

(2009) 10 BOM CK 0035

In the Bombay High Court

Case No : Writ Petition No. 2025 of 2002

Kapil Shikshan Prasarak Mandal and Dr. Rajendra Prasad
Primary School

APPELLANT

Vs

Vasant Jagdeorao Sirsath, Education Officer (Primary) and
Shobha Gupta

RESPONDENT

Date of Decision : 12-10-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1A
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act,
1977 — Section 5, 5(1), 5(2)
Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule
16, 9(8)

Citation : (2010) 1 BomCR 935 : (2010) 124 FLR 922 : (2010) 1 MhLj 627

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : Vivek Dhage, for the Appellant; V.S. Panpatte, for R. No. 2, R.R. Suryawanshi, for R. No. 1 and S.S. Jadhavar, for R. No. 3, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Shinde, J.—This writ petition is directed against the judgment and order dated 17th April, 2002 passed by the Presiding Officer, School Tribunal, Aurangabad in Appeal No. 131 of 1999.

2. The background facts of the case are as under:

The present respondent No. 1 was appointed as Assistant Teacher on 16.6.1994 in the petitioner school. It was the case of respondent No. 1 before the School Tribunal that his appointment was on probation since 1st May, 1997. The Respondent No. 3 Education Officer (Primary), Zilla Parishad, Nanded has granted approval to his service. After completion of the Summer Vacation, original appellant respondent No. 1 herein went to join the school on 14.6.1999 at about 11 a.m. but, the petitioners did not allow the respondent No. 1 to sign the muster roll and to take classes.

3. The respondent No. 1 challenged the oral termination by way of filing appeal before the School Tribunal. His case is that he is a permanent teacher and served since 1994 and the Education Officer also granted approval to his appointment till 30th April, 1998. Therefore, he is entitled to get the benefits of the provisions of Section 5(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (hereinafter referred to as the M.E.P.S. Act, 1977).

It is specific case of the respondent No. 1 that the original respondent No. 4 before the School Tribunal is the daughter of the President of the Society and for accommodating respondent No. 4, the management is going to terminate his services without following due procedure of law. Her name is also shown on the Muster Roll only to withdraw salary. She is residing with her husband at Ambad and withdraws salary without rendering any services.

The respondent No. 1 served the petitioner institution till 30th April, 1999 and during that period he did not see respondent No. 4 even on single occasion in the school. It is further case of the respondent No. 1 that the petitioners herein have prepared false documents and submitted before the respondent No. 3 Education Officer showing that the original respondent No. 4 is serving in the school. Original respondent No. 4 belongs to open category. Respondent No. 1 herein also belongs to open category. There is no reservation to the backward category. There is no notice prior to termination of services of respondent No. 1. He has completed probationary period of two years. Thus, the impugned termination is illegal. He prayed that the termination dated 14.6.1999 may be set aside.

4. The petitioners herein did not file written statement within the specified time and therefore, the appeal proceeded ex parte. The respondent Nos. 3 and 4 have also not filed written statement.

5. The School Tribunal framed necessary points for its determination and came to the conclusion that the impugned termination order contravenes the procedure of law laid down under M.E.P.S. Act and the Rules framed there under and further held that the original appellant respondent No. 1 herein is entitled for reinstatement.

6. Being aggrieved by the judgment and order passed by the School Tribunal, this writ petition is filed.

7. The learned Counsel for the petitioners submitted that an application was filed praying therein that the written statement of the petitioners should be taken on record. However, the School Tribunal rejected the said application and consequently, the proceedings conducted by the School Tribunal are ex parte. Therefore, in the interest of justice, the impugned judgment and order of the School Tribunal deserves to be quashed and set aside. It is further submitted that the respondent No. 1 teacher was not appointed on clear vacant post. The said appointment was on reserved post for scheduled tribe category. It is further submitted that even the Education Officer (Primary) has also granted approval with an endorsement that approval to the services of the respondent No. 1 is

