be invalid on the count that his own appointment that was made by the Director of Education was illegal. Till the date the Administrator handed over the charge of the institution to the Management, he was working in de facto capacity. Even on 13th July, 1991, he was continued on the strength of the order of the High Court. If the above proposition of the learned Counsel for the petitioner-Society that the appointments made by the Administrator were invalid because his own appointment was illegal is accepted, then each and every affair administered by the Administrator will be nullified. The authorities cited by the learned Counsel for respondents No. 3 on the point of doctrine of de facto capacity are (1) Gokaraju Rangaraju Vs. State of Andhra Pradesh, and (2) Dr. N. Ugramurthy v. The Chief Secretary, Government of Karnataka and others 1999 Lab.I.C. 1267. The former authority is on the point of de facto Judge acting under the colour of lawful authority and the ratio of the latter case is that the powers and the functions discharged by the Authority after the date in de facto capacity have to be treated as having done under the authority.

5. The second line of arguments advanced by the learned Counsel for the petitioner-Society was that the Administrator is not empowered to make the appointments of the employees and it is the School Committee, who can make the appointments. The learned Counsel invited the attention of this Court to various provisions. In Clause 3 of Schedule "A" to the Maharashtra Employees of Private Schools, (Conditions of Service) Rules, 1981 (for the sake of brevity, "The M.E.P.S. Rules, 1981"), the functions of the School Committee have been enumerated. The said Clause 3 shows that the appointment of employees (other than the Head of the School) is one of the functions of the School Committee. So this Clause enables the School Committee to make the appointments. Rule 9(2) of the M.E.P.S. Rules, 1981 lays down that the appointments of teaching staff (other than the Head and Assistant Head) and those of non-teaching staff in a school shall be made by the School Committee. Then further, Clause 2 of the Schedule "A" to the M.E.P.S. Rules, 1981 speaks about the constitution of School Committee. It reads:

"2. The School Committee shall consist of---

(a) Four representatives of the Management consisting of the President of the governing body or his nominee and three members nominated by the governing body. The President of the governing body or his nominee shall be the Chairman of the Committee.

(b) One member from amongst the permanent teachers from the same school

only in order of seniority by annual rotation and one member from amongst the non-teaching staff from the same school only in order of seniority and by category wise annual rotation.

Illustration.----- ---- -;

(c) The Head of the School, who shall be ex-officio Secretary of the School Committee, shall be responsible to keep a record of the proceedings of the Committee's meeting."

The learned Counsel for the petitioner-Society contended that the Administrator steps in the shoes of the Management. The "Management" is defined in section 2h(2) of the M.E.I. Management Act, 1976. It reads:

"(h) "Management" in relation to an educational institution, means-

- (1) in the case of an institution managed by a local authority, that local authority;
- (2) in the case of any other institution, the person or body of persons (by whatever name called) who are responsible for the general administration of, and financial control over, the institution, but does not include an institution managed by the State Government."

Again the definition of "Management" finds place in section 2(12) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for the sake of brevity, "The M.E.P.S. Act, 1977). The provision reads:

"2(12): "Management", in relation to a School, means,

- (a) In the case of a school administered by the State Government, the Department;
- (b) In the case of a school administered by local authority, that local authority; and
- (c) In any other case, the person or body of persons, whether incorporated or not and by whatever name called, administering such school."

So the main function of the Management is to administer the school. The learned Counsel for the petitioner-Society submitted that since the Administrator steps in the shoes of the Management, he can be one of the members of the School Committee and he alone is not competent to make the appointments, which is the job of the School Committee as demonstrated in the aforesaid provisions.

6. The learned A.G.P. submitted that as soon as the management of the institution is taken over and the Administrator is appointed, the School Committee stands dissolved and the Advisory Committee has to be appointed by the Government to assist the Administrator u/s 5 of the M.E.I. Management Act, 1976. In answer to these submissions, the learned Counsel for the petitioner-Society submitted that the School Committee is a different entity and it is constituted in accordance with the provisions of Schedule "A" to the M.E.P.S.

Rules, 1981 as stated in Rule 2(1)(i) of those Rules.

