

(2010) 03 BOM CK 0059

In the Bombay High Court

Case No : Writ Petition No. 3834 of 2002

Chandrashekhar Patel

APPELLANT

Vs

Navshakti Vidyalaya and Others

RESPONDENT

Date of Decision : 26-03-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 5, 5(1), 5(2), 5(3), 5(4)
Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule
10, 9, 9(7), 9(9)

Citation : (2010) 3 BomCR 283

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : S.S. Voditel, for the Appellant; A.A. Naik, for Respondent Nos. 1 and 2, I.L. Bodade, AGP for Respondent No. 3 and G.D. Vaidya, for Respondent Nos. 4, 5 and 6, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Chavan, J.—This petition by a Teacher is directed against the judgment dated 31-7-2002 by the School Tribunal, whereby the Tribunal dismissed the petitioner's appeal questioning his oral termination with effect from 4-5-1995.

2.1 Facts, which are material for deciding this petition and about which there is not much dispute, are as under:

2.2 The petitioner, who did not belong to the Scheduled Caste/Scheduled Tribe/Nomadic Tribe category, was appointed as Assistant Teacher on 9-8-1994 by respondent Nos. 1 and 2 in a post which was reserved for those categories. The petitioner belongs to Other Backward Class category. The petitioner claimed that his services were terminated on 4-5-1995, whereas according to the Management, the services were terminated on 30-4-1995 on the term of appointment coming to an end.

2.3 The petitioner's claim before the School Tribunal that the petitioner was appointed in a permanent vacancy without issuing any appointment order, as also that his service was orally terminated without any notice was rejected by the Tribunal, holding that the petitioner's appointment was not as per Section 5(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, "the MEPS Act") and was not approved by the Education Officer. The Tribunal, therefore, concluded that the impugned order of the petitioner's termination was legal. This is why the petitioner is before this Court.

3. I have heard elaborate arguments painstakingly advanced by both the learned Counsel for the petitioner as also respondent Nos. 1 and 2. Since it cannot now be disputed that the School Tribunal has the exclusive jurisdiction to deal with cases of teachers even from Institutions, which do not receive grant-in-aid, it is not necessary to deal with the judgments in Shailaja Ashokrao Walse Vs. State of Maharashtra and others, and St. Ulai High School and Shri Adishakti Hindi Prachar Samitee Vs. Shri Devendraprasad Jagannath Singh and The Zilla Parishad, .

4. The learned Counsel for the petitioner first, submitted that a forged appointment order had been placed by the Management before the Tribunal, which had not at all been given to the petitioner. This appointment order is at Page 29 (Annexure-III) of the petition. It may be seen that though in one sheet the document is in two parts - the first appointment letter, and the second - an acknowledgment thereof by the Teacher, with the words "cut here" appearing in between. The learned Counsel for the petitioner submitted that this would imply that the Management should have in its possession two separate sheets of appointment and acknowledgment, and production of this composite document is itself sufficient to reject the document as untrustworthy. As rightly pointed out by the learned Counsel for respondent Nos. 1 and 2, the document was produced by the Management, which was the copy on the record of the Management. Therefore, there was nothing wrong in both the order and acknowledgment being on one sheet. The first part relating to appointment in original was given to the petitioner and on the office copy, without cutting the two parts, the petitioner's acknowledgment was obtained. He pointed out that when before the Tribunal the termination order had been caused to be sent by the petitioner for examination by the Handwriting Expert, the signature of the petitioner on this acknowledgment part of the appointment order was shown as comparative signature or admitted signature. The fact that the petitioner's signature appears on the acknowledgment part, which is on the same sheet, as the appointment order would repel the petitioner's contention that appointment order was not issued and consequently his appointment was not for a fixed period.

5. In my view, a bare look at the appointment order would show that there is nothing irregular in both appointment and acknowledgment parts of the order being on one sheet in office copy of the School. Rather this is the only proper

and safe way of obtaining acknowledgments, removing any doubt as to whether some other document was in fact given. Further the petitioner's indicating his signature on the acknowledgment part as comparative signature for the purpose of assailing signature on termination letter would add to the authenticity of the document - disproving the petitioner's contentions in this behalf. It cannot, therefore, be said that the Tribunal erred in concluding that the petitioner was appointed by the order dated 9-8- 1994, and was aware of contents therein, namely that his appointment was for fixed period from 9-8-1994 to 30-4-1995 and not on probation for two years.

6. The learned Counsel for the respondent submitted that terms of appointment order are not decisive about nature of appointment, while his learned adversary submitted those terms do determine the question and both the learned Counsel relied on a number of judgments in support of their respective contentions.

7. I would examine the judgments to find out if, irrespective of terms of appointment order, the petitioner could be held to have been appointed on probation. Before going to the judgments cited, it may be useful to reproduce for ready reference Section 5 of the MEPS Act, which reads as under:

Section 5 of the MEPS Act:

Certain obligations of Management of private schools:

(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.

(2) Every person appointed to fill a permanent vacancy except shikshan sevak shall be on probation for a period of two years. Subject to the provisions of Sub-sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed:

Provided that, every person appointed as shikshan sevak shall be on probation for a period of three years.

(2A) Subject to the provisions of Sub-sections (3) and (4), shikshan sevak shall, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher.

(4) If the services of any probationer are terminated under Sub-section (3) and he is reappointed by the Management in the same school or any other school belonging to it within a period of one year from the date on which his services were terminated, then the period of probation undergone by him previously shall be taken into consideration in calculating the required period of probation for the purpose of Sub-section (2).

(4A) Nothing in Sub-section (2), (3) or (4) shall apply to a person appointed to fill a permanent vacancy by promotion or by absorption as provided under the proviso to Sub-section (1).

(5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf, and shall state the period of appointment of such person.

8.1 In Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others, on which Shri Naik, learned Counsel for the respondent, relied, facts were recounted as under:

Para 3: ...The admitted position is that Respondent 1 came to be appointed on 10-6-1992 against a clear vacancy with the following stipulation:

Your appointment is purely temporary for a period of 11 months from 11-6-1992 to 10-5-1993 in the clear vacancy. After expiry of the above period your service shall stand terminated without any notice.

Para 4: Thus, it could be seen that the appointment of the first respondent was only a temporary appointment against a clear vacancy.

8.2 After quoting the provisions of Section 5 of the MEPS Act, the Supreme Court held as under:

Para 5: In view of the above and the order of appointment, the appointment of the respondent was purely temporary for a limited period. Obviously, the approval given by the competent authority was for that temporary appointment. As regards permanent appointments, they are regulated by Sub-sections (1) and (2) of Section 5 of the Act according to which the Management shall, as soon as possible, fill up, in the manner prescribed, every permanent vacancy in a private school by appointment of a person duly qualified to fill in such vacancy. Every person so appointed shall be put on probation for a period of two years subject to the provisions of Sub-sections (4) and (5). He shall, on completion of the probation period of two years, be confirmed."

Para 6: Under these circumstances, the appointment of the respondent cannot be considered to be a permanent appointment. As a consequence, the direction issued by the High Court in the impugned judgment dated 31-7-1996 in Writ Petition No. 5821 of 1995 that he was regularly appointed is clearly illegal and cannot be sustained.

8.3 It cannot be said that this judgment could not be taken to have laid down a proposition of law that recitals in order of appointment are decisive of nature of appointment, since it was rendered without respondents therein being present before the Court. As rightly pointed out by the learned Counsel for the respondent, irrespective of whether parties were present or not, pronouncements of Supreme Court, after considering relevant provision of statute, must be held to have laid down as to what are the implications of the statute.

9.1 The learned Counsel for the respondent then relied on a judgment of the Supreme Court in *Bharatiya Gramin Punarrachana Sanstha Vs. Vijay Kumar and Others*, . It may be useful to quote the relevant portions of the judgment so as to bring out the context in which the Supreme Court rendered the judgment, which read as under:

Para 3: On 6-8-2001, this Court issued notice limited to the question as to why the appointment of the respondent (Respondent 1) should not be confined to the period mentioned in the order of appointment dated 22-6-1996.

Para 4: ...The first respondent applied for the post of Lab Attend in response to an advertisement. He was selected and appointed by the appellant on 22-6-1996 for a period of two years from 24-6-1996 to 23-6-1998. The appointment of the first respondent was approved by the Deputy Director of Education, Aurangabad initially for the academic year 1996-97. As no approval was forthcoming for the next academic year 1997-98 and the management was not in a position to pay the salary to the first respondent, his services were terminated by the appellant on 17-9-1997....

9.2. The argument, which the Apex Court considering, was:

Para 6: ...Mr. B.N. Deshmukh, the learned Senior Counsel appearing for the first respondent, invited our attention to Sub-section (2) of Section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short "the Act") and submitted that after the period of two years the first respondent would be deemed to have been confirmed, therefore, the order under challenge does not warrant any interference.