granted subject to filling in the backlog. It is further submitted that respondent No. 1 was not at all in service since 17th March, 1998. The appeal filed by the respondent No. 1 challenging the oral termination dated 14.6.1999 was filed belatedly. In fact, to bring the appeal within limitation, the respondent No. 1 has taken imaginary date i.e. 14.6.1999 of his oral termination. It is further submitted that the respondent No. 1 himself remained absent since 16th March, 1998. Notice was also issued to respondent No. 1 on 30th March, 1998 in which it was mentioned that the approval was granted to the appointment of respondent No. 1 on the condition to fill the backlog. The respondent No. 1 himself was absent from duties since 16th March, 1998. Vide letter dated 30th March, 1998, services of respondent No. 1 were terminated w.e.f. 1st May, 1998. It is further submitted that the letter dated 30th March, 1998 was sent to respondent No. 1 by Registered Post A.D. However, respondent No. 1 had not accepted the said letter sent by R.P.A.D.

It is further argued that the respondent No. 1 himself has admitted that he was not allowed to sign the Muster Roll for the academic year, 1998-99 and that itself shows that respondent No. 1 was not at all in service of petitioner Nos. 1 and 2 since 16th March, 1998. There are no signatures of respondent No. 1 on the muster roll since 16th March, 1998. It is further argued that the services of respondent No. 1 are terminated w.e.f. 1st May, 1998 vide letter dated 30th March, 1998. It is further case of the petitioners that respondent No. 1 made false statement that he worked from 1st May, 1997 to 30th April, 1999. It is submitted that respondent No. 1 voluntarily left service and never turned up after 16th March, 1998. Therefore, as per Rule 16 of the M.E.P.S. Rules, 1981, the respondent No. 1 is deemed to have abandoned services as he failed to apply for leave within seven days from the date of absence. It is further submitted that Respondent No. 1 cannot be said to be a permanent employee as he was appointed on the reserved post. It is further submitted that the respondent No. 1 is not in service since 16th March, 1998. Therefore, it cannot be said that to accommodate respondent No. 3 herein the services of respondent No. 1 are terminated. It is further submitted that the appointment of respondent No. 3 herein is not at all on the post reserved for reserved category. It is further submitted that the Presiding Officer, School Tribunal, Aurangabad passed orders on 23rd August, 2001 stating that it would not be justified to accept the written statement. It is further submitted that at no point of time the Presiding Officer, School Tribunal passed No W.S. order and therefore, written statement should have been taken on record. It is further submitted that though the application was filed by the petitioners on 7.11.2001 praying therein to set aside the order dated 23rd August, 2001 refusing the petitioners to file written statement. However, the School Tribunal has rejected the said application. It is further submitted that the Presiding Officer has directed the petitioners to reinstate respondent No. 1 within 40 days with full back wages and further consequential benefits. The School Tribunal has not taken into consideration the fact that the respondent No. 1 is not in service since 17th March, 1998. It is further submitted

that since the order passed by the School Tribunal is without referring to the written statement of the petitioners, the same deserves to be set aside.