7. I am unable to agree with the proposition of the learned Counsel for the petitioner-Society that even after the Management is taken over the School Committee exists and such Committee only is competent to make the appointments. The learned Counsel for respondents No. 3 canvassed that when, as submitted by the learned Counsel for the petitioner-Society, the Administrator steps in the shoes of Management, then in that event he alone will represent the entire Management, whereas as per Clause 2 of Schedule "A" to the M.E.P.S. Rules, 1981, the School Committee consists only of four representatives of the Management consisting of the President of the governing body or his nominee and three members nominated by the governing body. So according to him, after the Administrator is appointed, the above condition of four representatives of the Management in the School Committee cannot be fulfilled and the School Committee therefore, cannot be constituted.

8. In this connection, it may be useful to refer to some provisions. The provision of section 3 of the M.E.I. Management Act, 1976 speaks about the taking over of the management of the educational institution. Then the provision of section 4 of the said Act speaks about the appointment of Administrator. As per the provisions of section 3(3) of the said Act, after taking over the management of any institution under this section, the Director may, with a view to maintaining continuity of education imparted in such institution, and in the interest of the students attending it, arrange to manage the institution through one or more Administrators appointed u/s 4. After the appointment of an Administrator, what is to be handed over to the Administrator is stated in section 7(1) of the M.E.I. Management Act, 1976. The provision is as below:

"7(1): On the appointment of an Administrator, the Management of the institution, the management of which has been taken over u/s 3, shall forthwith hand over the management of the institution to the Administrator and all papers and property of the institution in its possession or under its control (being papers and property which in the opinion of the Director is essential or necessary for the management of the institution)."

All these provisions indicate that after the appointment of Administrator, he is entrusted with all the affairs of Management.

9. A reference was made by the learned A.G.P. to the provision of Clause 6 of Schedule "A" to the M.E.P.S. Rules of 1981. The provision says:

"The term of the School Committee or Co-ordination Committee shall be co-terminus with that of the Management."

10. The submission of the learned A.G.P. is that in view of the above Clause 6, when the management is taken over by the Government and the Administrator is appointed, the School Committee automatically stands dissolved.

11. A further reference is made by the learned A.G.P. to the provision of section

6 of the M.E.I. Management Act of 1976 wherein the powers of Administrator are described. The provision reads as under:

"The Administrator shall manage the affairs of the institution which has been taken over u/s 3 in accordance with the rules, regulations or bye-laws or any other instrument which regulates the management of such institution. The Administrator may, notwithstanding anything contained in such rules, regulations, or bye-laws or such instrument administer the affairs of the institution as he may, subject to the approval of the Director, having regard to the exigencies of the situation, think fit."

12. So as per the learned A.G.P., when as per Clause 6 of Schedule "A" to the M.E.P.S. Rules, 1981, the existence of School Committee comes to an end as soon as the management is taken over by the Government and since section 6 of the M.E.I. Management Act, 1976 empowers the Administrator to manage the affairs of the institution, of course with certain restrictions, the power of making appointments of the employees impliedly vests in the Administrator although there may not be any express provision. I fully agree with the learned A.G.P. in this respect. It is thus clear that the Administrator has got power to make the appointments of employees in the institutions under his control, however with certain restrictions.

13. The learned Counsel for the petitioner-Society canvassed that even if the submission of the learned A.G.P. that the Administrator has got power to make the appointments of the employees is accepted, it is incumbent upon the Administrator to follow some norms. As per the provision of section 4(4) of the M.E.I. Management Act, 1976, the Administrator has to consult the Advisory Committee as far as practicable in respect of the affairs of the administration or management of the institution and he is to be guided in all such matters by its advice, unless for reasons to be recorded in writing he disagrees with the advice of the Committee. If the Administrator disagrees, then he may disregard the advice of the Committee, but in that event he has to inform the Director of the disagreement and the action taken by him and if the Director does not approve the action taken by the Administrator, then the Director has to issue such directions as he thinks fit, and the Administrator has to comply with the directions. As per the learned Counsel for the petitioner-Society, it is not made to show that in the instant case, before making the appointments of the respondents No. 3 in these writ petitions, the Administrator had consulted the Advisory Committee. In answer to these arguments, the learned Counsel for respondents No. 3 submitted that the Advisory Committee was not appointed in the present case after the management was taken over by the Government and the Administrator was appointed. The learned Counsel for the petitioner-Society contended that in that event, it was incumbent upon the Administrator to inform the Director about the action taken by him in respect of the appointments of the aforesaid employees and he should have further sought the directions from the Director. According to the learned Counsel, no such course was adopted by the

Administrator. The material on record also does not show that the Administrator had solicited the directions of the Director.