9.3 In this context, the Court held as under:

Para 7: We may notice here, Section 5 of the Act deals with certain obligations of management of private schools. Sub-section (2) of Section 5 on which reliance is placed by Mr Deshmukh reads as under:

5. Certain obligations of management of private schools.---

(1) * * *

(2) Every person appointed to fill a permanent vacancy shall be on probation for a period of two years. Subject to the provisions of Sub-sections (4) and (5), he shall, on completion of this probation period of two years, be deemed to have been confirmed.

A plain reading of the said provision which is subject to the provisions of Sub-sections (4) and (5), would show that it applies to a person who is put on probation consequent upon his appointment in a permanent vacancy. In such a case the period of probation will be for a period of two years. Sub-section (4) refers to computation of the period of probation of a probationer who is terminated by the management during the period of probation but who has been reappointed within a period of one year. Sub-section (5) empowers the management to fill up temporary vacancy by appointing a qualified person in such a vacancy. It is thus clear that only when an employee has completed successfully the probation period of two years, Sub-section (2) directs that he shall be deemed to have been confirmed. In our view, this provision does not help the first respondent. First, because his services were terminated before completion of two years and his case does not fall within Sub-section (4); secondly, admittedly the first respondent was appointed only for the period of two academic years 1996-97 and 1997- 98 and was not put on probation. The order of appointment specifically mentions that after the expiry of the said period of two years the services of the first respondent would come to an end without any notice. Even the undertaking given by the first respondent recites that on relieving him on the expiry of the period of academic year 1997-98 he shall not claim any right on the said post. It may be noticed that, admittedly, the approval of appointment of the first respondent, given from time to time, is also up to 1997-98. The order of termination, referred to above, dated 17-9-1997, was passed before the expiry of the said period of two years. Under the said order of appointment the first respondent is entitled to remain in service till the end of academic year 1997-98.

Para 8: For the aforementioned reasons, the order of the Tribunal directing reinstatement in service of the first respondent has to be confined to the period till 23-6-1998. The first respondent is, therefore, entitled to his salary from the date of his termination till 23-6-1998.

The order of the Tribunal as confirmed by the High Court is modified in the above terms."

10.1 The learned Counsel for the respondent relied on a judgment of this Court in Maharashtra Shikshan Sanstha and Another Vs. State of Maharashtra and Others, in which facts were narrated by this Court as under:

Para 2: ...The 1st petitioner - Maharashtra Shikshan Sanstha had started a school, which was granted a provisional recognition by the order dated 14-6-1985 for a period one year vide order of the same date of the Education Officer, Zilla Parishad, Nagpur. The school was again granted a recognition for a period of one more year, i.e. from 1986 to 1987 vide order dated 23-6-1986. This recognition was further extended by one year from 1-4-1987 to 31-3-1988 vide order dated 8-7-1987 of the Education Officer, Zilla Parishad, Nagpur."

Para 3: It is true that during this period the petitioner appointed respondent No.

3 as a teacher. The order of appointment dated 1-7- 1985 appoints the 3rd respondent as a teacher for a period of one year from 1-7-1985 to 30-4-1986. As a matter of fact, the 3rd respondent appears to have continued for another period of two years by the management. However, there is no appointment order appointing the 3rd respondent for a period of two years. Apparently, the continuation was in an ad-hoc manner from year to year, having not shown any appointment order to the contrary.

10.2 The arguments, which the Court was considering, can be gathered from following paragraph:

Para 6: Mr. Dharmadhikari, learned Counsel, for the petitioners relied upon a judgment of Supreme Court in Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others, in which the Supreme Court was considering the effect of an appointment order for a period of 11 months from 11-6-1992 to 10-5-1993 in a clear vacancy....

10.3 The Court held:

... Having regard to the fact that school was granted recognition from year to year for a period of three years consecutively and having regard to the admitted fact that the approval of 1st respondent was not for more than one year, it is clear that the appointment in question was similar to the one considered by Their Lordships in decision cited supra.

Para 8: In fairness, Mr. Manohar, learned Counsel for the 3rd respondent, did not dispute that the facts of the present case are covered by the decision of Division Bench of this Court in Mathuradas Mohota College of Science Vs. R.T. Borkar and Others, . In similar situation, the Division Bench presided over the Chief Justice Shri M.B. Shah, as then he was, has in paragraph 7 observed as under:

...Apart from this, even assuming that there was a clear vacancy, the order issued was purely temporary and, therefore, not proper order. However, it will be an error to treat the said order as an order u/s 5 of the Act, viz., the order for a period of two years probation. Such legal fiction we do not find anywhere in the Act and the Rules and, therefore, the finding recorded by the Tribunal that the order is covered u/s 5 of the MEPS Act is not correct.

10.4 This Court allowed the petition. The learned Counsel for the respondent submitted that a SLP No. 21891 of 2002, preferred by the teacher was dismissed by the Supreme Court on 29-11-2002. Review Petition No. 24 of 2003 too was dismissed by the Supreme Court on 16-1-2003. Thus the judgment of this Court has been approved by the Apex Court.

10.5 The learned Counsel for the respondent submitted that this judgment would be squarely applicable to the case at hand, since even in the present case, the School had been recognized for only one year.

10.6 This judgment was followed in an unreported judgment of this Court in Shri

Sadguru Dnyan Prasarak Shikshan Sanstha, Khairgaon, Taluka Narkhed, Distt. Nagpur, through its Secretary Shri Premraj Daulatrao Shelke and Anr. v. Presiding Officer, School Tribunal, Amravati Division, Amravati, Distt. Amravati Writ Petition No. 3444 of 1994 Decided by Hon"ble Shri Justice C.L. Pangarkar on 25 th November, 2009 on which the learned Counsel for the respondent placed reliance.

10.7 Facts in the context of which the aforesaid unreported judgment was rendered were recounted as under:

Para 2: The facts giving rise to the petition are as follows. The petitioner runs a school known as Linga High School at Linga, Tq. Warud. It is a recognized school and is governed by the provisions of Maharashtra Employees of Private School (Conditions of Service) Regulation Act, 1977 and Rules thereunder (M.E.P.S., Act). There was a clear and permanent vacancy of an Assistant Teacher in the said school in the year 1986-87. Respondent No. 2 applied for his appointment as an Assistant Teacher. He was accordingly appointed as Assistant Teacher w.e.f. 13/9/1986 but according to respondent No. 2, no written order was issued. The services of respondent No. 2, however, were continued and he continued to work up to 30/4/1990. Respondent No. 2 holds qualification M.A. B.Ed. It is the contention of respondent No. 2 that his services were orally terminated by the present petitioner. Since the services of respondent No. 2 came to be terminated, he filed an appeal u/s 9 of the M.E.P.S. Act before the School Tribunal."

Para 6: From the submissions made in the memo of appeal, it does not seem to be in dispute that respondent No. 2 was appointed in clear vacancy for three consecutive years i.e. from 1987-88 to 1989-90. His appointment, however, was from year to year for three years.

10.8 In this context, the learned Single Judge held as under:

...According to Clause 4.1 and 4.2 of the School Code, a school upon establishment continues to receive temporary recognition only for year to year for first five years. It is only after five years that it becomes eligible for permanent recognition. This school itself had temporary recognition from year to year during that period and therefore there was no question of respondent No. 2 being appointed on probation for two years or in a permanent vacancy. This Court had an occasion to deal with similar contingency. In a decision reported in Maharashtra Shikshan Sanstha and Another Vs. State of Maharashtra and Others, .

10.9 After quoting from the said judgment, the learned Single Judge held:

Para 9: The decision applies on all fores (sic fours) to the instant case. It would be clear that the school had no permanent recognition and was still under temporary recognition. The recognition could be withdrawn any time and therefore, the posts that were available were not permanent vacancies though they could be said to be clear vacancies. In order to bring the case u/s 5(2) of the M.E.P.S. Act, it would be necessary that the post against which the claim is

made is permanent. Due to the temporary recognition in no case the post could be said to be permanent.

11. I am in respectful agreement with these conclusions. Even in the case at hand, it has been stated by the learned Counsel for the respondent that the School had recognition for one year only and so there was no question of availability of a permanent vacancy. The petitioner has not shown that the statement that the School had recognition for only one year at the relevant time is not correct. The learned Counsel for the petitioner submitted that this burden ought to be on the Management, which has the custody of relevant records. As rightly countered by the learned Counsel for the respondent, the petitioner too could have sought relevant information from the authorities concerned or could have sought relevant production of documents before the Tribunal.

