

(2012) 03 BOM CK 0009

In the Bombay High Court

Case No : Writ Petition (O.S.) No. 315 of 2006 with Notice of Motion No. 175 of 2012 with C.W.P. No. 7482 of 2006 with Civil Application No's. 467 of 2009, 63 of 2012, 4683 of 2005 and etc. etc.

Ramkrishna Chauhan and

APPELLANT

Vs

Seth D.M. High School and etc. etc.

RESPONDENT

Date of Decision : 12-03-2012

Acts Referred:

Constitution of India, 1950 — Article 133, 134(A), 14, 16
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 2, 5, 5(1), 5(2)

Citation : (2013) 3 ABR 106

Hon'ble Judges : Ranjit More, J;K.K. Tated, J;A.M. Khanwilkar, J

Bench : Full Bench

Advocate : Mihir Desai, Sunil Dighe and A.M. Joshi, for the Appellant; A.G. Kothari, Ms. Sindha Shridharan, AGP., Raju Moray, instructed by . Mandar Limaye, Jaydeep Deo, AGP., Sanjeev J. Raikar, Santosh Jagtap and Suresh Kumar Panicker, for the Respondent

Judgement

A.M. Khanwilkar, J.—This Full Bench has been constituted by the learned Chief Justice in the light of reference made by the learned single Judge of this Court Brother Justice Dr. D.Y. Chandrachud, in Writ Petition No. 315 of 2006, on 22nd January, 2007, by a speaking order. His Lordship in the reference order has adverted to the two line of decisions of this Court and also to the decisions of the Apex Court. His Lordship, has opined that in view of the law laid down by the Apex Court, in Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others, and the subsequent decisions in the case of Bharatiya Gramin Punarrachana Sanstha Vs. Vijay Kumar and Others, and Management of Kalpataru Vidya Samasthe (R) and Another Vs. S.B. Gupta and Another, it may not be within the jurisdiction of the Tribunal to hold that an employee, who has been appointed on temporary basis, to be deemed to be appointed on probation, on the ground that there was a clear and permanent vacancy. Further, even the Division Bench of this Court, in the case of Venkatraman Shankar v. Jasbir Kaur

Anand and Ors. Decided on 6th August, 1999 in Review Petition No. 16 of 1997, in Appeal No. 273 of 1997 in Writ Petition No. 2799 of 1990 has taken the same view. On the other hand, the exposition in two decisions of learned single Judge of this Court, in the case of Shri. Sairam Education Trust v. Lalsaheb More and Anr. Decided on 25th August, 2005 in Writ Petition No. 902 of 1993 and in the case of Shikshan Prasarak Mandal Vs. Presiding Officer, School Tribunal and Another, is contrary to the principle enunciated by the Apex Court as well as the Division Bench of this Court. In the reference order, other decisions adverted to are in the case of National Education Society 's High School v. Lulomool Monachary Decided on 27th March, 1987 in Writ Petition No. 1751 of 198 National Education Society's High School and Junior College Vs. Lulomool Monachary (Mrs.), Decided on 5th August, 1987 in Writ Petition No. 4714 of 1987, Kazi Safiruddin Muzaffaruddin v. The State of Maharashtra and Ors. Decided on 28th April, 2006 in Writ Petition No. 2668 of 2005, Kazi Safiruddin Muzaffaruddin v. The State of Maharashtra Decided on 18th April, 2006 in Appeal No. 228 of 2006 arising out of Writ Petition No. 2268 of 2005, Siddharth Charitable Trust v. Pandurang Maruti Dhumal Decided on 7th July, 1999 in Writ Petition No. 3488 of 1999 (This decision has been upheld by the Supreme Court in SLP (C) No. 14795 of 1999 decided on 22nd November, 1999), Mathuradas Mohota College of Science Vs. R.T. Borkar and Others, , Management of Kalpataru Vidya Samasthe (R) and Another Vs. S.B. Gupta and Another, Accordingly, the learned single Judge directed the Registry to place the papers before the Learned Chief Justice, in order to constitute Larger Bench to answer the following question:--

Would it be open to the School Tribunal to hold that an employee would be deemed to be on probation within the meaning of Section 5(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 on the ground that the appointment was made in a clear and permanent vacancy, notwithstanding the fact that the letter of appointment specifically stipulated that the appointment has been made in a temporary capacity?