14. The learned Counsel for the petitioner-Society further pointed out that as per the provisions of section 6 of the M.E.I. Management Act, 1976, while managing the affairs of the institution, the Administrator has to act in accordance with the rules, regulations or bye-laws or any other instrument which regulates the management of such institution. He further canvassed that the above said provision shows that if the Administrator has to act de hors the rules and regulations, then he has to get the approval of the Director and that also depends upon the exigencies of the situation. The contention of the learned Counsel is that while making the appointments of respondents No. 3 in these writ petitions, the Administrator did not follow the rules and regulations. There was no exigency to make the appointments and even if it is taken that there was any exigency, then the Administrator ought to have got the approval of the Director for the appointment of the respondents No. 3 in the writ petitions.

15. The learned Counsel for the petitioner-Society invited the attention of this Court as to what are the rules and regulations to be followed and the procedure to be adopted while making the appointments of the employees in the educational institutions. The procedure for making the appointment is prescribed in section 5 of the M.E.P.S. Act, 1977. The provision is reproduced as below:

"5(1): The Management, shall as soon as possible, fill in, in the manner prescribed, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy:

Provided that unless such vacancy is to be filled in by promotion, the management shall, before proceeding to fill such vacancy, ascertain from the Educational Inspector, Greater Bombay, the Education Officer, Zilla Parishad or, as the case may be, the Director or the officer designated by the Director in respect of schools imparting technical, vocational, art or special education, whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools; and in the event of such person being available, the Management shall appoint that person in such vacancy."

The above provision shows that before filling the permanent vacancies, the appointing authority has to ascertain from the educational authority as to whether there is any suitable person available on the list of surplus persons maintained by that authority and if such person is available, he is to be absorbed. The learned Counsel pointed out that this was not followed by the Administrator while making the appointments of respondents No. 3 in both the writ petitions.

16. The next provision referred to by the learned Counsel for the petitioner-Society is Rule 9 of the M.E.P.S. Rules, 1981. The relevant sub-rules are given below. Sub-rule (3) reads:

"Unless otherwise provided in these rules for every appointment to be made in a school, for a teaching or a non-teaching post, the candidates eligible for appointment and desirous of applying for such post shall make an application in writing giving full details regarding name, address, date of birth, educational and professional qualifications, experience, etc., attaching true copies of original certificates."

So this sub-rule provides that the desirous and eligible candidates shall apply for the posts concerned in a particular form.

Then as per sub-rule (7) of Rule 9 of the said Rules, some reservations in respect of teaching as well as non-teaching staff are to be made for the members of Scheduled Castes, Scheduled Castes converts to Buddhism, Scheduled Tribes, Denotified Tribes, Nomadic Tribes and Other Backward Classes.

Then sub-rule (8) of Rule 9 of the said Rules requires that the advertisement has to be issued for the purpose of filling up the vacancies reserved under sub-rule (7). The advertisement is to be given at least in one newspaper having wide circulation in the region. The vacancies are also to be notified to the Employment Exchange of the District and to the District Social Welfare Officer and also to the associations or organisations of the persons belonging to Backward Classes recognised by the Government for the purposes of this sub-rule. The sub-rule further provides that if it is not possible to fill in the reserved posts from amongst the candidates, who have applied in response to the advertisement or whose names are recommended by the Employment Exchange or the District Social Welfare Officer or aforesaid associations or organisations and if no such names are recommended by the Employment Exchange or the District Social Welfare Officer or the aforesaid associations or organisations within a period of one month, the appointing authority can proceed to fill up the reserved post in accordance with the provisions of sub-rule (9).

As per sub-rule (9)(a) of Rule 9 of the above said Rules, in case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post can be filled by selecting a candidate from the other remaining categories in the order specified in sub-rule (7) and if no person from any of the categories is available, the post can be filled in temporarily on a year-to-year basis by a candidate not belonging to the Backward Classes.