12. The learned Counsel for the respondent has placed reliance on a judgment of this Court in *Rayat Shikshan Sanstha and Another Vs. Yeshwant Dattatraya Shinde*, to support his contention that burden to show that he was appointed against a permanent vacancy lay on the petitioner. The Court held as under:

Para 3: Admittedly there is no evidence on record that the appointment of the respondent was made after following the procedure laid down in the M.E.P.S. Act and Rules. The Tribunal has come to a conclusion that the said appointment was made on a clear and permanent vacancy. Admittedly, no advertisement was issued, nor any interview was held and, as such, cannot be said that the appointment was made on a clear and permanent post. The Tribunal, however, came to the conclusion that the appointment was made on a clear and permanent vacancy because the management was not in a position to produce the relevant material on record. In my view, the burden of establishing that the appointment was made on a clear and permanent post that too were following the procedure laid down under the Act and Rules, is squarely on the Appellant and not on the management. The Tribunal, therefore, in my view, committed an error of law, which is apparent on a face of record.

13. The learned Counsel for the petitioner relied on a judgment of this Court in *Priyadarshini Education Trust and The Head Master, National Urdu High School Vs. Ratis (Rafia) Bano*, which resolves most of the issues and in which this Court held as under:

Para 12: ...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 the 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 status 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.

14. In my humble opinion, "eligible" is not to be restricted to eligibility as regards academic qualification but eligibility in all senses - including belonging to a category/caste for which the vacancy was reserved. The question whether the petitioner in this case at hand was so eligible would be shortly dealt with while considering arguments based on Rule 9 of the MEPS Rules.

15.1 The learned Counsel for the petitioner relied on a judgment of this Court in Hindi Vidya Bhavan, Mrs. C.R. Pathak, Principal, Hindi Vidya Bhavan School and Mr. V.O. Somani, Hon. Secretary, Hindi Vidya Bhavan School Vs. Presiding Officer, School Tribunal, Education Inspector, Ramprakash Badlu Mandar and Mithila Azad Security Force, . It may be useful to recount the peculiar facts of the case so as to comprehend the findings of the Court. The facts could be gathered from the judgment as under:

Para 2: Petitioner No. 1 is a Public Charitable Trust, registered under the provisions of the Bombay public Trusts Act, 1950 runs a school by the name Hindi Vidya Bhavan, now known as HVB Academy ("the school" for short). Petitioner Nos. 2 and 3 are the Principal and the Secretary of the school respectively. Respondent No. 3-employees were the appellants in the appeals filed before the School Tribunal. Respondent No. 4 is, Mithila Azad Security Force ("Mithila" for short), an agency/contractor, which was engaged to provide certain services to the petitioners. According to the petitioners, respondent No. 3 is an employee of Mithila and was never in the employment of the school.

Para 3: The case set out in the petitions by the petitioners is that they have teaching and non-teaching staff for the school approved by respondent No. 2 - Education Officer. They engaged additional persons, namely, respondent No. 3-

employees on ad hoc basis through Mithila. The school was required to employ respondent-employees since various services which were required to be provided to its students could not be met with by the then existing staff employed by it and as sanctioned by the Education Department. Therefore, in order to meet miscellaneous services required from time to time, the petitioners had engaged Mithila to provide additional persons on an ad hoc basis.

Para 4: The facts set out in the petition further disclose that the school maintains two muster books one for its permanent employees and another for its temporary employees. Two of the respondentemployees in writ petition No. 1495 of 2007 and 1498 of 2007, namely, Parshuram Gurao and Manohar Pavaskar, were employed by the school as peons on a temporary basis and their names were reflected in the temporary muster roll maintained by the school for the said period. They were also issued appointment letters. Parshuram Gurao and Manohar Pavaskar, according to the petitioners, joined Mithila on 1st October, 1996 and were deputed by Mithila to provide certain services to the petitioners. The other five employees were never on the temporary muster of the petitioners and were at all material time employees of the said Mithila. The bills raised by Mithila in respect of the services provided by its employees to the school were paid from time to time by the school. There is no dispute that all the respondentemployees worked with the school for more than two years between 23-6-1995 and 8-4-2000 as Peons/Ayah. They all, as stated in their appeals, were terminated on 8-4-2000.

Para 5: According to the petitioners, in or about April, 1998 the respondent-employees started claiming permanency in the service with the school. This demand was sought to be conveyed through Mumbai Labour Union, of which they claimed to be the members. In the weeks that followed, the respondent-employees started creating serious unrest by discharging their duties in a most unsatisfactory and perfunctory manner and then from 8th April, 2000 ceased to provide any services to the petitioners. It appears that the respondent-employees had initially filed a complaint before the Labour Court under the provisions of MRTU and PULP Act against the petitioners. The said complaints, however, came to be withdrawn and they all filed appeals u/s 9 of the Act before the School Tribunal.

15.2 In this factual context, after considering applicable law, the Court held as under:

Para 28: There could be an employee, either permanent or nonpermanent. Non-permanent employee may be either temporary or on probation. The temporary employee is one who is appointed to a temporary vacancy for a fixed period. In the present case, it is not a case of the petitioners that the respondent employees were engaged for a fixed period. Two of the petitioners were appointed as temporary for two years since before they were shown as the employees of Mithila. They all worked for atleast two years and when they started claiming permanency they allegedly ceased to render services to the

school. Sub-section (2) of Section 5 of the Act clearly provides that every "person" appointed on a permanent vacancy shall be on probation for a period of two years and he shall on completion of the probation period be deemed to have been confirmed. If a person, duly qualified, is appointed by the Management as a member of the staff and if it is not disputed that such person has worked for two years, on a permanent vacancy, he is deemed to have been confirmed as provided for u/s 5(2) and consequently entitled for all the benefits of permanent staff even if his appointment is not approved and formal order of appointment was not issued. Non-approval of such post would not be an embargo either on the management to make him permanent or on such person to claim permanency. In the present case it is not in dispute that all the respondent-employees worked for more than two years and the posts on which they were appointed and working, no specific qualification is prescribed.

Para 36: The submission that, in any case, the respondentemployees are not entitled for reinstatement since they were temporary or casual employees, based on the judgment of the Supreme Court in Hindustan Education Society (supra) also deserves to be rejected outright for more than one reason. Firstly, looking at the nature of work they were doing for more than two years and that they were qualified to work, their appointment cannot be treated as either temporary or casual. Secondly, until all the respondent-employees were terminated on the very same day they worked for more than two years. The manner in which they were appointed and then terminated it cannot be said that their appointment was temporary and they deemed to have been made permanent on expiry of the period of two years.

16. The learned Counsel for the petitioner submitted that after considering the judgment of the Supreme Court in Hindustan Education Society, the learned Single Judge had concluded even in the absence of any appointment order that the employees concerned could not be held to have been temporary employees. His learned adversary submitted that the judgment cannot be an authority for the proposition that terms of appointment order can be ignored, since in that case the Management had adopted stratagem of outsourcing to avoid liabilities flowing from appointing employees permanently. Thus, according to him, the decision is more a conclusion drawn from facts.

17. I have carefully considered the judgment. It may be seen that the judgment does not explain or elaborate the implications of judgment of the Supreme Court in Hindustan Education Society. It holds on facts as unfolded that the appointments were permanent. The judgment is based on facts peculiar to that case. Yet the distinction between permanent - non-permanent appointments flowing from Rule 10 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, which has been highlighted in the judgment needs to be borne in mind. In this regard, it has to be noted that the term "permanent" has not been defined in the Act or Rules. Rule 10, which reads as under, only defines a temporary employee.

Rule 10: Categories of Employees: (1) Employees shall be permanent or non-permanent. Non-permanent employees may be either temporary or on probation.

(2) A temporary employee is one who is appointed to a temporary vacancy for a fixed period.

If temporary employee is one who is appointed to a temporary vacancy for a fixed period, the converse would be that a permanent employee is one who is appointed to a permanent vacancy which is not limited by any period of time. Probationers would be obviously those waiting to be appointed to a permanent vacancy after successful completion of probation, having been recruited to fill a permanent vacancy in terms of Section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act. The material question would, therefore, be if the vacancy to which the petitioner was appointed was permanent vacancy - i.e. without any limit of time. And, according to the respondent, it was not, since recognition to the School itself was on an year to year basis. Therefore, a vacancy in such a School would be a clear, but not a permanent vacancy, which would acquire permanency once the School receives recognition not limited by any fixed period.

18.1 The learned Counsel for the petitioner has placed reliance on the judgment of this Court in *The Maharashtra Shikshan Sanstha and Anr. v. The Presiding Officer, School Tribunal and Ors.* 2007 (2) ALL MR 269 in which this Court has observed as under:

Para 1: ...The question about the effect of temporary appointment or time bound appoint made by the management vis-a-vis the provisions of Section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, (hereinafter referred to as the Act) arise in both these writ petitions."