2. The brief facts, which have given rise to the filing of the said Writ Petition, in which reference to Larger Bench has been made, can be delineated as under:--

The Writ Petitioner possesses M.A., B.Ed. Degrees. He was fully qualified to teach in secondary school. He was appointed in respondent No. 1 school, as a full time Assistant Teacher from 21st July, 1999. The initial appointment order indicated that he was appointed only for the academic year, though the appointment was against a clear, open and permanent vacancy. The appointment order dated 17th July, 1997 was made over to the petitioner on 30th March, 1998. On the same day, he was issued a letter of termination, terminating his service w.e.f. 30th April, 1998. The petitioner was then continued as an Assistant Teacher in the following academic year. However, he was not given any formal appointment letter in that regard. The petitioner was issued a letter of termination, terminating his service w.e.f. 30th April, 1999. Again, in the next academic year

(1999-2000), the petitioner was continued as an Assistant Teacher, without issuing any fresh appointment order. At the end of the academic year, on 27th March, 2000, the petitioner was issued a letter, terminating his service w.e.f. 29th April, 2000. The petitioner, therefore, preferred appeal. During the pendency of that appeal, the Management issued appointment order dated 10th June, 1999, indicating that the petitioner was appointed on probation. During the probation period, however, few memos were issued to the petitioner, which, according to the petitioner, were unrelated to his work. Nevertheless, the petitioner was served with the termination order. In fact, in the subject taught by the petitioner, the result of the students was 100%. The petitioner, aggrieved by the termination of his services, filed appeal before the School Tribunal, asserting that he was appointed as permanent employee, right from the initial appointment and, his service could not be terminated in the manner sought to be done. The Tribunal, however, dismissed the appeal preferred by the petitioner and instead, held that since the initial appointment order of the petitioner was purely on temporary basis for a limited period, the petitioner cannot be treated as appointed on probation. The Tribunal rejected the argument of the Petitioner of having become deemed permanent. The petitioner then filed the present Writ Petition in this Court, in which, reference has been made to the Larger Bench, as mentioned above.

3. We have heard counsel for the respective parties. The leading argument was made by Advocate Mihir Desai, followed by Mr. Sunil Dighe espousing the cause of the employees; and by Mr. A.G. Kothari, Mr. Suresh Kumar Panicker and Mr. A.M. Joshi espousing the cause of the Management. Ms. Sindha Shridharan and Mr. Jaydeep Deo, AGPs appeared for the State.

4. According to the counsel for the employees, the purport of Section 5 of the Act leaves no choice to the Management of a private school but to fill in the permanent vacancy, by appointing a person duly qualified to fill in such vacancy, in the manner prescribed. The Management, after commencing the procedure for appointment of a person duly qualified, to fill permanent vacancy, cannot deflect that process by issuing appointment order indicating that the appointment was made on temporary basis or for limited period- Further, irrespective of the tenor or the contents of the appointment order, it will have to be assumed that the appointment was on probation for a period of two years, if made against permanent vacancy. For the same reason, even the Tribunal or the Court, as the case may be, would be justified to hold that the person was deemed to be appointed on probation, within the meaning of Section 5 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act 1977 (hereinafter referred to as "the said Act"), if it is found that his appointment was against a clear and permanent vacancy, notwithstanding the contents of the letter of appointment. In support of their submission, Learned counsels have relied on the Authorities referred to in the reference order. They have also pressed into service decisions of the single Judge of this Court in the case of *Enteshan Baig v. Abdul Aziz Ansari* Decided on 5th December, 1985 in Writ

Petition No. 2616 of 1983, and Jagdamba Education Society, Nagpur v. Rajendra Baburao Golhar and Ors., 2009 (2) Mh LJ 522: (2009 (3) ABR (NOC) 560), They attempted to distinguish the decision of the Division Bench of our High Court in the case of Priyadarshini Education Trust and The Head Master, National Urdu High School Vs. Ratis (Rafia) Bano, and also unreported decision of the Apex Court in the case of Chatrapati Shivaji Shikshan Prasarak Mandal and Ors. v. Dattatraya Rupa Pagar and Ors. Decided on 13th April, 2012 in Civil Appeal No. 3563 of 2012, arising out of SLP (C) No. 18327 of 2011.