Then as per sub-rule 9(b), in a case of non-teaching post, if a person from the particular category of Backward Classes is not available, the Management has to make the efforts with regular intervals to fill up the post within the period of five years and the post shall not be filled up during that period by appointing any other person, who does not belong to the respective category of Backward Class.

17. In view of the above provisions, according to the learned Counsel for the petitioner-Society, the reservations were required to be worked out first and then the advertisement, as contemplated by sub-rule (8) of Rule 9, ought to have

been given. So also the intimation as laid down in that sub-rule should have been given to the concerned authorities and if the names were not sent by the authorities, the applications could have been received directly. The above mentioned provisions show that if the post is reserved for a particular category of Backward Class and the candidate from that category is not available, the candidate from other category of Backward Class can be appointed in a permanent vacancy on probation. But if no candidate from any of the categories of the Backward Class is available, then the said reserved post has to be filled up by the candidate of open category on a year-to-year basis.

18. The learned Counsel for the petitioner-Society also made a reference to the Government Resolution of Education and Employment Department Resolution No. EMP 185/500471(11) EMP 1 Mantralaya, Bombay dated 13th April, 1991 (Law relating to "Educational Institutions and Schools in Maharashtra" by U.P. Deopujari, Volume 2, page 720) which makes it incumbent upon the appointing authority, except in the schools and colleges run by the minorities, to call the candidates sponsored by the Employment Exchanges and then to issue the advertisement for filling the post.

19. In sum and substance, the arguments advanced by the Counsel for the petitioner-Society on the above point are that the Administrator, while making the appointments of respondents No. 3 in these writ petitions, did not adopt the procedure as provided above; It is not made to show that he consulted the Director; It is also not made to show that he took the approval of the Director. As per the learned Counsel, since the procedure prescribed in section 5 of the M.E.P.S. Act, 1977 as well as the M.E.P.S. Rules, 1981 and laid down in the concerned G.R. was not followed, the Management, who took over the charge of the institution after removal of the Administrator, was justified in terminating the services of the respondents No. 3 in both the writ petitions.

20. So far as the aspect of following the rules, regulations and procedure is concerned, the learned A.G.P. also pointed out in addition that the figure approval of the Education Officer is necessary before making the appointments and such approval was not taken.

21. So far as the aspect of termination of the services of respondents No. 3 in these two writ petitions is concerned, the learned A.G.P. submitted that the termination of the services of these respondents was effected by the subsequent Management by the order dated 30th September, 1991 before the expiration of their probation period and the termination was not, therefore, according to law and the same was illegal. He also pointed out that there was no reason to terminate the services as contemplated by the provision u/s 5(3) of the M.E.P.S. Act, 1977.

22. The School Tribunal, in its impugned judgments, set aside the orders of termination of the present respondents No. 3 in these writ petitions, who were the appellants before that Tribunal, on the very ground that the termination was

effected without following the procedure prescribed for the termination of services in the case of probationer.

23. The learned Counsel for the petitioner-society assailed the order of the School Tribunal on the ground that the learned Presiding Officer of the School Tribunal did not frame the preliminary issues as required by the decision of the Division Bench of this Court in Anna Manikrao Pethe Vs. The Presiding Officer, School Tribunal and others, The relevant observations in the decision cited above are as below:

"When applications u/s 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, are filed before the School Tribunals by the teachers challenging any act of termination on the part of the management, it will be necessary for the Tribunal to frame and decide three preliminary issues, viz, whether the school was a recognised school as defined under the M.E.P.S. Act; whether the appointment of the concerned teacher was made as per section 5 of the M.E.P.S. Act and the Rules thereunder; and whether such an appointment has been approved by the Education Officer in pursuance of the provisions of the Act as well as the Rules framed thereunder including the Government Resolutions issued from time to time regarding reservations etc. These preliminary points are required to be framed and decided before the appeal proceeds on merits and even if such points are not raised by any of the parties to the appeal, it would be proper on the part of the Tribunal to frame such issues suo motu before examining the merits of the case. In case the findings to any of the preliminary issues are in the negative, the appeal must fail then and there itself, so far as the relief of reinstatement/ continuation in service is concerned."

