
(2004) 10 BOM CK 0010

In the Bombay High Court

Case No : Writ Petition No. 1621 of 1991

High School Education Society and Another

APPELLANT

Vs

Presiding Officer, School Tribunal and Another

RESPONDENT

Date of Decision : 18-10-2004

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 4(2), 4(6), 5, 5(2), 5(3)

Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 10, 10(2), 14, 14(2), 15

Citation : (2005) 2 ALLMR 138 : (2005) 2 BomCR 773

Hon'ble Judges : Dharmadhikari B.P., J

Bench : Single Bench

Advocate : R.K. Deshpande, for the Appellant; D.P. Thakare, A.G.P. and V.A. Kothale, for the Respondent

Final Decision : Dismissed

Judgement

Dharmadhikari B.P., J.—By this petition under Articles 226 and 227 of Constitution of India the petitioners i.e. Management and Head Mistress of the School challenge order and judgment dated 30th April, 1991 passed by respondent No. 1 School Tribunal in Appeal No. 143/88-A with further directions. Brief facts giving rise in filing the present petition are as under:

2. Respondent No. 2 was employed as an Assistant Teacher by the petitioners by order dated 01-12-1986 for the period up to 30th April, 1987, During relevant period his qualifications were S.S.C., D.Ed. This order specifically stated that his appointment was purely temporary from 01-12-1986 to 30-04-1987. By order dated 01-05-1987, he was continued up to 30th April, 1988. It appears that by order dated 23-9-1988 his services were terminated with effect from the same day and he was paid an amount of Rs. 1,222/- by cheque in lieu of one month's notice. This order is issued by Principal of Smt. Ushabai Deshmukh Junior College, Achalpur City. This termination was challenged by respondent No. 2 by

filing above mentioned appeal u/s 9 of Maharashtra Employees of Private School (Conditions of Service) Act, 1978 (hereinafter referred to as "MEPS Act") before respondent No. 1 School Tribunal at Amravati and Aurangabad Division, Aurangabad. The respondent No. 2 contended that he was appointed against the permanent post and as such he ought to have been appointed on probation for a period of two years from beginning i.e. from 01-12-1986. He contended that the management demanded certain amount from him and he paid Rs. Eight Thousand to petitioner No. 1 and he was unable to pay further an amount of Rs. Five Thousand demanded from him. He concludes that on account of this failure his services were terminated. He contended that he has served school for 21 months satisfactorily and no adverse remarks were issued to him. He points out that by letter dated 1-9-1988 serious charges of misbehaviour were levelled against him and as such his services could not have been terminated without completing departmental, enquiry as contemplated under Rules 33, 36 and 37 of M.E.P.S. Rules, 1981. He contends that his termination is illegal and against the principles of natural justice. The School Tribunal issued notice to the petitioner management and both the petitioners (respondents before School Tribunal) filed their reply alongwith documents in support of their submission. They stated that respondent No. 2 was appointed as Assistant Teacher in their school from 1-12-1986 and he continued till termination of his service on 23-9-1988. They contended that large number of complaints were received from the students and their parents and also teachers against him. The petitioner No. 2 Head Mistress brought those complaints to the notice of respondents No. 2. It is alleged that respondent No. 2 expressed apology and he was continued with a view to give him chance to improve. But he failed to show any improvement in his behaviour and as such he was not required to be retained in service and came to be terminated. The petitioners contended before the School Tribunal that he was appointed on year to year basis temporarily and his services were liable to be terminated by giving him one month's pay or one month's notice in lieu of such notice. They denied that respondent No. 2 was appointed on probation and that no adverse remarks were communicated or given to him during his tenure of service. They contended that communication dated 1-9-1988 given to respondent No. 2 was itself sufficient to reflect upon his behaviour. It is further alleged that opportunity was given to the respondent No. 2 to explain his stand in relation to various complaints received from guardians of the girl students and his response was not satisfactory. Therefore, decision was taken by the management to terminate his services w.e.f. 23-9-1988. The termination is plain and simple and does not cause any stigma upon him. Holding of departmental enquiry was therefore, not necessary and provisions of Rules 33, 36 and 37 of Maharashtra Private School (Conditions of Service) Rules, 1981 (for short "MEPS Rules, 1981") were therefore, not attracted. It is alleged that the said provisions are attracted only in the case of permanent employee. It is further mentioned that respondent No. 2 was temporary employee and it is also mentioned that being a probationer, as his work and behaviour was found unsatisfactory he came to be terminated by giving him one month's pay in lieu of notice. It is mentioned

that the petitioner No. 2 assessed the work of respondent No. 2 employee as required by Rule 15 of M.E.P.S. Rules and it was found that it was unsatisfactory.