5. On the other hand, counsel for the Management would argue that the submission canvassed by the employees is founded on misinterpretation of Section 5 of the said Act. Section 5 merely provides for a legal fiction that if a person who has been "appointed on probation" to fill up a permanent vacancy, upon completion of probation period of two years shall be treated as deemed to have been confirmed. Section 5, however, does not contain a legal fiction to ignore the terms and conditions of the appointment order and to assume that the appointment was on probation basis, merely by virtue of the fact that the appointment was against a permanent vacancy. According to the Management, in a given case. even though the Management may commence the process for selecting a qualified person to be appointed on probation, against a permanent vacancy, in its private school, however, there is inherent power in the Management to issue appointment order, to appoint that person on purely temporary basis for a limited period, making it clear that his services will be terminated on expiry of that period, without any notice. Further, the Management is free to issue successive appointment orders on similar basis, until a duly qualified person, who is found to be suitable by the Management, is available and selected to fill up the permanent vacancy. The Management may consider appointing only such person on probation. For, there is no obligation on the Management to appoint a person duly qualified, directly on probation for two years against a permanent vacancy. In other words, only duly qualified suitable candidate, selected by the Management, as such, at the end of the selection process, to fill a permanent vacancy, the Management would appoint the person on probation. Section 5 of the Act does not whittle down this power and authority of the Management. On the contrary, the language of Section 5 supports this stand of the Management. The counsel for the Management, in addition to the authorities referred to in the reference order, have pressed into service decision of the Apex Court in the case of GRIDCO Limited and Another Vs. Sri Sadananda Doloi and Others, which has restated the legal position that the power to make contractual appointment is implicit in the power to make a regular permanent appointment unless the statute under which the Authority exercises its powers and discharges its functions or the Rules and Regulations governing recruitment specifically forbid the making of such an appointment.

6. Before we analyse the rival submissions, we deem it appropriate to reproduce relevant provisions of Section 5 of the Act and the Rules. Section 5 reads thus:--

5. 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 (4) and (5), 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.)

(3) 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 (or honorarium) of one month in lieu of notice.))

(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 purposes of sub-section (2).

((4A) Nothing in sub-sections (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 subsection (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.

7. Rules 9 and 10 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (hereinafter referred to as "the said Rules"), reads thus:--

9. 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) Appointments of teaching staff (other than the Head and Assistant Head) and those of non-teaching staff in a school shall be made by the School Committee:

Provided that, appointments in leave vacancies of a short duration not exceeding three months, may be made by the Head, if so authorized by the School Committee.

(3) Unless otherwise provided in these rules for every appointment to be made in a school, for a teaching or a non-teaching post, the candidates eligible for appointment and desirous of applying for such post shall make an application in writing giving full details regarding name, address, date of birth, educational and professional qualifications, experience, etc., attaching true copies of the original certificates. It shall not be necessary for candidates other than those belonging to the various Sections of backward communities for whom posts are reserved under sub-rule (7) to state their castes in their applications.

(4) The age limit for appointment to any post in a school shall be as follows, namely:

(a) for an appointment to be made to any post in a primary school, a candidate shall not be less than 18 years of age and more than + (28) years of age, and in the case of candidate belonging to the Backward Classes he shall not be more than + (33) years of age)

Provided that, upper age-limit may be relaxed in case of women, ex-servicemen and persons having previous experience with the previous permission of the Deputy Director.

+(the figures and words "25 years" and "30 years" are substituted by figures and words "28 years" and "33 years" by Note No. PST 1083/194/SE-3, Cell, dated 20.12.1984.)

(b) for an appointment to be made to any post in any school other than primary school, a candidate shall not be below the age of 18 years.

(5) A letter of appointment order in the Form in Schedule "D" shall be issued to a candidate appointed to the post. A receipt in token of having received the appointment order shall be obtained from the candidate appointed.

(6) Every employee shall within three months of his appointment, undergo medical examination by a registered medical practitioner named, if any, by the Management or otherwise by any registered medical practitioner. The expenses

of medical examination shall be borne by the Management. The appointment shall be conditional pending certificate that he is free from any communicable disease and that he is physically fit to be so appointed.

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

+sub-rule (7) substituted by Note No. PRASHANYA. 1005/- (94/05)/SE-2 dated 08.07.2008.

(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 organizations of persons belonging to Backward Classes, by whatever names such associations or organizations are called, and which are recognized 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 organizations as aforesaid) or if no such names are recommended by the Employment Exchange or the District Social Welfare Officer +(or such associations or organization 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).