8. The learned Counsel for the respondent No. 1 submitted that the School Tribunal, after taking into consideration the entire evidence placed on record and after hearing the Counsel for the parties, has passed the impugned judgment and order. It is further submitted that the written statement was not filed by the petitioners herein for years together and consequently, the School Tribunal, after giving sufficient opportunity to the petitioners, allowed the appeal filed by the respondent No. 1. It is submitted that the petitioners were heard at length before the impugned judgment and order was passed by the School Tribunal. It is further submitted that the attempt on behalf of the petitioners institution was to dislodge the respondent No. 1 from service to accommodate respondent No. 3 herein, who is daughter of the President of the Institution. The learned Counsel further submitted that appointment of the respondent No. 1 to the post was after following proper procedure, he is well qualified for the post of Assistant Teacher, the petitioner school is a primary school receiving 100% Grants from the Government, there were four sanctioned posts of Assistant Teachers in the said school for the academic year, 1994-95 and respondent No. 1 came to be appointed to one of the posts out of four sanctioned posts. It is further submitted that the appointment of the respondent No. 1 was on clear and permanent vacant post. Respondent No. 1 joined services w.e.f. 16.6.1994 and to that effect, Education Officer has granted approval for the academic year, 1994-95 i.e. for the period from 16.6.1994 to 30.4.1995. The Education Officer further continued his approval to the services of the respondent No. 1 vide his order dated 16.10.1995 for the period from 1st May, 1995 to 30th April, 1996. Therefore, the learned Counsel would contend that if the period is taken into consideration from 16.6.1994 till 30th April, 1996, it would be clear that respondent No. 1 was continuous in service and approval was also granted by the Education Officer for the entire period of two years. It is further submitted that the appointment of respondent No. 1 was made from the open category. The learned Counsel further submitted that in the approval letters dated 8th March, 1995 and 16th October, 1995 it is specifically mentioned in column 6 that the appointment of the respondent No. 1 is shown from open category. It is further submitted that the petitioners No. 1 and 2 also forwarded proposal for granting approval to the services of the respondent No. 1 for the academic year, 1996-97 and the Education Officer (Primary), Zilla Parishad, Nanded was also pleased to grant his approval in favour of respondent No. 1 by his letter dated 27th March, 1997 for the period from 1.7.1996 to 30.4.1997. It is further submitted that the petitioners passed a resolution in School Committee on 15.4.1997 and thereby resolved that the respondent No. 1 is appointed as an Assistant Teacher w.e.f. 1st May, 1997 on probation for two years. As per the above said resolution passed by the School Committee, the Secretary of the Management issued appointment letter on 15.11.1997 thereby appointing the respondent No. 1 as Assistant Teacher in the petitioner No. 2 school in the pay scale of

Rs. .1200-2040 in continuation to the earlier service of the respondent No. 1 w.e.f. 1st May, 1997 for the period of two years. The management forwarded the proposal for getting approval of the Education Officer for the services of the respondent No. 1 and the Education Officer granted his approval for the period from 1.5.1997 to 30.4.1998. The learned Counsel for the respondent No. 1 invited my attention to the copies of the resolution passed by the School Committee dated 15th April, 1997 and submitted that the petitioner management itself has appointed the respondent No. 1 on probation or two years as Assistant Teacher. The learned Counsel further submitted that the approval by the Education Officer was for the period from 16.6.1994 to 30.4.1995 and the name of the respondent No. 1 was at Sr. No. 4 in the approval list. Further approval was granted for the period from 1.5.1995 to 30.4.1996 and name of respondent No. 1 was at Sr. No. 2 and for the period from 1.7.1996 to 30.4.1997 again the name of the respondent No. 1 was at Sr. No. 4 in the approval list and the Education Officer further granted approval for the period from 1.7.1997 to 30.4.1998 in favour of the respondent No. 1. Therefore, the learned Counsel would submit that the appointment of respondent No. 1 was on permanent and clear vacancy and the management has also given appointment on probation. Therefore, his case purely falls under the provisions of Section 5 of the M.E.P.S. Act, 1977.

9. The learned Counsel further submitted that the respondent No. 1 was in service w.e.f. 16.6.1994 to 14.6.1999 i.e. till his oral termination dated 14.6.1999. Being aggrieved by the said oral termination, the respondent No. 1 approached the School Tribunal and the School Tribunal has rightly allowed the appeal filed by the respondent No. 1. He further submitted that the impugned judgment and order passed by the School Tribunal is after hearing both sides.

It is further submitted that the letter dated 30th March, 1998 annexed to the writ petition at Annexure P-3 is prepared afterthought. The said written termination order dated 30th March, 1998 was never served upon the respondent No. 1. The respondent No. 1 had no knowledge about the so called termination order dated 30th March, 1998. The learned Counsel further submitted that the perusal of the contents of the said letter would show that services of respondent No. 1 were w.e.f. 1st May, 1997 to 30th April, 1998 and same were approved by the Education Officer on condition of fulfillment of the backlog and in the same letter, it is mentioned that the respondent No. 1 was absent from 15th March, 1998. Therefore, the learned Counsel would submit that from the reasons given in the letter, it is clear that the petitioners have prepared this letter afterthought. It is further submitted that the respondent No. 1 was never appointed on the post which is reserved for any reserved category and, therefore, the writ petition deserves to be dismissed. It is further submitted that to show that the respondent No. 1 was in service after 15th March, 1998, it is relevant to point out that one letter dated 19th March, 1998 was issued by the Block Education Officer, Panchayat Samiti, Nanded to the Head Master i.e. petitioner No. 2 in which it was directed that the services of the respondent No. 1 were necessary