Para 27: The judgment of the Hon"ble Apex Court in *Hindustan Education Society's* case (supra) is also considered by the Division Bench of this Court in *Anna Manikrao Pethe Vs. The Presiding Officer, School Tribunal and others*, , therein in paragraph 14 the Division Bench has noticed that the Hon"ble Supreme Court has held that temporary appointees are not entitled to claim permanent status until and unless such permanent vacancies are filled in as per Section 5 of the MEPS Act. The Division Bench notices that the facts in the case of *Hindustan Education Society's* case reveal that employee there was untrained teacher and during the relevant three years, he was appointed on purely temporary basis. As already mentioned above, I have considered this judgment also in judgment in *High School Education Society* 2005(2) ALL MR 138 (supra) and found that the judgment does not by lay down a proposition that all appointments made by the management mentioning a particular time limit in appointment order do not become temporary appointments. Merely because appointment order uses the word "temporary" or "till particular date or session end" or provides for automatic termination, it does not become a temporary appointment in terms of Rule 10 of MEPS Rules and therefore can be viewed as

appointment on probation."

Para 28: Under Rule 10 of these rules, employees are categories as under:

permanent non-permanent

temporary probationer.

A "temporary employee" has been defined in Rule 10 as one who has been appointed to a temporary vacancy for a fixed period. Can it be said that respondent was appointed to a temporary vacancy? The answer must be clearly in the negative. The appointment could be temporary in the sense that she was going to be on probation for a certain number of years. That however did not change her status from that of a probationer to a temporary hand."

Para 38: It is therefore clear that in the facts of Hindustan Education Society's case (supra), the employee was not holding D.Ed. qualification and therefore was untrained and he could not have been appointed permanently to fill in clear vacancy. He was, therefore, being appointed on year to year basis. It is apparent that these facts were not brought to the notice of this Court when it decided Writ Petition No. 3488 of 1999 (Bombay) on 07-07-1999. However, this Court was aware of the implications arising and therefore thought it fit that matter should be decided once for all by the Hon'ble Apex Court and hence granted leave to employee to appeal. The employee in that case was in service and this Court protected his services for a period of eight weeks. I, therefore, find that reliance upon the judgment of Hindustan Education Society's case (supra) or said unreported judgment dated 07-07-1999 by learned Counsel for the petitioners is clearly erroneous. The said judgments cannot be construed to lay down a proposition which does not emerge from reading of Section 5(1) and 5(2) of the Act or Rule 10 of the Rules.

18.2 This judgment was followed in Yogeshwar Vikas Sanstha and Others Vs. Rajendra T. Shinde and Another, on which the learned Counsel for the petitioner relied.

Para 1: ...Respondent No. 1 was appointed on 26-7-1995. The appointment order issued to him mentioned that he was appointed temporarily from 28-7-1995 to 30-4-1996....

Para 6: A perusal of the appointment order which is placed on record indicates that the order was issued on 25-7-1995. The appointment order further mentions that respondent No. 1 was being appointed for the period from 28-7-1995 to 30-4-1996. However, the Tribunal has concluded on the basis of the evidence and other material on record that there was a clear permanent vacancy which was available and, therefore, respondent No. 1 ought to have been appointed to the post as a probationer. This is a finding of fact which need not be disturbed by the Writ Court. u/s 5(2) of the MEPS Act an employee who is appointed against a permanent, clear vacancy is liable to be appointed on probation for two years. Thus the initial appointment of respondent No. 1 ought to have been for a

duration of 2 years as a probationer. He would thereafter be entitled to be deemed permanent under the provisions of the Act. The Tribunal has also rightly held that the termination of service was in breach of the MEPS Rules and hence, the order of termination was bad. The Tribunal has rightly concluded that the petitioner had compelled respondent No. 1 to resign from duty and in these circumstances came to the conclusion that the termination was bad.

Para 7: The learned advocate for the respondents brings to my notice the judgment of a learned Single Judge of this Court in the case of *The Maharashtra Shikshan Sanstha and Anr. v. The Presiding Officer, School Tribunal and Ors.* 2006(7) Mh.L.J.1 : 2007(2) All MR 269 where the learned Single Judge (B.P. Dharmadhikari, J.) sitting at Nagpur Bench has held that merely because the appointment order uses the word "temporary" or provides for automatic termination, it does not become a temporary appointment. What is required to be noticed according to the learned Judge is the character of such an appointment; whether the appointment has been made against a clear permanent vacancy or not. The use of the word "temporary" does not indicate that the appointment is in fact a temporary appointment in terms of Rule 10 of the MEPS Rules and therefore, such an appointment is to be viewed as an appointment on probation. In the present case, there is a finding of fact recorded by the School Tribunal that the respondent was appointed against a clear vacancy. That being the position, though the letter of appointment does mention that the appointment is only for a specified period, the appointment must be considered as one on probation.

18.3 It may be noted that on facts the Court had concluded that the vacancy was not only clear but also permanent and hence there would be no difficulty in reconciling it with judgments of Supreme Court in *Hindustan Education Society and Bharatiya Gramin Punariachana Sanstha*.

19.1 The learned Counsel for the petitioner relied on a judgment of this Court in *Matoshri Ramabai Ambedkar Vidyarthi Vasatigrh Trust and Anr. v. Bharat D. Hambir and Anr.* 2009 (2) Mh.L.J. 121 in which this Court has very forcefully brought to the fore the ill effects of giving a free hand to unethical managements in the matter of appointment of teachers in the following words:

Para 5: ...Firstly, it was submitted that the first respondent was not appointed on probation, but was a temporary employee. The School Tribunal has noted that in the present case, the first respondent was appointed after an advertisement was issued on 19th April, 2004 and interviews were held on 7th June, 2004. The first respondent was appointed with effect from 14th June, 2004 as an Assistant Teacher. The first respondent is a duly qualified teacher holding the B.A. and B.Ed. qualifications. The appointment of the first respondent was approved by the Social Welfare Officer on a probationary basis. In fact, it was the contention of the petitioners that the work of the first respondent during the period of probation was not satisfactory. This aspect would be dealt with later. However, it is evident that even the petitioners accepted and treated the appointment of the

first respondent as being on probation. The law in this regard is clear. Section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 obligates every management of a private school to fill up a permanent vacancy by appointment of a duly qualified candidate to fill such vacancy and under Sub-section (2) of Section 5, every person appointed to fill a permanent vacancy shall be on probation for a period of two years. Upon the satisfactory completion of the period of probation, there is a deeming fiction under the statute by which an employee is deemed to have been confirmed. A permanent vacancy has to be filled in by the appointment of a duly qualified candidate and every candidate appointed to fill a permanent vacancy has to be appointed on probation.

19.2 It may be seen that on facts it was held in that case that the teacher was appointed on probation after selection pursuant to an advertisement to fill up a permanent vacancy, and his appointment was treated as such by the Management. The further observations of the Court have to be read in this factual context. The Court held:

Para 5A: Of late, there is a growing tendency of managements of private schools to appoint temporary employees from year to year, even though the vacancy is permanent and an adequate work load is available. This leads to grave uncertainty for teachers and places them at the mercy of the managements. The temporary appointment of a teacher who questions unethical practices of the management is promptly terminated. He or she who questions is cast away. Those who turn a blind eye or worse, become willing participants in a pattern of exploitation, are retained. This is a perversion of what was intended by the State legislation enacted in 1977. Placing teachers in a state of eternal uncertainty is destructive of the cause of education. In numerous cases before this Court, the grievance is that teachers of aided institutions are being subjected to extortionate demands by unscrupulous managements. Education has become a business and managements of private schools, with notable exceptions, are becoming pirates in the high seas of education. The interpretation of Section 5 of the Act must be purposive - one that would attain the statutory object and not lead to a negation of statutory intent. Once a permanent vacancy arises, a management is duty bound statutorily to fill it up by appointing a duly qualified candidate on probation. The vacancy must be advertised to allow equal opportunity to eligible candidates. A regular process of selection must be held. A duly qualified candidate has to be appointed. Temporary appointments can by definition be made when the vacancy is temporary. In such cases, the exigencies of education require that students must be imparted education and a vacancy even for a short period will cause serious hardship. But temporary appointments are an exception. Making temporary appointments the rule is to give a tool of subversion to the hands of unethical managements. Temporary appointments, followed as a practice become a tool of subversion because they perpetuate a regime of uncertainty about service, place the teacher in a position of perpetual fear and deprive the teacher of the stability needed to contribute to the process

of moulding young minds. This Court must emphasise with all the authority at its command that a subversion of statutory intent should not be allowed. The Court will not allow itself to be a mute by stander to the growing trend of a lack of ethics in the management of private schools. Judicial intervention is warranted in order to preserve the statutory intent.

Para 9: In the present case, it was the case of the management that the first respondent had without sufficient cause failed to apply for leave and had remained absent. The management was entitled to treat this as a breach of discipline and to hold a disciplinary enquiry to establish the allegation. Until the misconduct was proved, it was only an allegation. Nothing of the kind was done. The School Tribunal has reviewed the material which has come on record in great deal of detail and noted that it is only after the first respondent filed a complaint against the management that it prevented him, with effect from 8th September, 2007, from signing the Muster Roll. The grievance of the first respondent is that the management was resorting to unethical practices by making extortionate demands. The Tribunal has for cogent reasons entered a finding of fact that there is substance in the grievance of the first respondent.