+ The words are inserted by Note No. PST/I083/194/SE-3-Cell dated 20.12.1984.

(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 or on a year-to-year basis by a candidate not belonging to the Backward Classes.

(b) In the case of 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.

+[(10) (a) The Management shall reserve 33 per cent. Of the total number of posts (or vacancies) of heads and Assistant Heads for the numbers of Scheduled Castes, Scheduled Castes converts to Buddhism, Scheduled Tribes Denotified Tribes (Vimukta Jatis), Nomadic Tribes and Special Backward Category as follows,

namely:--

(b) In case it is not possible to fill in the post of a Head or Assistant Head for which a vacancy is reserved for a person belonging to the Castes and Tribes specified in Clause (a), the post may be filled in by promoting a candidate from the other remaining categories in the order specified in Clause (a), so however that the percentage of filling up such vacancies does not exceed the limit laid down for each such category. If candidates belonging to any of these categories are not available, then the vacancy or vacancies--

(i) of the Head may be filled in by promoting any other teacher on the basis of seniority-cum-merit after obtaining previous approval of the Education Officer:

(ii) of the Assistant Head shall be kept unfilled for a period of three years; unless such vacancy or vacancies could be filled in by promotion of any teachers belonging to such castes or Tribes becoming available during that period.

+Clause (a) substituted by Note No. PRASHANYA. 1607/(5 I6/07)/PE-3 dated 08.10.2008--

+[(11)....]Deleted.

+Sub rule (11) is deleted by Note. No. PST/1083/194/SE-3-Cell, dated 20.12.1984."

"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.

8. Form of order of appointment, as prescribed in Schedule "D" reads thus:

"SCHEDULE "D"

(See rule 9 (5))

Order of Appointment

No.

Date

From

To

Shri/Smt.

With reference to your application datedI have the pleasure to inform you that you are hereby appointed as on Rs. per month in the scale of Rs.with effect from.....or the

date your report for duty. You will be entitled to allowances such as compensatory local allowance, house rent allowance and dearness allowance as specifically sanctioned by Government from time to time.

2 * Your appointment is purely temporary for a period of.....*months/years fromIn the * leave/deputation vacancy. After expiry of the above period, your services shall stand terminated without any notice.

OR

*Your appointment is on probation for a period of two years.

3. The terms of your employment and conditions 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.

4. You shall have to undergo a medical examination by Dr. ...within three months from the date of joining the post. Your appointment shall be conditional pending the receipt of physical fitness certificate from the doctor whose name is mentioned above.

5. You are requested to acknowledge receipt of this order of appointment and communicate the acceptance of the appointment within....days from the date of receipt of the same.

6. If no reply accepting the appointment is received within the period mentioned in paragraph 5 the order shall be treated as cancelled.

Yours faithfully.

* Head Master and Secretary of the School Committee (in the case of appointment order of teaching and non-teaching staff of the school excluding the Head Master/ Assistant Head Master).

Seal

* Chief Executive Officer (in the case of order of appointment of Head Master/ Assistant Head Master).

* Strike off which is not applicable.

+ To be named by the Management.

9. We shall also refer to the Bombay Primary Education and the Maharashtra Employees of Private Schools (Conditions of Service) Regulation (Amendment) Act, 2011, which came into effect from 14th May, 2012. Sections 10 to 12 of the said Act reads thus:

10. Amendment of Section 2 of Mah. III of 1978-

In Section 2 of the Maharashtra Employees of Private Schools (Conditions of service) Regulation Act, 1977 (hereinafter, in this Chapter, referred to as "the

Employees of Private Schools (Conditions of Service) Regulation Act"), -

(a) in Clause (7), for the words "shikshan sevak" the words "Assistant Teacher (Probationary)" shall be substituted;

(b) in Clause (10), for the words "shikshan sevaks" the words "Assistant Teachers (Probationary)" shall be substituted;

(c) in Clause (24A), for the words "shikshan sevak" the words "Assistant Teacher (Probationary)" shall be substituted.

11. Amendment of Section 5 of Mah. III 1987-

In Section 5 of the Employees of Private Schools (Conditions of Service) Regulation Act,

(a) in sub-section (2)-

(i) for the words "shikshan sevak" the words "Assistant Teacher (Probationary)" shall be substituted;

(ii) in the proviso, for the words "shikshan sevak" the words "Assistant Teacher (Probationary)" shall be substituted;

(b) in sub-section (2A), for the words "Shikshan sevak" the words "Assistant Teacher (Probationary)" shall be substituted.