for checking the answer sheets of 4th class Board Examination. The said letter also mentions that the respondent No. 1 should be immediately relieved w.e.f. 6th April, 1998 at 10 a.m. to join at Nehru English School, Somesh Colony, Behind Kala Mandir, Nanded. In response to the said letter by Block Education Officer, petitioner No. 2 Head Master issued relieving letter dated 6th April, 1998 thereby directing the respondent No. 1 that his services were required for checking Class 4 Board Examination papers and, therefore, he was relieved for the said purpose w.e.f. 6th April, 1998. As per the directions issued by petitioner No. 2, the respondent No. 1 joined at the above said address for checking 4th Class Board Examination papers and obeyed the orders. After completion of paper checking work, the Education Extension Officer, Mudkhed-2, Panchayat Samiti, Nanded vide his letter dated 27th April, 1998 relieved the respondent No. 1 to joint the school. In the said relieving letter dated 27th April, 1998, the Education Extension Officer mentioned that the work of checking of Board Examination papers is completed w.e.f. 6th April, 1998 to 27th April, 1998 and, therefore, he is relieved from 27th April, 1998 afternoon. It is further submitted that the contention of the petitioners that respondent No. 1 was not in service w.e.f. 15th March, 1998 is totally incorrect and baseless. It is further submitted that on the date of issuance of letter the respondent No. 1 was in service and the Head Master on 20th August, 1998 sent the respondent No. 1 to the office of the District Social Welfare Officer for collecting forms of handicapped / disabled students. The said letter has been written by the respondent No. 1 in his own handwriting, which is signed by the Head Master. The learned Counsel further submitted that to prove his contention that the respondent No. 1 was in service on the disputed date i.e. 15th March, 1998, respondent No. 1 has produced on record the monthly extracts/Civil List of June, 1998 and July, 1998, wherein the name of the respondent No. 1 is at Sr. No. 4.

10. It is further submitted that the very appointment of the respondent No. 3 is beyond sanctioned posts in the school. Merely because she is daughter of the President of the Institution, she came to be appointed from open category in excess of the sanctioned posts. Therefore, the appointment of respondent No. 3 itself is illegal and only to accommodate respondent No. 3 herein, the record is created by the school against the respondent No. 1 to remove him from service so that respondent No. 3 can be accommodated on the sanctioned post in his place. It is further submitted that the Education Officer himself and by appointing his Officers has ascertained as to whether respondent No. 3 is really serving in the school or not and, upon inquiry, it was found that respondent No. 3 was not present in the school during the school hours. The learned Counsel further submitted that there is one clear sanctioned post available at present in the petitioner school.

11. The learned Counsel further submitted that there are four teachers working in the petitioner school, which is clear from the extract of Muster Roll of January and February, 1998 wherein the dates of appointments of all the teachers are mentioned. The date of appoint of one teacher namely Mr. Sunil Patil is shown as

11.6.1993. Mr. Sirsat Vasant Jagdeorao present respondent No. 1 is shown to have been appointed on 16.6.1994, Sau. Jaybhay Nanda Marotirao is shown to have been appointed on 19.6.1995 and Smt. Shaikh Rehana A. Azeez is shown to have been appointed on 19.6.1995. Therefore, the learned Counsel would submit that from the said extract of Muster Roll, it is clear that respondent No. 1 stood at Sr. No. 2 in the list. Therefore, it is clear that the appointment of the respondent No. 1 is not against a reserved post.