3. The School Tribunal appears to have framed issues in this background and after hearing both the sides delivered its judgment on 30th April, 1991. The School Tribunal has held that there was no satisfactory explanation put forth by the petitioner as to why respondent No. 2 employee came to be appointed temporarily and against which temporary vacancy he was appointed. The School Tribunal has found that the petitioner management did not take plea that respondent No. 2 employee was appointed against any particular reserved post for backward class category. The School Tribunal found that respondent No. 2 teacher belongs to Scheduled Caste community and he possesses requisite qualification. The School Tribunal has therefore, drawn inference that respondent No. 2 was therefore, appointed to fill up permanent vacancy and was appointed on probation for the period of two years as per Section 5(2) of M.E.P.S. Act. The School Tribunal further finds that in these circumstances his services could have been terminated by petitioner management on the ground of unsatisfactory work or behaviour u/s 5 of the Act. The School Tribunal has further found that the management did not produced any record before it to show that they has written and maintained confidential reports of respondent No. 2 and communicated adverse remarks to him as per mandatory provisions of Rule 15 of M.E.P.S. Rules, 1981. It found that provisions of Rule 15(6) requiring objective assessment of employee on probation by the head are breached. The Tribunal has further relied upon Rule 15(5) to hold that failure to write and maintain confidential reports and communication of adverse remarks to respondent No. 2 within a period prescribed under Sub-rule (3) of Rule 15 has effect of holding that the work of said respondent No. 2 employee was satisfactory during the period of probation. The School Tribunal in paragraph No. 11 of its judgment concluded that in the absence of any such material on record it cannot accept the plea of petitioner management that services of respondent No. 2 employee were terminated on the ground of unsatisfactory performance. The School Tribunal has also perused order of termination dated 23-9-1988 and found that the said order does not disclose that services of respondent No. 2 were terminated on the ground of unsatisfactory work or behaviour during the period of probation. It is held that petitioners have not mentioned any such reason in the said order of termination and therefore, it held that the services of respondent No. 2 were not terminated as per provisions of Section 5(3) of M.E.P.S. Act. It has also considered the complaints as alleged by the petitioner against respondent No. 2 and has also considered the say of the petitioners in the background of these complaints that without putting any stigma his services were terminated. The School Tribunal has perused copies of these complaints produced before it and it found that these complaints disclosed that though respondent No. 2 was not guilty of misbehaviour of serious nature but he was found guilty of such misconduct of serious nature specified under Rule 22(5)(b) of MEPS Rules, 1981. It held that therefore, it was incumbent on the part of the petitioners to hold

departmental enquiry as contemplated by Rules 33, 36 and 37 of MEPS Rules, 1981. It held that admittedly no such enquiry was conducted and therefore, in view of provisions of Section 4(6) and Section 4(2) the School Tribunal concluded that services of respondent No. 2 could not have been terminated without following the process as contemplated by above Rules. It also found that the misconduct was covered under Rule 22(2)(k) of MEPS Rules, 1981 and held that this could not have been done without holding proper enquiry. It further found that explanation of respondent No. 2 was called for by the letter dated 1-9-1988 and respondent No. 2 relied to it on 3-9-1988 and respondent No. 2 denied the so called misbehaviour. It further found that the management admittedly continued the respondent No. 2 in service beyond 3-9-1988 with a view to enable him to improve. It has further considered the other complaints and found that they pertain to period of 20th August, 1988 to 14th October, 1988 and allegations therein are of grave and serious nature. It further concluded that the order of termination is illegal and improper and against the principles of natural justice and hence, the School Tribunal quashed and set aside the same and directed the petitioners to reinstate the respondent No. 2 in service within 40 days and to make payment of arrears of pay and allowances till he was allowed to resume his duties within period three months. In the alternative, direction was given to the Government to deduct amount equal to the said amount from the grants due and payable or from future grants payable to the management and pay such deducted amount to respondent No. 2. The present writ petition is directed against this order of the School Tribunal.

4. The writ petition has been admitted on 25-6-1991 and on 1-7-1991 this Court granted interim relief in terms of prayer Clause - 2. On 27-8-1991 the stay has been confirmed.

5. I have heard learned Advocate. R.K. Deshpande for the petitioners, learned Advocate V.A. Kothale for respondent No. 2 and learned A.G.P. for respondent No. 1.