Para 10: The judgment of the Tribunal is consistent with the law laid down by the Division Bench in Priyadarshini Education Trust and The Head Master, National Urdu High School Vs. Ratis (Rafia) Bano, . The first respondent was duly selected; he was appointed in a clear and permanent vacancy and he was duly qualified. The termination was wholly arbitrary.

19.3 In this judgment, there was no occasion to consider the judgments of the Supreme Court in Hindustan Education Society or Bharatiya Gramin Punarrachana Sanstha.

20.1 The learned Counsel for the respondent has also cited a judgment delivered by me in Janta Education Society and Anr. v. Prakash Babarao Shingane and Anr. 2010 (1) Mh.L.J. 329 in the following factual matrix:

Para 2: Facts, which are material for deciding this petition, are as under:

Respondent No. 1 was M.Com., B.P.Ed. when he was first appointed in a Junior College on 2-8-1985 on a fixed salary of Rs. 250/- per month for a period up to 30-6-1986. His appointment was approved by the Deputy Director of Education for the subjects of Commerce and Physical Education on a pay scale of Rs. 250-450/- for the Academic Session 1985-86. This appointment was continued by another order dated 28-6-1986 on a fixed pay of Rs. 500/- for the Academic Session from 1-7-1986 to 8-5-1987. This too was approved by the Deputy Director of Education for the Academic Session 1986-97. There is a dispute about the next appointment order dated 9-7-1987. According to the petitioners, respondent No. 1 was appointed by order dated 9-7-1987 on a clock-hour basis for the period from 9-7-1987 to 24-3-1988. By order dated 17-10-1988, the Deputy Director of Education approved this appointment on a clock-hour basis at the rate of Rs. 12/- per hour with effect from 9-7-1987 till the end of the

Academic Session 1987-88. However, according to respondent No. 1, this order was fabricated and in fact he was appointed from 9-7-1987 to 8-7-1987 in a clear vacancy. Respondent No. 1 relies on a undated order signed by the President of the Society, which does not mention any pay scale, whereas the petitioners rely on an order signed by the Principal of the College.

20.2 After considering several judgments (many of which have been already noted in preceding paragraphs), the following conclusion was drawn:

Para 24: I have considered these erudite judicial pronouncements. I have serious doubts if the findings of the Apex Court, in not one, but two judgments, after nothing the provisions of Section 5 of the MEPS Act, could be ignored and it could still be held that an appointment in a clear vacancy must be on probation. The order of appointment, which was under consideration of the Apex Court in Hindustan Education Society and Anr. v. Sk. Kaleem Sk. Gulam Nagi and Ors. has already been quoted in preceding paras. Teachers, who appointment was question in Bharatiya Gramin Purnarrachana Sanstha v. Vijay Kumar and Ors. was selected and appointed after following procedure for two years in a clear vacancy. Yet, the Supreme Court in these two cases did not hold that the appointments must be held to have been made on probation. It may be audacious for me to ignore this and yet follow contrary findings, which could be reconciled only by distinguishing between a clear vacancy and a permanent vacancy. Every clear vacancy need not be mistaken for a permanent vacancy. When a new School starts, teachers will have to be appointed even before students are enrolled. Such appointments would obviously be in clear but temporary vacancies, since no one would be able to predict if the School would succeed or fail.

21. The learned Counsel for the respondent also relied on my judgment in Liberal Education Society and The Headmaster, Hadas High School Vs. Smt. Vrushali Aole, The Education Officer (Secondary) and Presiding Officer, School Tribunal, too, a similar conclusion was drawn. Rather than re-writing the comments on similar arguments advanced, I would quote following two paragraphs from the judgment as under:

Para 11: The learned Counsel for petitioners submitted that both these judgments of the Hon"ble Supreme Court would rule out the proposition that u/s 5 of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, an appointment to a post on a clear vacancy had to be on probation. He pointed out that neither in Yogeshwar Vikas Sanstha nor in Matoshri Ramabai Ambedkar Vidyarthi Vasatigruh Trust were these judgments of the Hon"ble Supreme Court noticed. He submitted that had the judgments of the Hon"ble Supreme Court in Hindustan Education Society, and particularly in Bharatiya Gramin Punarrachana Sanstha, been noticed by the learned Judges they would certainly have taken a different view.

Para 12: While the causation in Matoshri Ramabai Ambedkar Vidyarthi

Vasatigruha, namely that purposive interpretation should be preferred is extremely persuasive, the fact that the Hon''ble Supreme Court, after considering provisions of Section 5 of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act and the fact that the employee in Bharatiya Gramin Punarrachana Sanstha was selected after the post was advertised and was appointed for two years in clear vacancy, observed towards the end of para 6 that provision of Section 5 of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act "applies to a person who is put on probation consequent upon his appointment in a permanent vacancy" and that the provision did not help the employee because "secondly, admittedly the first respondent was appointed only for a period of two academic years of 1996-97 and 1997-98 and was not put on probation.

It may be seen that in para 3 of the judgment the Hon''ble Supreme Court had specifically stated as under:

On 6-8-2001, this Court issued notice limited to the question as to why the appointment of the respondent (respondent 1) should not be confined to the period mentioned in the order of appointment dated 22-6-1996.

Thus the specific question which Hon''ble Supreme Court was considering was about confining the appointment to period mentioned in the appointment order. In face of this, after noticing the pronouncement of the Apex Court, it may be impermissible for me to follow contrary view taken by this Court in the two Judgments referred to in preceding paragraphs.

22. The object of elaborately dealing with several judgments cited at the bar was two-fold - first, to check up the correctness of premises of my earlier decisions in Janta Education Society and Anr. v. Prakash Babarao Shingane and Anr. reported at 2010 (1) Mh.L.J. 329 and Liberal Education Society and The Headmaster, Hadas High School Vs. Smt. Vrushali Aole, The Education Officer (Secondary) and Presiding Officer, School Tribunal, and secondly to find out if there is any conflict in the pronouncements of the Supreme Court in Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others, ; and Bharatiya Gramin Punarrachana Sanstha Vs. Vijay Kumar and Others, ; on the one hand and the judgments of this Court in Hindi Vidya Bhavan, Mrs. C.R. Pathak, Principal, Hindi Vidya Bhavan School and Mr. V.O. Somani, Hon. Secretary, Hindi Vidya Bhavan School Vs. Presiding Officer, School Tribunal, Education Inspector, Ramprakash Badlu Mandar and Mithila Azad Security Force, ; The Maharashtra Shikshan Sanstha and Anr. v. The Presiding Officer, School Tribunal and Ors. reported at 2007(2) All MR 269; and Matoshri Ramabai Ambedkar Vidyarthi Vasatigruh Trust and Anr. v. Bharat D. Hambir and Anr. reported at 2009(2) Mh.L.J. 121 on the other.

23. The Supreme Court in its two decisions has referred to the appointments of persons against clear vacancies and yet held that the procedure prescribed u/s 5 of the MEPS Act would apply only to the appointments to fill up permanent

vacancies. In Hindi Vidya Bhavan, Mrs. C.R. Pathak, Principal, Hindi Vidya Bhavan School and Mr. V.O. Somani, Hon. Secretary, Hindi Vidya Bhavan School Vs. Presiding Officer, School Tribunal, Education Inspector, Ramprakash Badlu Mandar and Mithila Azad Security Force, this Court was dealing with a case of a wholesale departure by a Management by resorting to contract workers. In Maharashtra Shikshan Sanstha and Anr. v. The Presiding Officer, School Tribunal and Ors. reported at 2007(2) All MR 269 and Yogeshwar Vikas Sanstha and Others Vs. Rajendra T. Shinde and Another, on facts, the Court was considering the question of filling up of a permanent vacancy and, therefore, obviously procedure prescribed u/s 5 of the MEPS Act would apply even as per the pronouncements of the Supreme Court in two cases referred to above.

24. There can be no doubt that the judgment of the Supreme Court in Hindustan Education Society cannot be construed to lay down a proposition which does not emerge from Sections 5(1) and 5(2) of the MEPS Act, as observed in Maharashtra Shikshan Sanstha 2007(2) All MR 269 . All the same, the fact that the Supreme Court had noted in para 4 of the judgment that the appointment of the Teacher was a temporary appointment against a clear vacancy, had noted the provisions of Section 5 of the MEPS Act and then unequivocally held in para 6 that the appointment could not be construed to be a permanent appointment cannot be wished away. The Apex Court dealt with another similar appointment in Bharatiya Gramin Punarrachana Sanstha similarly. The principle that emerges is that the Managements cannot artificially turn permanent vacancies into temporary vacancies by making appointment thereto for a fixed period. At the same time, a "clear" vacancy need not be confused for a "permanent" vacancy, which would be available without any limit of time. And, only while filling a permanent vacancy procedure prescribed u/s 5 of the MEPS Act would have to be followed.