In the above case cited by the Counsel for the petitioner-society, the appointee concerned was temporary appointee, that is to say, he was appointed purely on temporary basis against a permanent vacancy and his appointment was for a limited period. It was held that the temporary appointees are not entitled to claim permanent status. However, the above guidelines about framing the preliminary issues and deciding the same appear to have been given in respect of filling both the kinds of vacancies, i.e. temporary and permanent as contemplated by section 5 of the M.E.P.S. Act, 1977. The learned Counsel for the petitioner-society submitted that since in the present matters, the School Tribunal failed to frame and decide the aforementioned preliminary issues, the matter needs to be remanded to the Tribunal for verifying as to whether the procedure laid down in M.E.P.S. Act, 1977 and the rules and regulations framed thereunder, was followed and then the School Tribunal shall have to consider the matter in the light of the guidelines issued in the above mentioned case.

24. During the course of the arguments, it was brought to the notice of this Court on behalf of respondents No. 3 that some employees whose appointments were made by the Administrator were continued by the Management and they are still continuing in the institution. At present, the ad hoc body is functioning

under the directions issued by the Joint Charity Commissioner in some litigation before that Court. The Secretary of the ad hoc body was, therefore, asked to file an affidavit regarding the factual position in above respect with the reasons as to how and why the services of those employees were continued irrespective of the fact that they were appointed by the Administrator like present respondents No. 3 in these petitions. The Secretary has placed the affidavit and further additional affidavit on the record of Writ Petition No. 1279 of 1998. From these two affidavits, it can be gathered that out of the employees mentioned in the list given in that affidavit, the appointments of two employees, namely Shri Y.G. Katkar and Shri R.K. Bagade, were made by the Administrator as Assistant Teacher and Peon respectively. The appointment of Shri Y.G. Katkar was made on 1st July, 1991 and that of Shri R.K. Bagde was made on 19th June, 1991. The approval to the appointment of Shri Y.G. Katkar from the Education Officer was received on 31st March, 1992 and that for the appointment of Shri R.K. Bagde was received on 5th March, 1993. The additional affidavit dated 19th September, 2000 shows that the services of Shri R.K. Bagde were terminated on 30th September, 1991 and he had challenged the said order of termination before the School Tribunal and he was ultimately reinstated on 29th January, 1992. Thus it can be gathered that the services of Shri Y.G. Katkar were not terminated although his appointment was made by the Administrator and though the services of Shri R.K. Bagde were terminated on 30th September, 1991, he was reinstated with effect from 29th January, 1992, obviously in pursuance of the order of the School Tribunal. In the case of Shri Y.G. Katkar, the Management waited for the approval from the Education Officer upto 31st March, 1992. In the present case, however, though the services of respondent No. 3 in Writ Petition No. 1154 of 1998 Murlidhar Kashinath Dange and respondent No. 3 in Writ Petition No. 1279 of 1998- Namdeo Govinda Shikhare were terminated on 30th September, 1991 and although the School Tribunal passed the orders in their favour directing their reinstatement after setting aside the termination, they were not reinstated and the present writ petitions against the order of the School Tribunal came to be filed. The petitioner is unable to tell what criterion was applied for the continuation of service in the cases of Shri Y.G. Katkar and Shri R.K. Bagde, and why only these respondents were not continued in the service. The learned Counsel for the petitioner-Society contended that there cannot be a parity in illegality and even if any illegality in continuing Shri Y.G. Katkar and Shri R.K. Bagde might have been done, the present respondents are not entitled to be continued on that count. It is true that there cannot be any parity in illegality, but still the question as to why the above said two employees were chosen in spite of the so-called illegality committed by the Administrator in appointing them by deviating from due procedure, remains unanswered.

25. The learned Counsel for respondents No. 3 in these writ petitions submitted that while terminating the services of these respondents, the principles of natural justice were not followed and no opportunity of being heard was given to them before the termination of their services.