6. Shri Deshpande relied upon the appointment orders and contended that it was a temporary appointment and therefore, there was no right to post. He contended that order dated 23-9-1988 is order of simple termination. He also invited attention to the confidential reports maintained by the petitioners in relation to services of respondent No. 2 for the period 1986-87 (1-12-1986 onwards), 1987-88 and the last report is for the period thereafter relying upon this reports he points out that services of respondent No. 2 are not satisfactory and therefore, he was rightly terminated by order of simple termination. He also invites attention to various complaints which are annexed with the petition. First complaint is dated 30th August, 1988 and it is addressed to petitioner No. 2 Head Mistress. It is signed by 13 persons but only names are appearing on this annexure. In it, it is mentioned that the signatories have learnt about various complaints of the girl students about respondent Shri Bhange. Next document is dated 14-9-1988 and it is stated to be sent by Municipal Council, Achalpur. The

annexure does not bear any signature but it is mentioned that the niece of signatory is studying in Vth Standard and she is always complaining about respondent No. 2 teacher. It is mentioned that the conduct of the teacher is not good and it is dirty. It is mentioned that in class or even out side the class his conduct is same. It is alleged that he calls students near table and touch them by his foot. It is mentioned by the signatory that therefore, his niece is reluctant to go to the school. The signatory has prayed that such teacher should be removed. Next document is complaint dated 17-9-1988 the signatory or sender of this complaint is not appearing on this annexure. It is addressed to petitioner No. 2 and in relation to respondent No. 2 teacher it is mentioned that the entire village speaks ill of the respondent No. 2 and the signatories did not find it convenient. They regretted that the conduct of teacher working in the girls school should be like this. It is mentioned that the signatories are working since last 15 years but there are no complaints against any of them. It is mentioned that looking to the interest of the girls students the signatories felt that respondent No. 2 should not work in the school. It is further mentioned that respondent No. 2 constantly makes phone calls from school. The signatories state that if he is asked anything he behaves arrogantly. These is letter dated 18-9-1988 written by Head Master petitioner No. 2 to President of petitioner No. 1. She has mentioned that on 9-9-1988 some relatives of respondent No. 2 from his "in laws side", had been to her office. One of them was Shri Ingale and he told the Head Mistress several bad things about respondent No. 2. The Head Mistress states that she has asked Mr. Ingale to contact the President of the Society but the President was out of station he could not be contacted. She further states that on 18-9-1988 she received one complaint from Ruprao Sarode and it is being forwarded with this letter. The next document is again letter written by the Supervisor on 21-9-1988 to the Head Master and in it, it is mentioned that there are complaints against Mr. Bhangе some times. It is mentioned that initially he used to touch girls but after admonition there is reduction in such instances. It is further mentioned that there were complaints about pulling hands of girls or touching their legs by his leg. It is further mentioned that previously for mathematics examination he has collected Rs. 2/- from each student. It is further contended that for work book and Graph copies he collects some amount and perhaps earns commission in this process, The supervisor has stated generally his behaviour is objectionable. On 21-9-1988 teacher's representative has also given complaint about touching girl students by respondent No. 2. On 22-9-1988 the petitioner No. 2 has given complaint to the President of the petitioner No. 1 institution on the same lines. It is mentioned that he has collected amount for mathematics examination and after Head Mistress learnt she took that amount and distributed prizes to the girl students. It is mentioned that he is selling graph copy worth Rs. 1/- for Rs. 1.40 It is mentioned that last year for photograph he collected amount of Rs. 44/- from students of Class VI(C) but he did not give photograph and also did not refund the amount. A complaint on these lines is revised from the students of VII(C) who were in VI(C) last year. It is mentioned that another complaint is dated 9th September, 1988. It is mentioned that though Mr. Bhangе has denied

in his reply all such instances, grand daughter of the person with whom respondent No. 2 is residing as a tenant studying in standard X(A) has stopped coming to school on account of this behaviour of respondent No. 2. She has also repeated previous complaints and stated that she is working since last 25 year in this institution and because of efforts of all teaching staff the school got grant of Rs. 10,000/- as ideal school. She has expressed regret that on account of such a conduct on the part of one member of the teaching staff reputation of the school is being spoiled. She has also forwarded with this representation a communication dated 28-09-1988 from one Sarode Mr. Sarode in the communication addressed to the President of petitioner No. 1 institution has stated that respondent No. 2 teacher has vacated the room belonging to him on 17-09-1988 and went to reside at another place. He has stated that motive of his earlier complaint dated 12-9-1988 was not to get his room vacated and he has maintained that grievance made by him are true and still survive. He has further stated that because of his bad conduct he was required to send his grand daughters studying in Xth Standard out of town by keeping her away from the school. On 13-10-1988 same person has sought transfer certificate for his two daughters studying in X(A) and Standard VIII. He has mentioned that respondent No. 2 has threatened to kidnap both these girls. Relying upon all these communications Advocate Deshpande contended that all these communications clearly show that it was not possible to retain respondent No. 2 in service. He contends that instead of holding any enquiry into the matter and as the respondent No. 2 was purely temporary employee, the management thought it fit to simply terminate him and accordingly he was terminated on 23-9-1988 by order of simple termination. He contends that there was no stigma cast against him.