25. In Matoshri Ramabai Ambedkar Vidyarthi Vasatigruh Trust and Anr. v. Barat D. Hambir and Anr. reported at 2009 (2) Mh.L.J. 121 on facts, the Court had found that the appointment was on a probation basis, i.e. obviously to fill up a permanent vacancy and had been approved by the concerned authority as appointment on probation. Therefore, there was no question of any departure from the procedure prescribed in Section 5 of the MEPS Act.

26. These judgments do not consider the judgment of the Division Bench of this Court in Mathuradas Mohota College of Science Vs. R.T. Borkar and Others, which is not shown to have been overruled. The observations in para 7 therein, which read as under, would make it impermissible to create a fictional appointment on probation.

Para 7: It is further to be noted that the post was of teacher in Botany subject which was not the subject of the respondent No. 1 as the respondent No. 1 is M.Sc. In Zoology and, therefore, it cannot be said that the respondent No. 1 was duly qualified for the said post. Apart from this, even assuming that there was a clear vacancy, the order issued was purely temporary and, therefore, not proper

order. However, it will be an error to treat the said order as an order u/s 5 of the Act, viz. the order for a period of two years, probation. Such legal fiction we do not find anywhere in the Act and the Rules and, therefore, the finding recorded by the Tribunal that the order is covered u/s 5 of the MEPS Act is not correct.

In face of this judgment of the Division Bench, it would be impermissible to follow contrary views taken by the learned Single Judges.

27. In *Shri Sadguru Dnyan Prasarak Shikshan Sanstha and Anr. v. Presiding Officer, School Tribunal, Amravati, and Ors.* Writ Petition No. 3444 of 1994 decided on 25-11-2009 a learned Single Judge of this Court had, in my view, rightly concluded that if the School itself had temporary recognition from year to year, there was no question of there being any permanent vacancy. At the cost of repetition, it has to be pointed out that the permanent vacancy would be one which would not be limited by any period of time. Apart from new Schools, which receive recognition from year to year, where vacancies would be clear but not permanent, there could be instances of Schools, where there is a spurt in admissions, resulting a need to engage more teachers on the basis of workload. But since this workload may fluctuate for a period of time before stabilizing, there could be some vacancies, which would be temporary, till it could be said - say after about three to five years - that the strength is unlikely come down. In every service, while fixing cadre strength, there are always some permanent posts and some additional or temporary posts to take into account the fluctuations in the requirement from time to time. The State Government could undoubtedly examine this aspect and clarify as to the number of vacancies, which could be considered as temporary vacancies even in established Schools where the student-strength increases.

28. It would be easy to say that if the strength is reduced, the teacher concerned could be accommodated in another School under the scheme of MEPS Act and that such a teacher could not be retrenched till the workload hits a zero. But it cannot be forgotten that this would throw additional burden on the exchequer which ultimately bears the burden of paying salaries of teachers. Also it is easy to say that the teacher retrenched from one School ought to be adjusted in another School, without realizing that the Schools are located at different places. The social milieu in which the School is located may be different, and the quality of teacher as distinguished from qualifications required in different Schools may be different. A graft of such a teacher - say from metropolis of Bombay to a tribal area, say Dahanu or metropolis of Nagpur, to a School in tribal area in Gadchiroli, may not work to the advantage of the students and the teachers. Therefore, rather than insisting upon filling up of several clear vacancies in the manner prescribed u/s 5 of the MEPS Act, it would be better to restrict the mandate of Section 5 only to permanent vacancies.

29. The learned Counsel for the petitioner next submitted that irrespective of the terms of appointment order, the petitioner was entitled to be appointed on probation under Rule 9(9) of the Maharashtra Employees of Private Schools

(Conditions of Service) Rules, 1981 (for short, "the MEPS Rules"), as the vacancy was clear and he was considered as a candidate belonging to backward class, other than that for which vacancy was reserved, as a candidate belonging to such category was not available. The advertisement in response to which the petitioner had applied and which appeared in daily Lokmat dated 17-6-1995, clearly shows that vacancy to be filled in was for SC/ST/NT/VJ category and not OBC category.

30. The learned Counsel for respondent Nos. 1 and 2 submitted first, that the School was recognized by the Education Department only for specific period of one year. Therefore, there was no question of petitioner being appointed to a permanent post. There is nothing to suggest that the School had recognition beyond one year when the petitioner was appointed. Secondly, he submitted that the petitioner was not appointed from OBC category because SC/ST/NT/VJ candidate was not available. No such claim was made by the petitioner in appeal before the School Tribunal and in fact the respondents had claimed in their reply before the Tribunal that the petitioner was considered from open category. The learned Counsel submitted that in any case, in view of the judgment of this Court in *Gajanan Uddhaora Garole v. State of Maharashtra and Ors.* reported at 2009 (5) Mh.L.J. 300 it is impermissible to appoint an OBC candidate against SC/ST/NT/VJ vacancy.

31. The learned Counsel for the petitioner submitted first, that the very fact that the respondent volunteered in the reply before the Tribunal that the appointment was considered from open category creates a suspicion. He submitted that "Roster" approved by the Education Officer would have been the best evidence to show if the petitioner's appointment was in fact considered against OBC vacancy. Roster was available with the respondent, which was not produced, and the Tribunal should have held that the petitioner was appointed as OBC candidate against the vacancy reserved for SC/ST/NT/VJ. The learned Counsel submitted that the Tribunal could not have expected the petitioner to produce roster and should have drawn adverse inference for Management's failure to produce copy of roster. For this purpose, the learned Counsel for the petitioner relied on the judgment of this Court in *Bhagwan Shikshan Prasarak Mandal and Others Vs. Rajendra Marathe and Others*, . The facts were stated to be as under:

Para 2: According to the petitioner/management:

(a) The petitioner was appointed for the first time on 20-6-1994, the post was meant for reserved category candidate, however, the management did not mention the said fact in the appointment order.

(b) After completion of two years' service, the petitioner was issued a fresh appointment order dated 24-6-1996, which admittedly mentions that this time, he is given appointment on probation of two years against a reserved vacancy.

The Court observed in this context in paras 9, 11, 13 and 16 as under:

Para 9: The best evidence of fact of post being reserved is of document i.e. roster which is a document required to be maintained by the management and to be approved by Government Officers who are vested with the powers and duty of achieving the object of ensuring the due and proper reservation as mandated by the Constitution of India and translated into rules under the Act in question.

Para 11: The roster to be so maintained has to be not just best but only evidence for proof of fact of reservation. The petitioner has refrained from bringing on record the said original roster which is expected to be duly certified by the Government authorities."

Para 13: The petitioner has thus withheld best evidence and desires that initially the Tribunal, should have accepted their word that the post was reserved and now wants this Court to do it."

Para 16: The fact which was jurisdictional and pivotal is, as to whether vacancy in question was a reserved vacancy and the petitioners have failed to discharge their burden. It is therefore liable to be held that the post on which respondent employee was appointed was not a vacancy meant for a candidate of reserved category.

32. In this context, the learned Counsel for the petitioner submitted that this error could be corrected by this Court in exercise of its power to issue a writ of certiorari and for this purpose, relied on a judgment in *The Chairman, Shri Chhatrapati Shivaji Maharaj Shikshan Sanstha and Another Vs. Chandrashekhar S. Giwari and Others*, . The facts unfolded were as under:

Para 2: Respondent No. 1 herein was appointed as a Peon on probation by an order dated 1st February, 1995 for a period of two years in the petitioner No. 2 school run by the respondent No. 1 Trust. The said appointment of respondent No. 1 was approved by the Education Inspector vide his order dated 15-11-1995 for one academic session i.e. till the expiry of 30th April, 1996 subject to the condition that backlog should be filled in.

Para 3: At this juncture, it will be relevant to note that the appointment of the respondent No. 1 as a Peon was in a permanent post which became available on account of promotion of one Shri Sawant to the post of Laboratory Assistant. The petitioner-Trust had adopted unanimous resolution to appoint and absorb respondent No. 1 in the said vacant post of Peon. By virtue of the very same resolution, Trust resolved to appoint one more peon on the newly created additional post of Peon reserved for such category.

Para 4: The services of the respondent No. 1-Peon came to be terminated by an order dated 29th March, 1996 with effect from 30th April, 1996.

In the context of these facts, the Court ruled as under, as to the power of issuing a writ of certiorari:

Para 36: The writ of Certiorari can be issued to correct an error of law. But it is

essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, .

When Certiorari will be issued:

(1) For correcting errors of jurisdiction as when an inferior Court or Tribunal acts, without jurisdiction or in excess of it or fails to exercise it.

(2) When the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving any opportunity to the parties to be heard or violates the principles of natural justice.

(3) The Court issuing a writ of Certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous.