12. Saving - The terms and conditions prescribed by the Government for the appointment of shikshan sevaks, by issuing Government Resolutions or orders, from time to time, before the date of commencement of the Bombay Primary Education and the Maharashtra Employees of Private Schools (Conditions of Service) Regulation (Amendment) Act, 2011, shall continue to be in force unless they are modified or revoked by the Government.

10. Reverting to the issue under consideration, there is force in the argument of the Management that the power to make a contractual appointment on temporary basis is implicit in the power to make an appointment on probation after following the prescribed selection procedure to fill in a permanent vacancy, unless the statute under which the authority is exercised expressly or impliedly forbids the making of such appointment (see Reva Electric Car Company P. Ltd. Vs. Green Mobil, thereof).

11. The question is: whether the provisions, extracted above, have the propensity to whittle down that authority of the Management? Indisputably, the governing provision regarding the conditions of service of employees of the private schools can be traced to Section 5 of the Act of 1977. Sub-section (1) thereof postulates that the Management shall fill in the permanent vacancy as soon as possible. It further provides that the appointment of a person duly qualified, to fill permanent vacancy, should be made in the manner prescribed. It is one thing to suggest that the permanent vacancy in a private school must be filled only by a duly qualified person and in the manner prescribed. But, that

does not necessarily mean that the inherent powers of the Management to make appointment on contractual basis, is expressly or impliedly taken away, by law. There is nothing in this sub-section to indicate to the contrary.

12. Indeed, this provision obliges the Management to fill in the permanent vacancy "as soon as possible". The term "as soon as possible" would mean that it has to be done within a reasonable time. That is a relative term. Nevertheless, by virtue of mandate of Section 5(1), there is implicit obligation on the Management to fulfill that requirement at the earliest, to wit, before commencement of the new academic year. That is so because, a permanent vacancy is one, which is in respect of a sanctioned post and in the case of an aided school, entitles the Management to receive commensurate grants in aid from the Government. Further, the sanctioned post for a school is prescribed by the State Authority keeping in mind the benchmark to be maintained for imparting high quality education and maintaining discipline in the school - commensurate with the strength of the students in the school. Thus, keeping the permanent vacancy unfilled for a long time, may entail in dilution of imparting of quality education. A fortiori, though the Management has implicit power to appoint a duly qualified person on contractual employment even against a permanent vacancy but, that must be only an interim arrangement till a suitable candidate is found in the selection process. It cannot be continued on year to year basis in succession. If the Management holds the selection process in the prescribed manner but wants to appoint the selected candidate on temporary basis must contemporaneously record tangible reasons as to why the selected candidate is not suitable to be appointed on probation against the permanent vacancy. In that event, the Appropriate Authority can consider the challenge to the appointment on temporary basis instead of probation, against a permanent vacancy. Further, the Management, receiving grants in aid, from the Government, should not and cannot be permitted to appoint a duly qualified person on temporary basis against a permanent vacancy, without holding of selection process as soon as possible in the prescribed manner. Besides, in spite of availability of a suitable candidate identified in the selection process held to fill in the permanent vacancy, the Management cannot appoint him on temporary basis against a permanent vacancy. Any other view would be antithesis to the mandate of Section 5(1) of the Act and against the principle underlying the exposition of the Apex Court in the case of *Rattan Lal and Others Vs. State of Haryana and Others*, as it would be hit by Articles 14 and 16 of the Constitution of India.

13. Reverting to the proviso to sub-section (1) of Section 5, it is in respect of vacancy to be filled in by promotion. This provision has no application to the question posed for our consideration, which is related to initial appointment.

14. We may now turn to sub-section (2) of Section 5 of the Act, which is the core provision for answering the controversy. No doubt, the opening sentence of this provision gives an impression that every person, appointed to fill a permanent

vacancy, shall be on probation for a period of two years. However, this provision cannot be construed as taking away the implicit power of the Management to make a contractual employment while making a regular permanent appointment. This provision is only an enabling provision that if the Management intends to fill a permanent vacancy, has to appoint a person duly qualified on probation for a period of two years. This part of sub-section (2), cannot be construed as a deeming provision or a legal fiction to treat every appointment made against a permanent vacancy must be on probation, notwithstanding the express terms contained in the appointment order that the appointment is contractual and temporary basis for a limited period, The deeming provision or legal fiction is found in the second part of sub-section (2), That applies to a person, who, in fact, has been appointed on probation and completes probation period of two years. That person is deemed to have been confirmed. The second part of this sub-section cannot come to the aid of an employee who was in fact appointed on purely temporary basis for a limited period.