7. He also relies upon the confidential reports mentioned above in which the same opinion is expressed by the petitioner No. 2 Head Mistress. First Confidential Report is for the period from 01-12-1986 and it is maintained as per Rule 14(2) read with 15(1). It is in the form prescribed in Schedule G. As per Rule 14(2) every employee, teaching or non-teaching has to submit report of self assessment in form mentioned is Schedule "G" within one month after the end of year. As per Rule 15(1) the confidential report are then required to be written only in Form-G. It is the contention of Advocate Deshpande that these confidential reports are maintained accordingly. He points out that in first confidential report for the period of six months, in most of the columns word "average" has been used and in last column it is mentioned that if appropriate improvements are made in his work he can be permitted to work. In next confidential report which is for the period 1987-88, it is mentioned that he has been orally informed about lacuna in his service and again so far as his service is concerned, the remarks would show that it is either average or on still lower side i.e. on adverse side to respondent No. 2. In last column it is mentioned that his teaching procedure is good but he is in a habit of supplying copy on examination centre. It is mentioned that he was informed about this in writing and thereafter

he was not seen at the examination centre. In last confidential report for the year 1988-89 again same type of remarks are put. It is mentioned that his relations in the society are not good and written complaints dated 17-09-1988 and 20-9-1988 are received. It is further mentioned that he has no command over the students and he has no moral. The said entry about character and integrity is made on the basis of complaints received from the guardians. Again it is mentioned that he is not fit to be retained and is not fit to be promoted. It is mentioned that there are written complaints from parents and he is not fit for working in girl school. It is mentioned that because of his conduct the school is being defamed. The nature of remarks put against each head are mostly on lower side i.e. either average or belated or bad or nil. By relying upon these confidential reports the Counsel for the petitioners has argued that his work and behaviour was found to be unsatisfactory. He contends that the observations of the School Tribunal that no records as required by Rule 15(6) have been produced or maintained is incorrect. He contends that order of termination dated 23-9-1988 is worded in plain and simple language and no misconduct is alleged against him. He contends that therefore, it was not necessary to hold any departmental enquiry against him.

8. Advocate Deshpande appearing for petitioner contends that the entire approach of the School Tribunal is erroneous and perverse. He contends that the School Tribunal has acted without jurisdiction in granting relief of reinstatement with full back wages to employee like respondent No. 2. He contends that it is not at all punitive order and the appointment of respondent No. 2 was in purely temporary capacity and hence, could not have been granted relief of reinstatement. He relies upon judgment reported at *Bharatiya Gramin Punarrachana Sanstha Vs. Vijay Kumar and Others*, , and *Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others*, , in support of this proposition. He also relies upon the judgment of Division Bench reported at *Anna Manikrao Pethe Vs. The Presiding Officer, School Tribunal and others*, , to contend that three aspects or angles which are necessary to be considered by School Tribunal are not considered and in any case they are against respondent No. 2 in this case and therefore, no relief of reinstatement could have been granted. He further relies upon the judgment reported at *Savitribai Fule Shikshan Prasarak Mandal and Another Vs. Dhananjay Deoraoji Diwate and Others*, , to contend that it is not necessary to communicate adverse remarks to a probationer. He, therefore, contends that entire perspective and approach of the School Tribunal in the matter suffers from error and calls for interference in this writ petition.