(4) An error in the decision or determination itself may also be amenable to writ of Certiorari, if it is a manifest error apparent on the face of the proceedings, e.g., when it is based in clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by Certiorari but not mere wrong decision.

Para 37: This is the principle that a Court; which has jurisdiction over a subject-matter, has jurisdiction to decide wrong as well as right and when the Legislature does not choose to confer a right of appeal against that decision it would be defeating its purpose and policy, if a superior Court were to rehear the case on the evidence and substitute its own findings in "Certiorari".

33. The findings of the School Tribunal would have to be examined bearing these parameters in mind.

34.1 The learned Counsel for the respondent relied on the judgment of this Court in Sharad Balaji Mankar v. Presiding Officer, School Tribunal, Amravati, and Ors. Writ Petition No. 2767 of 1996 Decided by Hon'ble Shri Justice B.P. Dharmadhikari on 6 th November, 2006 . The relevant facts in the said case as summarized in para 2 are as under:

Para 2: The petitioner approached the School Tribunal, by filing Appeal on 20.04.1994 challenging order of termination given to him allegedly on 16.4.1994. The order of termination is dated 23.3.1994. He contended that he was working since 8.1.1992 and he was appointed against the clear vacancy. No order of probation as such was ever given to him. He has contended that thus from 8.1.1992, till termination he has worked and was therefore a permanent employee, and the management could not have terminated him abruptly. The management in its reply stated that the post was reserved for Scheduled Caste/ Scheduled Tribe and petitioner who was belonging to open category came to be selected as candidate from reserved category was not available. They have

pointed out that because of this, he was not given any permanent appointment order or appointment order on probation and his appointment was only till session end. The School Tribunal has after hearing both the sides found that the vacancy was reserved for scheduled caste/scheduled tribe category and as candidate from that category was not available, petitioner was considered for appointment....

34.2 In the context of these facts, the Court held:

Para 8: Perusal of Rule 9[9][a] of the Rules, as also the judgment on which the learned Counsel for petitioner has placed reliance, shows that when it is not possible to fill in any particular post from the category from which the vacancy arises, it could be filled in from other remaining category as specified in Sub-rule 7, and if no person from such other category is available then only the post can be filled in temporarily or on year to year basis by a candidate not belonging to backward class. It is therefore, apparent that the rule requires assertion of certain facts. The essential fact which the petitioner therefore ought to have established before the School Tribunal that he belongs to other backward class, as a candidate belonging to that category he was entitled to appointment on reserved post. As that has not been done, as the School Tribunal has not said anything about it, mere contention that he belongs to other backward class cannot be appreciated to apply the provisions of Rule 9[9][a], here in the Writ Petition for the first time. In the circumstances, I do not find that any interference is warranted in the judgment of School tribunal. Writ Petition is accordingly dismissed. No costs.

35. The learned Counsel for the respondent, therefore, submitted that the petitioner ought to have established two things before the Tribunal: first, that he belongs to OBC and as a candidate belonging to that class, he was entitled to appointment. He pointed out that no such claim was made by the petitioner before the Tribunal and the petitioner cannot take advantage of the fact that the Management clarified that the petitioner was not so appointed as an OBC candidate.

36. Since there was no issue or dispute, there was no question of tendering evidence, and consequently, no question of drawing adverse inference due to non-production of roster by the respondent. It cannot, therefore, be said that the Tribunal should have held, or this Court should hold, that the petitioner was appointed as an OBC candidate against a vacancy for SC/ST/VJ/NT. The learned Counsel for the respondent, therefore, submitted that the judgments on which the learned Counsel for the petitioner placed reliance, which are being discussed in paras to follow, would not be of any help.

37. The learned Counsel for the respondent further submitted that Rule 9(a) of Rule 9 of the MEPS Rules, which is only an enabling provision, does not confer right on a person not belonging to a category for which the post is reserved for being appointed to such a post. He submitted that this provision, which was

meant to ensure that the posts are filled up, if allowed to be abused by permitting appointments of candidates belonging to the category other than that for which the post is reserved, would result in breaking down the entire scheme of reservation. He pointed out that different percentage of posts are reserved for different categories and it is not that all the reserved posts could be filled up by candidates belonging to any of the reserved categories. As an illustration, he submitted that even Nomadic Tribes could not be considered as one class. The State has prescribed reservations of 2.5% for Nomadic Tribe Category B; 3% for Category C; and 3% for Category D. This, according to the learned Counsel, was meant to ensure that even amongst the Nomadic Tribes, there is no imbalance and one caste or community does not eat up the entire quota meant for Nomadic Tribes as a whole. He submitted that if a person belonging, to say OBC, was allowed to be appointed on a post meant for Scheduled Caste, merely because a candidate from Scheduled Caste was said to have been not available, it would result in encroachment on the posts meant for Scheduled Caste. Therefore, according to him, first, in face of Division Bench judgment in *Gajanan Uddhaorao Garole v. State of Maharashtra and Ors.* reported at 2009 (1) Mh.L.J. 300 and secondly, also on account of the observations of the Division Bench in *Priyadarshini Education Trust and The Head Master, National Urdu High School Vs. Ratis (Rafia) Bano*, discussed earlier, such appointments can be only temporary and not permanent.

38.1 In *Gajanan Uddhaorao Garole v. State of Maharashtra and Ors.* reported at 2009 (5) Mh.L.J. 300 the relevant facts could be gathered from paras 2 and 5 as under:

Para 2: This is an appeal by a Teacher whose services were terminated by the respondents. The learned Single Judge of this Court has held that the School Tribunal has rightly dismissed the appeal filed by the appellant because the appointment order was not signed by the Head Master and though he is an OBC candidate, he was appointed on a post which was reserved for a candidate belonging to Scheduled Tribe category.

Para 5: Shri Parchure, learned Counsel for the respondent points out that after this Court set aside the roster and remanded the matter for reconsideration by the backward Class Cell, it has been found that the post to which the appellant appointed was in fact reserved for a scheduled Caste category candidate and not for an OBC category candidate to which the appellant belongs. This fact is evident also from the judgment of this Court in Contempt Petition No. 133 of 2008.

38.2 The Bench held in para 6 as under:

Para 6: Thus, we find no substance in the contention of the learned Counsel for the appellant. We, accordingly approve the finding of the learned Single Judge in this regard. No other point has been urged on behalf of the appellant.

39. The learned Counsel for the respondent submitted that in face of this

pronouncement by a Division Bench, a candidate from OBC category (or any other reserved category) could not claim as of right appointment to a post meant for another category. Even so, it will be useful to examine the numerous judgments cited by both the learned Counsel on the question of appointment of candidate from one backward class against a vacancy meant for another backward class. But before going to the judgments, relevant part of Rule 9 of the MEPS Rules may be reproduced for ready reference as under:

Rule 9 of the MEPS Rules:

Appointment of staff - (1) The teaching staff of the school shall be adequate having regard to the number of classes in the school and the curriculum including alternative courses provided and the optional subjects taught therein.

(2)

(3)

(4)

(5)

(6)

(7) The Management shall reserve 52 per cent. of the total number of posts of the teaching and non-teaching staff for the persons belonging to the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes as follows, namely:

(8) For the purpose of filling up the vacancies reserved under Sub-rule (7) the Management shall advertise the vacancies in at least one newspaper having wide circulation in the region and also notify the vacancies to the Employment Exchange of the District and to the District Social Welfare Officer and to the associations or organisations of persons belonging to backward classes, by whatever names such associations or organisations are called and which are recognised by Government for the purposes of this sub-rule requisitioning the names of qualified personnel, if any, registered with them. If it is not possible to fill in the reserved post from amongst candidates, if any, who have applied in response to the advertisement or whose names are recommended by the Employment Exchange or the District Social Welfare Officer or such associations or organisations as aforesaid or if no such names are recommended by the Employment Exchange or the District Social Welfare Officer or such associations or organisations as aforesaid within a period of one month the Management may proceed to fill up the reserved post in accordance with the provisions of Sub-rule (9).

(9)(a) 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 may be filled in 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 may be filled in temporary on an year to year basis by a candidate not belonging to the Backward Classes.

(b) In the case of a non-teaching post, if a person from the particular category of Backward Classes is not available, the Management shall make 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....

40. The learned Counsel for the petitioner relied on the judgment of the Supreme Court in *Shakuntala Ganpatsa Shirbhate v. Industrial Weaving Co-operative Society and Ors.* reported at 1994 Mh.L.J. 218 in which facts were as under:

Para 2: The appellant was appointed as a teacher in Biology initially for a period of one year. The appointment was extended from year to year several times. The last order passed in her favour in 1987 mentioned the appointment "until further orders". On 1-4-1988 the services of the appellant were terminated which she challenged by filing an appeal before the School Tribunal u/s 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act of 1977 (hereinafter referred to as the "Act"). In pursuance of a stay order passed by the Tribunal the appellant continued in service during the pendency of the appeal, which was dismissed on 8-11-1990. The appellant, thereafter, approached the High Court with a writ petition which was dismissed by the impugned judgment.