15. The question is, whether the Management has unbridled power and authority to appoint a duly qualified person on temporary basis against a permanent vacancy? As aforesaid, the Management is, primarily, under an obligation, in law, by virtue of Section 5(1), to fill in the permanent vacancy as soon as possible. To wit, if a permanent vacancy is caused by any reason, before the commencement of the new academic year, the Management must take immediate steps to fill in that vacancy, by appointing a duly qualified person, after following the prescribed procedure, on probation, for a period of two years. That means, the selection process must be held to, as far as possible, culminate with selection of a duly qualified person, before the commencement of the new academic year. However, for some fortuitous or tangible reason, such selection process cannot be commenced or for that matter completed, there would be nothing wrong if the Management were to appoint a duly qualified person on contractual or temporary basis, for a limited duration, so that, in the mean time, the prescribed procedure to select a duly qualified person, to fill in the permanent vacancy is completed and the selected person can be appointed on probation, against the permanent vacancy. There may be situation where the Management makes efforts in right earnest to complete the selection process but, at the end of the process, it is confronted with a situation where the person who participated in the selection process, though duly qualified, in its perception is not suitable for appointment. In that event, it can certainly make an appointment on contractual or temporary basis, for a limited duration, so that new selection process can be commenced and concluded within a reasonable time.

16. Ordinarily, if the selection process is commenced and at the end of the selection process a person duly qualified is available and is found to be suitable, the Management is under an obligation to appoint him on probation, to fill in the permanent vacancy. This mandate flows from conjoint reading of subsections (1) and (2) of Section 5. The only exception is, where a person identified in the selection process is duly qualified but is not found suitable by the Management,

the Management is free to exercise its inherent power of making a contractual or temporary appointment. Indeed, whether a person, who had participated in the selection process, is suitable for being appointed or otherwise, is the subjective satisfaction of the Management. Merely because a person is duly qualified, that per se is not enough. The person must not only be duly qualified to till the permanent vacancy but, must also be found to be suitable by the Management. However, the Management cannot be permitted to take cover under the pretext of successively rejecting the candidates in selection process on the ground of suitability; and keep on appointing same person or different persons on contractual or temporary basis for limited duration, against a permanent vacancy. In cases where the Management takes a conscious decision to appoint a duly qualified person on temporary basis, for a limited period against a permanent vacancy, it must contemporaneously record its subjective satisfaction in that behalf. For, if the appointment order on contractual basis were to be made subject matter of challenge before any Authority or Court of law, in such inquiry, it may be open to examine the controversy on the touchstone of permissibility of judicial review of such decision. If finding of colourable exercise of power by the Management is arrived at in that inquiry, appropriate direction can be issued against the Management. That will have to be examined on case to case basis.

17. A priori, we have no hesitation in taking the view that neither Section 5(1) nor 5(2) of the Act can be construed as forbidding the Management from making an appointment on contractual or temporary basis for a limited duration against a permanent vacancy until a suitable candidate is selected. Further, there is nothing in these provisions to indicate that every appointment made by the Management, in relation to a permanent vacancy, must be deemed to have been made on probation for a period of two years. There is no such legal fiction unlike in the case of a person appointed "on probation" for a period of two years, is deemed to have been confirmed, upon completion of that period. In other words, the parties would be bound by the terms and conditions stated in the letter of appointment, as there can be no presumption of appointment having been made "on probation" unless expressly stated in the appointment letter itself.

18. Our attention was invited to sub-section (2A) of Section 5 as also the amendment of 2011. This provision essentially pertains to the conditions of service of Shikshan sevaks. The question under consideration has no application to the appointment of Shikshan sevaks. By virtue of proviso to sub-section (2), a duly qualified person has to be appointed on probation for a period of three years as Shikshan sevak and by virtue of sub-section (2A), on completion of probation period of three years, that person is deemed to have been appointed and confirmed as Assistant Teacher. The term Shikshan sevak, by virtue of amended provisions would mean "Assistant Teacher (Probationary)". As aforesaid, we are not concerned with the conditions of service of Shikshan sevak or Assistant Teacher (Probationary), much less with the amended provisions or the efficacy thereof.