12. In support of his contention that appointment of respondent No. 1 was on permanent and vacant post as contemplated u/s 5(2) of the M.E.P.S. Act, 1977, the learned Counsel relied upon the reported judgment of this Court in case of Hareshwar Shikshan Prasarak Mandal and Shree Malveer Vidyamandir Vs. Smt. Rajashree Sarjerao Lokhande, The Education Officer (Secondary), Zilla Parishad and Shri Bhimrao Phadtare, and invited my attention to paragraphs 12 and 19 wherein it was held by this Court that the respondent-Assistant Teacher therein rendered unblemished service from June, 1988 till June, 2004 and she cannot be deprived of her claim for permanency and, as such she acquired deemed confirmation by virtue of Section 5(2) of the M.E.P.S. Act, 1977.

The learned Counsel further submitted that even though appointment letter mentions appointment for one year and if the appointment is against clear and permanent vacancy, then the said appoint must be considered as one on probation. In support of this contention, he placed reliance on the reported judgment of this Court in case of Jagannath Gopala Gaidhani and Another Vs. Minister, Urban Development, Govt. of Maharashtra and Others, and more particularly paragraph 7 of the said judgment. The learned Counsel further placed reliance on reported judgment of this Court in case of President, Mahila Mandal Sinnar and Anr. v. Sunita Bansidhar Patole 2007(2) Mh.L.J. 105 and submitted that once the post wherein the respondent is appointed was a permanent vacancy, and unless it is specifically disclosed by the roster that the same was meant to be filled in by appointment of reserved category candidate, the provisions of Section 5(1) of the M.E.P.S. Act, 1977 are clearly attracted. Once the appointment is made in terms of Section 5(1) of the M.E.P.S. Act, 1977, it takes colour of appointment on probation. The learned Counsel further placed reliance on reported judgment of this Court in case of Ramchandrar Ramadhar Yadav Vs. Hyderabad (Sind) National Collegiate Board and Another, and submitted that grant of approval by Education Officer to appointment of petitioner in that case has been held as not relevant to decide the status of the petitioner therein.

The learned Counsel, therefore, would submit that once there is appointment on clear and vacant post, the said appointment is u/s 5 of the M.E.P.S. Act, 1977. Though the appointment is given on year to year basis, if the post is vacant and permanent in nature, in that case the said appointment has to be considered on probation. Approval to the services of the respondent No. 1 is not the criteria to decide the status of his appointment. Therefore, the learned Counsel submitted

that the impugned judgment and order cannot be faulted with and, therefore, no interference is warranted in writ jurisdiction.

13. The learned Counsel appearing for the Education Officer (Primary), Zilla Parishad, Nanded respondent No. 2 vehemently opposed the prayers in the petition and submitted that the petitioners, with an intention to accommodate the Respondent No. 3, who is daughter of the President of the petitioner institution, has created record against respondent No. 1 so that he can be removed from the service and in his place the respondent No. 3 can be absorbed in permanent service. The learned Counsel further submitted that as per the record maintained by the office of the Education Officer, there are only four sanctioned posts in the petitioner school. One of the four sanctioned posts, appointment of respondent No. 1 was approved by the Education Officer. It is further submitted that there is clear communication by the father of the respondent No. 3, which is part of the record of the Education Officer, that since respondent No. 1 is removed from service, in his place Smt. Gupta Shobha Bajrang is appointed and, therefore, approval may be given to her appointment. Therefore, the learned Counsel for the Education Officer respondent No. 2 would submit that the whole action of the petitioners to dislodge the respondent No. 1 from service is with malafide intention to accommodate respondent No. 3. The learned Counsel further tendered communication by the President of petitioner institution who is father of respondent No. 3 and also the certificate of the Head Master and submitted that these documents would clearly show that respondent No. 3 is appointed in place of respondent No. 1. It is further submitted that on number of occasions the representative of respondent No. 2 visited the petitioner school and found that respondent No. 3 was not present on duty in the school. The learned Counsel further submitted that the appointment of respondent No. 3 at the beginning was not on sanctioned post. He further invited my attention to the fact that at the time when approval was granted to the services of the respondent No. 1 in 1995, out of were four sanctioned posts, two candidates were from Scheduled Tribe Category. The learned Counsel, therefore, would submit that the petition deserves to be dismissed.