9. As against this Advocate Kothale appearing for respondent No. 2 points out that all complaints against him have cropped up suddenly after 01-09-1988 and before the said date there was absolutely nothing against him. He denies that at any point of time earlier respondent No. 2 was warned about his behaviour or conduct. He contends that he ought to have been appointed on probation for the period of two years from 01-06-1988 itself in view of mandate of Section 5 of

M.E.P.S. Act and as such he was about to complete his probation successfully in the month of December, 1988. He states that his appointment cannot be said to be temporary as the management fails to prove that he was appointed against any temporary vacancy. He further contends that the management demanded certain amount from him and when he could not arrange for payment of Rs. 5,000/- all this started and he has been victimised. He further contends that his termination is punitive. He contends that only examination of language of termination order is not determinative of this aspect and the School Tribunal has correctly tore the veil and gone behind the termination order. He contends that finding reached by the School Tribunal there could have been departmental enquiry before ordering his termination is just and proper. He relied upon the cases reported at Radhey Shyam Gupta Vs. U.P State Agro Industries Corporation Ltd. and Another, , Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others, , and V.P. Ahuja Vs. State of Punjab and Others, , in support of his contention. He contends that termination of probationer in such circumstances is stigmatic and holding or regular enquiry is must. In relation to the confidential records and complaints he contends that he was only given one letter i.e. dated 1st September, 1988 and he has denied all allegations therein. He states that all other complaints were never communicated to him and according to respondent No. 2 all those complaints are false and by way of afterthought. He further argues that issue whether adverse remarks are to be communicated to the probationers or not is relevant here because according to the petitioner management such adverse remarks have been communicated to him. He contends that he has been victimised and therefore, order of School Tribunal needs to be maintained.

10. The petitioners have placed on record Civil Application No. 5076 of 2004 mentioning therein that respondent No. 2 has secured job of Assistant Teacher in Zilla Parishad school at Amravati and he is working in the employment of Zilla Parishad since 14-8-1992. Request has been made to this Court to note this subsequent event in order to come to the correct decisions in the matter. On 28-9-2004 the respondent No. 2 has also filed pursis that he is restricting his claim in the appeal before the School Tribunal only to the extent of back wages w.e.f. 23-9-1988 to 13-8-1992 i.e. for the period of three years ten months and twenty two days. He mentions that he has got appointment with Zilla Parishad on 14-8-1992 and he is not pressing relief of reinstatement. Thus, grievance of petitioners in this petition survives only to the extent of challenge to grant of back wages for this period and therefore, the challenge to the order of reinstatement becomes infructuous. When this pursis was filed in view of subsequent event of securing employment by the respondent No. 2, without going into merits of the matter, both the Advocates were requested to find out whether it was possible to have some amicable settlement in the matter. The respondent No. 2 was also informed about the problems which he may face if the petition is allowed and the order of termination passed by the management is upheld. However, after taking instructions from respondent No. 2 Advocate

Kothale informs that respondent No. 2 does not want to settle the matter in relation to payment of back wages. Advocate R.K. Deshpande also informs the Court that it is not possible for the management to pay any back wages to the respondent No. 2. Therefore, petition is taken up for final decision.

11. It is therefore, necessary to find out whether termination as effected by management on 23-9-1988 is punitive and stigmatic or not. The said order is produced on record which reads as under :

"You are hereby informed that your services are terminated with effect from 23-9-88. The cheque for Rs. 1222/- (Rs. One Thousand Two Hundred Twenty Two only) Bearing No. OC-50-979916 dated 23-9-88 is enclosed herewith in lieu of one month notice.

You will hand over your charge to this office.

Sd/- . Smt. Ushabai Deshmukh Junior collect, Achalpur City".

Thus, if one peruses this order, apparently it does not carry any stigma and appears to be an order of simple termination. The case law cited by the Advocate for the respondent No. 2 needs to be considered in this light. In Radhey Shyam Gupta Vs. U.P State Agro Industries Corporation Ltd. and Another, , the employee was working as Senior Accountant from 27-7-1970 and he was appointed as Branch Manager on 17-7-1973. He was posted at Faizabad in the same capacity on 3rd October, 1975 and thereafter, he received communication dated 12-1-1976 from the Managing Director mentioning that one person by name Jai Chandra Lal complained that the employee had fraudulently taken Rs. 2000/- from him and therefore, his explanation was called. The employee submitted his explanation on 22-1-1976 and no departmental enquiry was held. On 23-1-1976 simple order of termination was passed stating that employee was appointed as Branch Manager by order dated 17-7-1973 and as per condition No. 3 of his appointment order he can be terminated at any time after giving one month's notice or one month's pay. It is in this background that the Hon'ble Apex Court has considered this grievance. In paragraph. No. 35 the Hon'ble Apex Court has held that in cases where termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the Officer and where on the basis of such a report the termination order is issued, such an order will be violative of principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish the employee and not merely to gather evidence for a future regular departmental enquiry. The Apex Court has held that in such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. The Apex Court says that in cases of such nature employer does not feel that there is a mere cloud against the employees conduct but are cases where the employer virtually finds to the prejudice of the employee, even though such acceptance of findings is not recorded in the order of termination. The Apex Court has concluded that, therefore the misconduct is