19. Relying on sub-section (5) of Section 5, it was argued that the Act makes distinction between "permanent vacancy" and a "temporary vacancy". While appointing a person against a temporary vacancy, the order of appointment has to be drawn in the prescribed form and it must state the period of appointment of such person. It was submitted that this sub-section is indicative of the scheme of Section 5. It makes a marked departure when the appointment is to be made against a permanent vacancy. No doubt, this provision deals with a specific category of vacancy namely, temporary vacancy and the manner of filling in that vacancy. However, this provision cannot be construed to mean as forbidding the Management from making contractual or temporary appointment in respect of a permanent vacancy, if the situation so warrants, which is the implicit power of the Management while making appointment against a permanent vacancy. The only word of caution we may add, is, ordinarily, when appointment is to be made against a permanent vacancy, the Management is obliged to follow the prescribed procedure in that behalf but, only when the selection process cannot be taken to its logical end or because of unsuitability of the candidates, the Management may be justified in appointing a duly qualified person for a temporary period. In that case, however, the Management is under a legal obligation to initiate the process for appointing a duly qualified suitable person against the permanent vacancy on probation, at the earliest.

20. We may now refer to Rule 9 of the said Rules. This provision deals with the procedure for appointment and issuance of appointment order in the prescribed form of staff, namely, teaching as well as non-teaching staff. The argument proceeds that sub-rule (8) merely provides for procedure for making temporary or year to year basis appointment only against a reserved vacancy. As regards the permanent vacancies or posts, such arrangement is conspicuously absent. This argument clearly overlooks that the Rules are framed only to specify the procedural matters. The substantive portion is found in Section 5 of the Act. We have elaborately dealt with the purport of Section 5 in the earlier part of this judgment. The fact that there is no provision in Rule 9 regarding the manner of making appointment on temporary or year to year basis against a permanent vacancy, does not, in any manner, affect the legal position that the Management has implicit power of appointing a person on contractual or temporary basis, while making a regular permanent appointment, in absence of an express provision forbidding it to do so.

21. Emphasis was then placed on Rule 10 to demonstrate that only two categories of employees are recognized by the Rules, namely, permanent or non-permanent. Further, the non-permanent employees may be either temporary or on probation. Sub-rule (2) of Rule 10 envisages that a temporary employee is one who is appointed on a temporary vacancy, for a fixed period. As aforesaid, the Rules cannot be the basis to undo or whittle down the implicit power of the Management, in making contractual or temporary appointment, as there is no express provision in the Act of 1971, forbidding the Management from exercising that power.

22. The Form of order of appointment is found in Schedule "D" to the Rules. Clause 2 of the Form indicates the category of appointment. purely temporary or on probation. As regards appointment on temporary basis, it refers to the appointment against leave/deputation vacancy. Moreover, the prescribed Form provides that the inapplicable conditions be struck off. Understood thus, we have no manner of doubt that the scheme of the Act and the Rules in no way forbid the Management to appoint a duly qualified person on temporary basis for a limited duration, until the selection of a duly qualified and "suitable" person for being appointed on probation, to fill in the permanent vacancy.

23. The other legal principle, which is indisputable, is that, if the parties accept the terms and conditions stipulated in the appointment order, later on. it is not open to the employee to challenge that appointment, being contrary to the Rules or on the ground that the terms and conditions stipulated therein were not legally valid. This legal position is restated in para 8 of Management of Kalpataru Vidya Samasthe (R) and Another Vs. S.B. Gupta and Another, In the facts of the present case, it is noticed that the initial appointment of the Writ Petitioner, in the leading Writ Petition, was on temporary basis for a limited period. After his service was terminated, once again he was appointed in the following academic year, on the same post but, on temporary basis. When the said petitioner was appointed in the succeeding academic years, he had become fully aware about the terms and conditions of his initial appointment, yet he continued to be in the employment. without any demurer. Suffice it to observe that if the appointment order mentions that the appointment is on temporary basis or for a limited period, it is not open to the employee to assume that he was appointed on probation against permanent vacancy, nor it is open to the School Tribunal or the Court of law to assume that fact. That is a question of fact to be pleaded and proved in appropriate proceedings, on case to case basis. We hold that there is no legal fiction or deeming provision that every appointment made against the permanent vacancy, is deemed to be on probation. though the Management makes that appointment on temporary basis, having found that the candidates appeared in the selection process were unsuitable.