14. The learned Counsel for respondent No. 3 submitted that before the School Tribunal, respondent No. 3 adopted the written statement filed by the petitioners herein. He further submitted that there is No. W.S. order passed by the School Tribunal and, therefore, there is no question of not accepting the written statement at the later stage of the proceedings. It is further submitted that though there is no challenge by the petitioners herein or respondent No. 3 to the interim order dated 11.12.2001 passed by the School Tribunal rejecting the application of the petitioners to take the written statement on record, the said order can be challenged with the final judgment and order passed on 17.4.2002 passed by the School Tribunal. The learned Counsel, in support of his contention, relied on the provisions of Order 43, Rule 1A of the Code of Civil Procedure. He further submitted that the respondent No. 3 is working since 1997 and she has rendered almost 12 years service. Initially, the services of respondent No. 3 were

approved by the Education Officer. However, subsequently though the approval was withdrawn, the respondent No. 3 is working in the petitioner school. Therefore, after rendering services for long period of 12 years, she may not be removed from the post of Assistant Teacher. The learned Counsel invited my attention to the grounds in the petition and submitted that since there was no written statement on record before the School Tribunal, the order of the School Tribunal is ex parte and, therefore, in the interest of justice, the matter may be remanded back to the School Tribunal by setting aside the impugned judgment and order for fresh hearing with a direction to take on record the written statement filed by petitioners.

15. I have heard the learned Counsel for the petitioners, the respective respondents, perused the writ petition, annexures thereto and the impugned judgment and order passed by the School Tribunal. The Presiding Officer, School Tribunal framed necessary points for its determination. The first point was as to whether the impugned termination order contravenes the procedure of law laid down in M.E.P.S. Act, 1977 or M.E.P.S. Rules, 1981 and thus, deserves to be set aside. The Tribunal held that the oral termination was not in accordance with the procedure laid down either in the said Act or the Rules. The second point framed was as to whether the appellant is entitled for reinstatement. The School Tribunal held that respondent No. 1 is entitled for reinstatement.

The School Tribunal considered the point Nos. 1 and 2 together. In paragraphs 7 and 9, the School Tribunal has given findings about the status of the respondent No. 1 in service. The Tribunal has recorded the contention of the respondent No. 1 -appellant in paragraph 7 that since 16.6.1994 the respondent No. 1 was in service of the petitioners, on probation. In paragraph 9 of the judgment referring to the approval granted by the Education Officer to the services of the respondent No. 1 from time to time, the Tribunal came to the conclusion that the appellant respondent No. 1 cannot be said to be on probation. It appears that the School Tribunal, has recorded the finding that respondent No. 1 was not on probation, which is contrary to the record. In fact, it is nobodys case that respondent No. 1 was not on probation. In fact, even the petitioners admit that in 1997 appointment order was issued to respondent No. 1, on probation for two years. Even, there is resolution of the managing committee of the petitioners school approving the appointment of respondent No. 1 on probation in 1997.

16. It is not in dispute that respondent No. 1 was working since 16.6.1994 in the petitioner school. Though it is contended by the Counsel for petitioners that the appointment of respondent No. 1 was against reserved post, the School Tribunal has negated the said contention of the petitioners. The tribunal has observed that the petitioners have failed to adduce any evidence on record in support of their contention that the appointment of the respondent No. 1 was against reserved post.

17. It appears that the post for which the petitioner was appointed on 16.6.1994 was sanctioned post. The Counsel appearing for the Education Officer has also

submitted before this Court that four posts were sanctioned to the petitioner school in 1994 and respondent No. 1 was appointed on one of the four sanctioned posts.