the foundation and not merely the motive, in such cases. In the facts of the case the Apex Court has found that on 22-1-1976 report was submitted by General Manager (Fertiliser) without issuing any charge memo or without giving any hearing to the employee and copy of report was also not given to the employee and thereafter on 22-1-1976 a simple order of termination was passed stating that it is in terms of condition No. 3 of the appointment order. In this background in paragraph No. 37 the Apex Court holds that here Enquiry Officer examined witnesses, recorded their statements and gave clear finding about acceptance of bribe by the employee and even recommended his termination and all this was done behind the back of the employee. The Managing Director passed order of termination on the very next day. The Apex Court says that it was not preliminary enquiry report and therefore, these findings are the foundation of termination order and not merely the motive. The Apex Court therefore, granted relief to the employee by quashing the order of termination and by upholding the order of Tribunal in favour of such an employee.

The facts in the present case are totally distinct. It is not the case of the respondent that any enquiry was conducted by the petitioners before ordering his termination. He does not say that any witnesses were examined by the management and report about his guilt was submitted by any Enquiry Officer. The respondent No. 2 does not contend that he has been terminated on the basis of such adverse report. In this background this ruling has no application in the facts and circumstances of the present case.

12. Next ruling on which reliance has been placed by Advocate Kothale on behalf of respondent No. 2 is reported at *Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others*, . Again here while examining the issue of termination of probationer, the Hon''ble Apex Court has considered the issue of allegations and has held that the answer to the same depends upon whether the allegations form foundation or motive of the termination order. Advocate Kothale relies upon paragraph No. 38 in which the Hon''ble Apex Court has held that the words amounting to "stigma" need not be contained in the order of termination but may also be contained in an order or proceedings referred to in the order of termination or in an annexure thereto and would vitiate the order of termination. In the facts before the Hon''ble Apex Court, in this case, the letter containing allegation that he prepared false bills and that he misbehaved with a women academic staff members was served upon probationer during the first year of his probation. The probationer forwarded reply denying the allegations and he also sought copy of the complaint said to have been given by a lady academic staff member. Then there were two orders of extension of probation each for six months and in the order of termination dated 30th April, 1997 it was stated that the order of termination was being passed because of conduct, performance, ability and capacity of the probationer during the whole period. The Apex Court has found that the finding of preparation of false bills or misbehaviour with women which ought to be arrived at only in departmental enquiry were referred to in this letter dated 11-12-1995,

without any enquiry. The Hon''ble Apex Court has noticed that letter dated 11-12-1995 does not merely say that there are such complaints against the employee but it concludes that the employee had prepared false bills and misbehaved with women academic staff members. In paragraph No. 42 of the judgment the Apex Court has considered the aspect relating to stigma by assuming that the words used in the order of termination do not contain any stigma. The Apex Court finds that the order of termination makes reference to three other letters and the letter dated 30th April, 1996 is not found objectionable by the Apex Court. While considering the second letter the Apex Court finds that it makes reference in paragraph (iii) to scuffle between the employee and one P. Chakraborty and on the basis of enquiry report and language used therein found the words to be stigmatic.

13. Last ruling on which Advocate Kothale has placed reliance is the judgment of the Hon''ble Apex Court, reported at V.P. Ahuja Vs. State of Punjab and Others, . In this judgment the Hon''ble Apex Court has found that the order of termination dated 2-12-1988 recorded the fact that the employee failed in performance of his duties administratively and technically and therefore, as per Clause (I) of the said appointment order his services were being terminated. The employee was appointed on probation for the period of two years by order dated 29th September, 1998 on the post of Chief Executive. The writ petition of the said employee was dismissed by the High Court on the ground that the order was not stigmatic. The Hon''ble Apex Court finds that language of the order itself shows that the order was stigmatic and punitive. The facts of the case at hand are totally distinct. The order of termination dated 23-9-1988 does not contain any such words.

14. Advocate Deshpande has relied upon the judgment reported at Usha Vs. Presiding Officer, Additional School Tribunal and Others, , to contend that order dated 23-09-1988 is not punitive order. However, in view of the discussion of this aspect made above, it is not necessary to consider this ruling again.