24. We shall now turn to the relevant decisions. In the case of National Education Society's High School (supra), the Learned single Judge of this Court, after adverting to the appointment order, which clearly mentioned that it was for the relevant academic year and for a limited term, held that since the petitioner therein was appointed in the vacancy caused due to the outgoing employee, who was a permanent employee, the appointment should be deemed to be on probation. It is not possible to countenance this exposition. The next decision is an unreported decision of the Division Bench of this Court in the case of Anil Vasant Chaudhari (supra), which has followed the view taken by the learned single Judge in the case of National Education Society (supra) and Enteshan Baig (supra).

25. However, we are bound by the exposition of the Apex Court in the ease of

Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others, which had occasion to consider Section 5 of the Act. In that case, the appointment of respondent No. 1 therein was against a clear vacancy but on purely temporary basis, for a limited period of eleven months. The Court, after considering Section 5(1) and (2) of the Act, opined that the said respondent cannot be treated to be appointed as a permanent employee or that he was appointed on probation. Even in the case of Bharatiya Gramin Punarrachana Sanstha Vs. Vijay Kumar and Others, the Apex Court was dealing with person appointed for a period of two years. No doubt, in that case, the appointment was on purely temporary basis, because of non-availability of reserved candidate to fill in permanent vacancy. But, the principle restated in this decision, is that, when the appointment letter expressly states the terms and conditions, it is not open to assume that the appointment was on probation, merely because of availability of permanent vacancy. Even in the unreported decision of the Apex Court in the case of Chatrapati Shivaji Shikshan Prasarak Mandal (supra), the same view has been reiterated. In the case of Priyadarshini Education Trust and The Head Master, National Urdu High School Vs. Ratis (Rafia) Bano, the Division Bench of this Court has culled out the gist of the decisions on the point, in paragraph 9 thereof. Notably, the issue was directly considered by the learned single Judge, after the decision in Hindustan Education Society (supra), in the case of Pandurang Maruti Dhumal (supra). As a matter of fact, the learned single Judge expressed his inability to take a different view because of the said decision of the Apex Court. His Lordship granted leave to appeal under Article 133 read with 134(A) of the Constitution of India, as prayed by the petitioner, as the issue was recurring one and involved in large number of matters. However, due to dismissal of the SLP (Civil) No. 14795 of 1999 against the decision in Writ Petition No. 3488 of 1999 in the case of Pandurang Dhumal, vide order dated 7th July, 1999, it is clear that the Apex Court did not find it necessary to examine the question any further, having been answered in the decision in Hindustan Education Society (supra).

26. The counsel for the Writ Petitioner, however, relied on the decisions of the learned single Judge of this Court in the case of Enteshan Baig (supra), Shri. Sairam Education Trust (supra), Shikshan Prasarak Mandal (supra) and Jagdamba Education Society (supra). For the view that we have taken, we do not agree with the exposition of the learned single Judge of this Court in the above said decisions. No doubt, attempt has been made in the case of Shikshan Prasarak Mandal (supra) to distinguish the judgment of the Apex Court in the case of Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others, Further, the reason to distinguish the decision of the Apex Court decision in the case of Hindustan Education Society (supra), will be of no avail. That reason cannot be the basis to discard the exposition, in particular, in Paragraphs 5 and 6 of Hindustan Education Society (supra). Because, it clearly proceeds on the admitted position that the appointment order of respondent No. 1 indicated that the appointment was on purely temporary basis, against a clear

vacancy, Counsel for the Writ Petitioner, however, was at pains to persuade us to take a view that the expression "clear vacancy" may have different connotation than the expression "permanent vacancy". In case of permanent vacancy, the manner of appointment can be only on probation. However, we are not impressed with this logic.

27. Accordingly, we are inclined to answer the issue in the negative. We hold that it is not open to the School Tribunal to assume as of fact that the appointment made against a clear and permanent vacancy is deemed to be on probation, within the meaning of Section 5(2) of the Act. The School Tribunal cannot disregard the terms and conditions of the letter of appointment, if it expressly provides that the appointment is on temporary basis, for a limited term. Having answered the issue under consideration, we deem it appropriate to direct the office to place the matters, before the Appropriate Bench, for taking up the same for hearing on merits.