Para 4: ...The learned Counsel for the appellant before us has contended that assuming the other findings recorded against her by the High Court to be correct, she is still entitled to regular appointment in view of Rule 9(a) of the Maharashtra Employees of Private School (Conditions of Service) Rules, 1981, which is quoted below:

(9)(a) 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 may be filled in 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 may be filled in temporarily on an year to year basis by a candidate not belonging to the Backward Classes....

Since the appellant is a member of one of the backward classes referred to in the said Rule, she was entitled to a regular appointment in the very first year when no person belonging to a Nomadic Tribe was available.

Para 5: The argument of the learned Counsel appears to be well founded. Admittedly the respondent No. 4 was available for appointment only in 1988. On the first occasion when the post was being filled up, there was no member of a Nomadic Tribe available for appointment. In the absence of a candidate belonging to a Nomadic Tribe, the Rule enjoins year to year appointment only if an available candidate does not belong to the backward classes. The question,

therefore, is whether the appellant belongs to a backward class.

41. The Apex Court then remitted the case back to the High Court for a fresh decision after deciding the question as to whether the appellant belongs to backward class on the basis of affidavits or to call for a finding from the School Tribunal.

42. The learned Counsel for the petitioner submitted that in face of this judgment, it is impermissible to contend that a candidate belonging to one backward class could not be adjusted permanently against the vacancy meant for another backward class. Following this judgment, similar view was taken by a Division Bench of this Court in D.G. Ruparel College v. State reported at 1998 II CLR 402 on which the learned Counsel for the petitioner relied. In that case grievance was about failure of the Education Department to accord approval to appointment of an OBC candidate against a vacancy meant for NT candidate on a regular basis for two years. In the third year, a candidate belonging to NT category was selected by the Management, which sought approval for his appointment.

43.1 The learned Counsel for petitioner also cited on the judgment of the Supreme Court in Kankavali Shikshan Sanstha and Others Vs. M.R. Gavali and Others, (which followed the judgment in Shakuntala's case), in which facts were as under:

Para 3: The short facts of the case are as follows:

Respondent No. 1 - M.R. Gavali was appointed as Assistant Teacher in the S.M. Junior College w.e.f. 18-6-1994 on purely temporary basis for the academic year 1994-1995 i.e. for the period from 18-6-1994 to 2-5-1995 against the backlog of SC/ST and NT category. Clauses 2, 3, 7 and 8 of the appointment order read as follows:

2. Your appointment is purely temporary for a period from 18-6-1994 to 2-5-1995 in the leave/deputation vacancy after expiry of the above period your services shall stand terminated without any notice. OR

3. The terms of your employment and condition of service shall be as laid down in the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 and the rules made thereunder.

7. Your appointment is conditional subject to the approval of the Education Department.

8. This post is reserved for Scheduled Caste and if candidate of that category will be available, your service will be terminated.

Para 5: The appellant-Institution sought to fill up the backlog against the reservation by publishing advertisement in the newspapers. However, the particular backward class candidate was not available. On account of non-availability of the ST reserved category candidate, respondent No. 1 - M.R. Gavali

was again appointed temporarily on 8-6-1995 for the academic year 1995-96. It was made clear that the said appointment is liable to be terminated as and when a candidate from the backward class is made available and that the said appointment was subject to the approval of the Education Department.

43.2 The Court then referred to judgment in Shakuntala's case, and observed as under:

Para 14: The law laid down by this Court on the interpretation of Rule 9(9)(a) is in our view resolves the controversy in the present case. The first respondent was appointed in 1994. The vacancy was reserved for an ST candidate. At that stage there was no candidate belonging to ST available. There is no dispute about the fact that the first respondent belongs to the Hindu Mali community which is an OBC. In the circumstances, in terms of the provisions of Rule 9(9)(a) since no other candidate belonging to ST was available, the first respondent was entitled to appointment on a regular basis. This Court, in the above case, held that in the absence of a candidate belonging to the reserved concerned, the rule enjoins year to year appointment only if a available candidate does not belong to a backward class. The respondent belonging as he does to a backward class was entitled to a regular appointment. The subsequent appointment of P.B. Lohar, the 3rd respondent herein again, operates to displace the first respondent because in any event much prior thereto the first respondent had duly crystallised the right. In any event, it has not been demonstrated before this Court that the 3rd respondent was appointed subsequently in the vacancy created by the termination of the first respondent.

44.1 In Jeles Education Society and The Head Master, Mahatma Gandhi Vidya Mandir Vs. Shri R.T. Bhitale and The Presiding Officer, School Tribunal, and Bhairavnath Shikshan Mandal, Pune and Anr. v. Raju Haribhau Thombe reported at 2009 (3) Mh.L.J. 605 following the pronouncements of the Supreme Court, it was held that a candidate belonging to a backward class was entitled to be appointed against a permanent post meant for another backward class, whose candidate was not available. In Jeles Education Society, this Court also considered the judgment of the Supreme Court in Hindustan Education Society and observed as under:

Para 8: ...The reliance placed on the judgment in the case of Hindustan Education Society (supra) and Writ Petition No. 3488 of 1999 (supra). This judgment does not make a distinction between persons appointed for a temporary period from the backward classes and from the open category. However, the interpretation of Rule 9(9)(a) of the MEPS Rules was not in question in these judgments. A harmonious reading of the judgments in Hindustan Education Society (supra) and Shakuntala G. Shirbhate (supra) will indicate that a person belonging to an open category cannot question his appointment made only for a temporary period against a reserved vacancy. However, when a suitable candidate belonging to a particular reserved category is not available and another from the backward classes is appointed, his

appointment cannot be considered to be a temporary appointment although the appointment letter stipulates so. In my view, therefore, the judgment of the School Tribunal which has been impugned in Writ Petition No. 232 of 1993 must be upheld.

44.2 Even in *Bhairavnath Shikshan Mandal, Pune and Anr. v. Raju Haribhau Thombe* reported at 2009 (3) Mh.L.J. 605 it was held that the judgment of the Supreme Court in *Hindustan Education Society* was not applicable in such a situation.

45. The learned Counsel for the petitioner relied on the judgment of this Court in *Smt. Gracyamma Johny Vs. The Management of Versova Welfare Association High School and Junior College and Others*, . However, since the question, which the Court was dealing with as indicated in para (quoted below) was altogether different, it is not necessary to elaborately discuss this judgment.

Para 4: The short point which requires consideration in the present writ petition is: whether the post of Assistant Headmistress which became vacant was an isolated post and if so, whether the Management was right in applying the policy of Reservation and Roster.

46. In any case, as a fact, it had not been claimed by the petitioner that he was appointed as OBC candidate against the vacancy meant for Scheduled Caste, Scheduled Tribe or Nomadic Tribe candidate. Therefore, there is no question of his appointment being considered as permanent in view of the provisions of Sub-rule 9(a) of Rule 9 of the MEPS Rules.

47. In view of this, it is not necessary to refer to judgments in *Allahabad Jal Sansthan Vs. Daya Shankar Rai and Another*, ; *State of M.P. v. Anil Dhug* reported at (2005) 12 SCC 213; *U.P.S.R.T.C. Vs. Mitthu Singh*, and *Progressive Education Society and Others Vs. Nitin Krishnarao Nimabalkar and Others*, on the question of back wages, on which the learned Counsel for the parties relied.

48. To sum up, first there is no force in the contention of the petitioner that he had not been served with the appointment order or that the appointment order, which was produced by the Management before the Tribunal was untrustworthy. Secondly, the School itself had recognition only for a period of one year and, therefore, it could not be said that there was a permanent vacancy, though the vacancy to which the petitioner was appointed was a clear vacancy. Hence, he could not be deemed to have been appointed on probation u/s 5 of the MEPS Act and the terms of his appointment would have been gathered from the appointment order itself, which was for a fixed period in view of the judgments in *Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others*, and *Bharatiya Gramin Punarrachana Sanstha Vs. Vijay Kumar and Others*, and the judgment of the Division of this Court in *Mathuradas Mohota College of Science Vs. R.T. Borkar and Others*, . Lastly, the petitioner's claim that he was appointed against a reserved post as a candidate belonging to OBC category had not been staked by him before the Tribunal in explicit terms and

the Management had categorically stated that he had not been so appointed. Nonproduction of roster by the Management was not material, first, since the parties were not at issue on this question and, secondly, since the burden to prove that he had been appointed as OBC candidate against the reserved category, lay on him. Hence, it cannot be said that the Tribunal erred in holding that the petitioner's appointment was not as per Section 5(2) of the MEPS Act and that, therefore, the termination of the petitioner did not warrant interference by the Tribunal.

49. In view of the foregoing, the petition is dismissed.