15. Advocate Kothale has further argued that the respondent No. 2 was appointed against the clear and permanent vacancy and therefore, it must be presumed that he has been appointed on probation for a period of two years. He contends that language of Section 5 of M.E.P.S. Act in this respect is mandatory and in view of the said language the management would not have appointed him for the period up to 30th April, 1987 initially and thereafter could not have extended his appointment by the period of only one year by order dated 01-05-1987. He further points out that by last order of appointment dated 01-05-1987 the services of respondent No. 2 were continued up to 30th April, 1988 and there is no order continuing his services beyond the said date though termination is dated 23-09-1988. He stated that the School Tribunal is therefore, right in holding that as per mandate of Section 5(2) permanent vacancy must be filled in by appointing respondent No. 2 on probation for the period of two years. In this connection Advocate R.K. Deshpande appearing for the petitioners has

relied upon the judgment of the Hon"ble Apex Court reported at Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others, . However, perusal of the said judgment clearly reveals that the employee therein was appointed specifically for the period of 11 months with further stipulation that his services will stand terminated after a period of 11 months, Thus, on facts, the appointment order there, is of totally different type. Here though in two appointment order issued to respondent No. 2, time limit has been specified, still he has been continued after 30th April, 1988 till 23-09-1988 without any express order of appointment. Therefore, this ruling could have no application in the facts and circumstances of the case other ruling on which reliance has been placed by Advocate Deshpande in this respect in reported at Bharatiya Gramin Punarrachana Sanstha Vs. Vijay Kumar and Others, . In this ruling the Hon"ble Apex Court has considered the fact that if employee was appointed for limited period, he can be reinstated only till expiry of such a period from the date of his final appointment. In the facts of this case before the Apex Court, the employee was teacher and his appointment was for two years with stipulation that his services would come to an end thereafter without notice and employee also gave undertaking that after the said period of two years he would not claim any right on the post. Thus, the observations of the Hon"ble Apex Court are to be understood in this background and are not applicable in the facts and circumstances of the present case. The learned Counsel Mr. Deshpande has also placed reliance upon the judgment of the Division Bench reported in 1997(3) Mh.L.J. 697 to contend that the School Tribunal has not considered the issues as required by paragraph No. 15 of this Division Bench judgment. By paragraph No. 15 the Division Bench has directed the School Tribunal to frame and decide three preliminary issues namely, whether the school was recognised school ? Whether the appointment of concerned teacher was made as per Section 5 of M.E.P.S. Act? and whether such an appointment has been approved by the Education Officer?

Here, before the School Tribunal, the petitioner management has not made grievance on these lines. Even in this writ petition there is no grievance about any of these issues. It is apparent that the petitioners appointed respondent No. 2 who was duly qualified in an aided school and they have nowhere disclosed that the appointment of respondent No. 2 has not been approved by Education Officer. In view of the absence of this pleadings, it is not necessary to consider the point being urged by Advocate Deshpande any further. The Division Bench of this Court in L.P.A. No. 53 of 2001 while deciding it on 9th July, 2001 have affirmed the view of the learned Single Judge that the appointment of employee (respondent No. 2 therein) was for period from 1-8-1992 till the end of session and it was contrary to the provisions of Section 5(2) of M.E.P.S. Act, 1977. The Division Bench has affirmed the findings of the School Tribunal by observing thus "we find that this observation of the learned Tribunal is justified since for filling permanent vacancy, it is incumbent and mandatory upon the management to give appointment on probation for the period of two years for filling permanent

vacant post, it is not open to the management to circumvent law by giving appointment for the period of less than two years. Since that would be any contravention of Section 5(2) of the M.E.P.S. Act, 1978. In the facts of the present case the School Tribunal has expressly recorded finding that the management has failed to point out the reasons for issuing first appointment order only for the period of five months i.e. from 01-12-1986 to 30th April, 1987 and then occasion for continuing it up to 30th April, 1988. The School Tribunal has found that the petitioner management has failed to point out as to how the said appointment was of temporary nature as no such temporary vacancy was pleaded and established before it. Same is the position even in this writ petition. The petitioners have failed to show that the respondent No. 2 was appointed against any temporary vacancy and therefore, he was temporary employee as contemplated by Rule 10 of M.E.P.S. Rules, 1981. Sub-rule (2) of Rule 10 defines temporary employment to mean, appointment on temporary vacancy for fixed period. Such case is not made out by the management at all. On the contrary as already stated above, the respondent No. 2 was continued even after 30th April, 1988 and till 23-09-1988 without any appointment order. It is thus, clear that the appointment of respondent No. 2 must be presumed to have been made on probation for the period of two years.