26. In this connection, the learned Counsel for respondents No. 3 placed heavy reliance on Basudeo Tiwary Vs. Sido Kanhu University and Others, The services of the appellant in this cited case were terminated on the ground that his appointment was made by an incompetent authority and was therefore invalid. The relevant provision of the Bihar Universities Act was quoted as "Any appointment or promotion made contrary to the provisions of the Act, statutes, rules or regulations or in any irregular or unauthorised manner shall be terminated at any time without notice". In spite of the above provision, which dispenses with the notice in case of appointment being made contrary to the provisions of the Act, statutes, rules or regulations or in any irregular or unauthorised manner, it was held that non-arbitrariness is an essential facet of Article 14 pervading the entire realm of State action governed by Article 14. It was observed that natural justice in turn is an antithesis of arbitrariness and it, therefore, follows that audi alteram partem which is facet of natural justice is a requirement of Article 14.

It was further observed "The condition precedent for exercise of power u/s 35(3) of the Bihar Universities Act is that an appointment has been made contrary to the Act, rules, statutes and regulations or otherwise. In order to arrive at a conclusion that an appointment is contrary to statutory provisions, a finding has to be recorded and unless such a finding is recorded, termination cannot be made. To arrive at such a conclusion, necessarily, an enquiry will have to be made as to whether such appointment was contrary to the provisions of the Act etc. If in a given case, such exercise is absent, the condition precedent stands unfulfilled. To arrive at such a conclusion, necessarily, an enquiry will have to be held and in holding such an enquiry, the person whose appointment is under enquiry, will have to be issued a notice. If notice is not given to him, then such a conclusion would not be just fair or reasonable. In such an event, it has to be held that there is an implied requirement of hearing for the purpose of arriving at a conclusion that an appointment had been made contrary to statutory provisions. It is only on such a conclusion being drawn, the services of a person can be terminated without further notice". So while interpreting the provision of section 35(2) of the Bihar Universities Act about dispensing with the notice, it was held that the opportunity of being heard cannot be dispensed with and it is only when such opportunity is given, then the further notice can be dispensed with.

In the present case, obviously, the respondents No. 3 were not heard before the termination of their services and no opportunity in that respect was given to them by holding enquiry.

27. The next authority cited by the Counsel for respondents No. 3 on the point of natural justice is Shrawan Kumar Jha and others Vs. State of Bihar and others, In this cited case, the teachers were appointed by the District Superintendent of Education. The appointments were cancelled by the Government on the ground that the District Superintendent of Education had no authority. Prior opportunity

of hearing was not given to the concerned teachers. It was held that such opportunity of hearing should have been given to them. The direction was issued that the Secretary (Education) or his nominee should give an opportunity to the appellants and thereafter give a finding whether the appointments were validly made.

28. The learned Counsel for the petitioner-Society cited (1) State of U.P. and others Vs. U.P. State Law Officers Association and others, and (2) Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others, .

29 In State of U.P. and others v. U.P. State Law Officers Association and others, the law officers, who were appointed by the State of U.P. were removed from the office. They had challenged the decision of the Government on the ground of violation of natural justice and absence of valid reasons. It was held that the persons appointed by the arbitrary procedure cannot challenge termination of their services on the ground that it is arbitrary. It was observed that their induction itself being the product of operation of the spoils system, no public interest was involved in saving their appointments even though the appointments were to a public office by the Government or a public body. It was held that the said law officers had no right to hold the office under the terms of appointment.

30. In Hindustan Education Society and another v. Sk. Kaleem Sk. Gulam Nabi and others, it was held that the appointment of the respondents could not be considered as permanent and, therefore, the appeal filed by the Society was allowed and the order of the High Court was reversed.

31. On going through the ratio of the cases cited by the respective sides, I find that the decision in Basudeo Tiwary v. Sido Kanhu University and others and also in Shrawan Kumar Jha and others v. State of Bihar and others is applicable to the present case. These authorities were further followed in Pancham Ram and others v. Chief Engineer, Jal Nigam and others 1999(83) F.L.R. 169.

32. In State of U.P. and others v. State Law Officers Association and others, the professional engagement of the law officers for the High Court made by the State Government was on contractual basis with the stipulation that they could be removed at any time without assigning any reason. No doubt the removal of those law officers from their posts was arbitrary, but it was justified because the induction of the law officers itself was the product of operation of the spoils system. They were appointed by arbitrary procedure and, therefore, it was held that they could not challenge the termination of their services on the ground of the same being arbitrary. In the circumstances of that case, it was held that it was not open to challenge the orders passed by the State Government on the ground of violation of principles of natural justice. The fact that they had no right to hold the office was also taken into account.