18. Therefore, there was clear and permanent vacancy of the Assistant Teacher in the petitioner school. This Court had occasion to interpret the provisions of Section 5 of the M.E.P.S. Act, 1977 and other relevant provisions in case of Hareshwar Shikshan Prasarak Mandal (supra) wherein this Court, in the facts of that case, held that since respondent No. 1 therein had worked for six continuous years as Assistant Teacher and she was allowed to work for such a long period due to her satisfactory service and as such, she acquired deemed confirmation by virtue of Section 5(2) of the M.E.P.S. Act, 1977. Yet in another judgment in the case of Jagannath Gopala Gaidhani and Anr. (supra), this Court in paragraph 7 has held that though the letter of appointment does mention that appointment was only for a specified period, the appointment can be considered one on probation. In the case of President, Mahila Mandal Sinnar and Anr. (supra), this Court in paragraph 17 observed thus:

17. The attention, however, on behalf of the petitioners was sought to be drawn to the orders of appointment issued every year and, therefore, it is contended that no benefit u/s 5(1) or (2) can be given to the respondent. The contention is devoid of substance. Merely because the management chooses to issue appointment orders every year, the appointment of the respondent ipso facto cannot become a temporary one. The Management is bound by the provisions of law comprised under M.E.P.S. Act in relation to the appointments of teachers. Once it is not in dispute that vacancy which was filled by the appointment of the respondent was a permanent vacancy, as such appointment was after following the procedure prescribed for appointing a person in permanent vacancy irrespective of the appointment letters being issued every year, the appointment of the respondent has to be construed as u/s 5(1) of the said Act. Being so, the so called appointment letters issued after 1st July, 1988 are to be considered redundant and without any legal consequence. As already observed, it is also to be noted that the order of 1st July,, 1988 nowhere discloses appointment was on temporary basis or for the period of one year.

This Court has examined the effect of approval granted by the Education Officer to appointment of a person and held that grant of approval by Education Officer to the appointment is not relevant to decide status of the petitioner therein. In case of Ramchandrar Ramadhar Yadav (supra), this Court in paragraphs 17 and 21 observed thus:

17. In the aforesaid backdrop, if one turns to the order of appointment of the petitioner, it would be clear that the petitioner was not appointed for a fixed period. The order of appointment clearly gives an indication that the vacancy in the post of Peon was a clear vacancy caused due to the resignation of one Shri Shejwal Shivram. At any rate, no material is on record to show that the vacancy in the post of Peon was temporary or that there was no permanent vacancy.

Having gone through the appointment order, it is clear that the appointment of the petitioner was against clear permanent vacancy notwithstanding the appointment order stipulates it to be temporary. Mere use of the word 'temporary' by itself will not make the appointment temporary.

21. So far as the impugned order of the Tribunal considering the approval granted by the Education Officer to respondent No. 1 is concerned, the order of the Education Officer granting or refusing to grant approval is not relevant to decide the status of the petitioner because the question of grant of approval is between the Education Officer and the management and the same is relevant only for the purpose of grant-in-aid by the State Government. As a matter of fact, the Education Officer while granting approval ought to have applied his mind to the order of appointment and ought not to have treated it as temporary appointment. He ought to have granted his approval for two years. In the circumstances, the Tribunal was not right in deciding the legality of the termination order taking shelter of the order of approval granted by the Education Officer.

It also appears that the observation of the Presiding Officer, School Tribunal in paragraph 9 of the judgment that it cannot be said that the appellants appointment was on probation, is contrary to the record, as the record itself shows that the appointment of the respondent No. 1 was on probation.

19. At this juncture, it would appropriate to refer to some of the grounds taken in the memorandum of appeal by respondent No. 1 before the School Tribunal. In Ground No. (X) it is stated:

X) ...The appellant is S.S.C. D.Ed. He has completed five years service and after his good performance in the teaching the respondents authorities also allowed to the appellant by issuing necessary orders time to time and also granted the approvals. This fact has not been taken into consideration with malafide intention i.e. to absorb the respondent No. 4 on his place. Therefore, the acts of the respondents are totally illegal and bad in law.

In Ground No. (XIV) also specific allegations are made by respondent No. 1 original appellant against the President of the petitioner institution. It is stated in the said para, thus:

XIV) The respondent No. 4 is a daughter of president of the society and the societys interest is to absorb her in the school and, therefore, there is malafide intention as against the appellant and respondents authorities going to show the appointment of the respondent No. 4 is made in place of the appellant, therefore, the respondent No. 1 and 2 are acting malafidely as against the appellant. All of this knowledge received to the appellant on dt. 14.6.1999.