16. Next grievance made by the learned Counsel for respondent No. 2 is that the alleged adverse remarks were never communicated to respondent No. 2. He points out the observations of learned School Tribunal which reveal that the petitioners have breached the provisions of Rules 14 and 15 of M.E.P.S Rules, 1981. He relies upon the provisions of Rule 15(5) to argue that as there is failure to write and maintain confidential reports with further failure to communication this adverse remarks to respondent No. 2 within period prescribed in Sub-rule (3), it is admitted that the work of respondent No. 2 was satisfactory during the entire period. Advocate R.K Deshpande, however, contends that the provisions of Rules 14 and 15 except Rule 15(6) are not applicable to the cases of probationer. He relies upon the judgment of learned

Single Judge reported at Savitribai Fule Shikshan Prasarak Mandal and Another Vs. Dhananjay Deoraoji Diwate and Others, , in this proposition. In paragraph No. 8 of this judgment the learned Single Judge has observed as under :

"The learned Counsel for respondent No. 1 vehemently contended that adverse remarks or unsatisfactory working, if any, were never communicated to the respondent No. 1. Learned Counsel invited my attention to Rule 15 of the Maharashtra Employees of Private Schools (Condition of Service) Rules, 1981 (for short, the "Rules") and submitted that adverse remarks ought to have been communicated to the respondent No. 1. What is relevant for the present purpose is Sub-rule (6) of Rule 15 of the Rules. It is reproduced below for ready reference:

"(6) performance of an employee appointed on probation shall be objectively assessed by the Head during the period of his probation and a record of such

assessment shall be maintained."

As per Sub-rule (6) of Rule 15, the performance of a probationer shall be objectively assessed by the Head during the period of his probation and record of assessment has to be maintained. Considering the scheme of the Act and the Rules, it can be said that Sub-rule (6) of Rule 15 is the only, relevant Rule as far as employees on probation are concerned. On assessment, the Head has to inform to the management for necessary action. It is provided under Sub-section (3) of Section 5 of the Act that if in the opinion of the Management, the work or behaviour of any probationer during the period of his probation, is not satisfactory, the management may terminate his services at any time during the said period after giving him one month's notice or salary of one month in lieu of notice. Therefore, it is the opinion of the Management which weighs with the services of a probationer. If Sub-section (3) of Section 5 of the Act and Sub-rule (6) of Rule 15 of the Rules are read conjointly, it can very well be inferred that adverse remarks need not be communicated to a probationer in order to grant him opportunity to improve upon the same or agitate the same. All that is provided is the assessment of probationer's work by the Head and decision of the Management whether to continue his services or not. Communication of adverse remarks; holding of enquiry; grant of further chance for improvement etc., in my view, is not contemplated either u/s 5(3) of the Act or Rule 15(6) of the Rules. Therefore, if the management is of the opinion that during the period of probation, the services of a probationer were not satisfactory, it can very well terminate the services of such employee before the probation period comes to an end."

The learned Single Judge had found that reading of Section 5(3) of M.E.P.S. Act that Sub-rule (6) of Rule 15 together reveal that adverse remarks need not be communicated to the probationer in order to grant him opportunity. The learned Single Judge has concluded that only requirement as to what is probationer's work and to take decision about his continuation in service. The learned Single Judge has held that communication of adverse remarks, holding of enquiry or grant of further chance of improvement is not contemplated u/s 5(3) read with 15(6) of the Rules. This law is binding and therefore, the observations of learned School Tribunal in this respect cannot be sustained. It is here pointed out that the appellant himself has admitted receipt of letter dated 1-9-1988 which shows that some adverse part has been communicated to him and his explanation was called for.

17. Thus, it is apparent that the respondent No. 2 was appointed on probation and the order of his termination dated 23-9-1988 is not a stigmatic order. The School Tribunal has erred in holding the same to be the stigmatic order. Thus, there is failure to apply the law as settled by Hon'ble Apex Court to the facts at hand by the School Tribunal. The said error has resulted in granting relief of reinstatement with full back wages to the respondent No. 2 employee. The respondent No. 2 employee has by Pursis dated 28-9-2004 already given claim

for reinstatement. As the order of termination dated 23-09-1988 is required to upheld, the claim for back wages as mentioned by respondent No. 2 in the said pursis also dies not survive. The impugned judgment of the School Tribunal dated 30th April, 1991 is hereby quashed and set aside. The writ petition is allowed.

Rule made absolute in the above terms with no order as to costs.