33. In Hindustan Education Society and another v. Sk. Kaleem Sk. Gulam Nabi and others, the appointment of the employees itself was purely temporary for a period of 11 months and it was specified in the order that after the expiry of the

above period, their services would stand terminated without any notice. It was also clarified as to what were the permanent appointments under the M.E.P.S. Act, 1977. It was observed that such permanent appointments are regulated by sub-sections (1) and (2) of section 5 of the Act.

34. Thus both the authorities cited by the learned Counsel for the petitioner-society have no application to the present case.

35. On the other hand, as in *Basudeo Tiwary v. Sido Kanhu University and others*, in the present case also, the services of respondents No. 3 in both these writ petitions were terminated on the ground that their appointments were made by an incompetent authority and, therefore, the said appointments were invalid. It is also not made to show that any enquiry was held for the purpose of ascertaining as to whether the due procedure was adopted in making the appointments of these respondents and that an opportunity of being heard was granted to either of them. Thus it can be said that the principles of natural justice are violated in the present case. Admittedly the respondents No. 3 in these writ petitions were appointed in permanent vacancy and they were put on probation of two years. So they were the probationers. The material on record does not indicate that the termination of services of respondents No. 3 in these writ petitions was made by the management for the reason that the work or the behaviour of those respondents was not satisfactory, as contemplated by sub-section (3) of section 5 of the M.E.P.S. Act, 1977. It was the termination simpliciter for the reason that the Administrator had no authority and he had not adopted the due procedure provided by the relevant provisions of enactment, rules and regulations. Respondents No. 3 cannot be termed as appointed purely on temporary basis. Before issuing the order of termination, an enquiry ought to have been held and a finding should have been recorded that the Administrator had no authority to make the appointments and he had not adopted the due procedure while making the appointments and during such enquiry, an opportunity of being heard ought to have been given to the respondents No. 3. No such course was followed. The termination of the respondents concerned would not sustain and shall have, therefore, to be held as invalid. In *Basudeo Tiwary's* case, cited *supra* the appellant had died during the pendency of the proceedings. So the directions as to the further enquiry or reinstatement could not be given. Since the termination of the appellant was declared as invalid and he had demised during the pendency of the proceedings, it was taken that he had died in harness. However, the appellant was held entitled to the payment of arrears of salary from the date of termination of his services up to the date of his death on the basis of the last pay drawn by him. The arrears were ordered to be paid to the legal representatives of the appellant.

36. Although the preliminary issues as directed in *Anna Manikrao Pethe's* case were not framed by the School Tribunal in this case, the matter needs no remand because this case is on a different footing and the same is governed by the ratio of the cases of *Basudeo Tiwary*, *Shrawan Kumar Jha* and *Pancham Ram*.

37. For the above reasons, I am inclined to declare the termination of services of Murlidhar Kashinath Dange, respondent No. 3 in Writ Petition No. 1154 of 1998 as an Assistant Teacher and Namdeo Govinda Shikhare, respondent No. 3 in Writ Petition No. 1279 of 1998 as a Peon, invalid. The termination is accordingly declared so. Both these respondents shall be reinstated by the petitioner-society in service in the posts occupied by them at the time of termination with the payment of arrears of salary from the date of termination of their services up to the date of their reinstatement, on the basis of the last pay drawn by them. Two months' time is granted to the petitioner-society for the above purpose. After the reinstatement, the petitioner-society shall be at liberty to hold an enquiry into the fact whether the appointments of these respondents made by the administrator were made contrary to the provisions of the M.E.P.S. Act, 1977 and the relevant rules and regulations and Government Resolutions. If such an enquiry is held, it shall be completed within two months after the reinstatement of the above said respondents and an opportunity of being heard shall be given to them.

The orders passed by the learned Presiding Officer, Additional School Tribunal, Nagpur (Chandrapur), both dated 20th February, 1998, in Appeals No. STN/256/91 and STN/258/91 are modified as above.

The petitions are disposed of accordingly. No order as to costs.

Order accordingly.