20. Therefore, what follows from the pleadings in the appeal and findings recorded by the School Tribunal in paragraph 9 of its judgment is that the petitioners with clear intention to absorb respondent No. 3 herein, who was

appointed in addition to four sanctioned posts in 1997, have systematically tried to dislodge respondent No. 1 so that respondent No. 3 can be accommodated on sanctioned post in his place. In paragraph 10 the Tribunal has discussed about the contention of the petitioners that the post in which respondent No. 1 was appointed is against the backlog or meant for reserved category and came to the conclusion that the post on which the respondent No. 1 was appointed was not reserved for any candidate from reserved category. The tribunal has further observed in paragraph 10 that no advertisement has been published as per Rule 9(8) of M.E.P.S. Rules, 1981 to fill up the post from backlog.

The School Tribunal in paragraph 11 has held that the services of respondent No. 1 original appellant cannot be terminated by written notice dated 30th March, 1998. In fact, the said notice dated 30th March, 1998 was not received by the present respondent No. 1. It is an admitted position that the said notice sent by the petitioners to the respondent No. 1 returned unserved. Perusal of the written arguments advanced on behalf of the respondent No. 1, it clearly appears that during that period for which the management has tried to show his absence and take advantage of Rule 16 of the M.E.P.S. Rules, 1981, the respondent No. 1 was very much in service of the petitioners.

21. I find considerable substance in the arguments advanced by the Counsel for the Education Officer respondent No. 2 that merely to accommodate respondent No. 3, who is daughter of the President of the petitioner institution, whole story was concocted by the petitioners in notice dated 30th March, 1998 by taking recourse to the provisions of Rule 16 of the M.E.P.S. Rules, 1981 to dislodge the respondent No. 1. I also find considerable substance in the arguments for the reason that the counsel for the Education Officer respondent No. 2 has tendered the documents while arguing the matter which clearly show that the President of the said institution as well as the Head Master have clearly communicated to the Education Officer that now the respondent No. 1 is not working and in his place respondent No. 3 should be accommodated.

It clearly appears that merely to accommodate respondent No. 3 who is daughter of the President of the Institution, the petitioners have tried to dislodge the respondent No. 1 and the malafide intentions on the part of the petitioners were writ large. Therefore, it will have to be held that the appointment of the respondent No. 3 was clearly in excess of the sanctioned posts. Though, initially approval was granted by the Education Officer to her services, the said approval had been subsequently withdrawn by the Education Officer. It is not in dispute that at the time of appointment of the respondent No. 1 the said appointment was on sanctioned post. Therefore, necessary result would be that while reinstating the respondent No. 1, the respondent No. 3 is required to be removed from the service.

22. Though the learned Counsel for the petitioners as well as respondent No. 3 tried to contend that since the order passed by the School Tribunal is ex parte and without taking written statement of the petitioners on record, it appears to

me that the School Tribunal has given sufficient hearing to the petitioners and also gave reasons to reject the application to take written statement on record. It is also relevant to mention that when the Tribunal rejected the application filed by the petitioners praying to take written statement on record, at that stage, it was open for the petitioners to challenge the said order. The said order was passed by the Tribunal on 11.12.2001 and the appeal was finally decided on 17.4.2002. Therefore, the order dated 11.12.2001 passed by the School Tribunal attained finality and the appeal came to be finally decided on 17th April, 2002.

23. On careful perusal of the findings recorded by the School Tribunal, it appears to me that those findings are reasonable and not perverse except the observation of the School Tribunal in paragraph 9 of the judgment that 'Thus it cannot be said that the appellants appointment was on probation. This observation in paragraph 9 of the judgment is absolutely unwarranted. In view of the above discussion, I find no substance in the writ petition

24. In the result, Writ Petition is dismissed with cost of Rs. 10,000/-, which is to be deposited by the petitioners in this Court within one month from today. The Respondent No. 1 herein will be at liberty to withdraw the said amount.

Rule is discharged. Interim relief stands vacated.

The petitioners are directed to comply with the judgment and order dated 17th April, 2002 passed by the School Tribunal, Aurangabad in Appeal No. 131/1999 within four weeks from today.