

(2005) 07 BOM CK 0038
In the Bombay High Court
Case No : Writ Petition No. 50 of 1990

Shri Chatrapati Shivaji Mahavidyalaya	APPELLANT
Vs	
Mansingh Shitole and Another	RESPONDENT

Date of Decision : 12-07-2005

Acts Referred:

Bombay High Court (Appellate Side) Rules, 1960 — Rule 7, 7(A)
Constitution of India, 1950 — Article 227
Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 — Section 2
Pune University Act, 1974 — Section 42, 43(B)

Citation : (2006) 1 ALLMR 331 : (2005) 4 MhLj 1095

Hon'ble Judges : A.B. Naik, J

Bench : Single Bench

Advocate : S.M. Kulkarni, for the Appellant; S.B. Talekar and V.H. Dighe, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

A.B. Naik, J.—This writ petition is on weekly board since last two weeks when it's turn came it is called out today at 2.15 p.m. Shri S. M. Kulkarni, learned advocate appearing for the petitioner opened the case and has made his elaborate submissions and he concluded his submissions at 4 p.m. As the other side was called to answer the point raised by Shri Kulkarni, though there are two advocates on record, none present. Shri Ram Deshpande, learned advocate instructed by Shri S. C. Bora, informed that the respondent Mansing has taken away the papers from Shri Bora, advocate who filed his V.P. initially and accordingly, Shri Bora, has handed over all the papers to the respondent. Thereupon then Shri Deshpande, or for that purpose "Shri Bora, advocate are not in position to reply the contention. Shri S. B. Talekar, has filed his V. P. Today, when the other side is called upon, Shri S. A. Kulkarni, who is present in the Court, holding for Shri Talekar, till the arguments of Mr. S. M. Kulkarni, is concluded has not even remotely suggested that Shri Talekar, learned advocate

on record is not available to argue the matter. Shri S. A. Kulkarni, has also expressed his inability to make any submissions in the matter. Shri Kulkarni, learned advocate fairly stated that the brief is not traceable in his office. I have seen that leave note is filed today only by Shri Talekar. In view of the provisions of Schedule 7 Rule 7 and 7A, of the Bombay High Court Appellate Side Rules, the leave notes are not applicable to the matters which are on board. If any advocate is not able to attend the Court, he has to make arrangement by instructing another lawyer to work out the matter. As this matter is on board since last two weeks, if advocate on record was required to go out of Aurangabad, a courtesy demands that request should have been made well in advance for seeking short adjournment but it appears that an unhealthy practice has been followed by the members of the Bar by filing leave notes at the 11th hour, only to see that the matters which are on board should not be heard on that day, which should be strongly deprecated. This does not mean that if the advocate is really in difficulty to attend the Court, at least, he should have requested his colleagues to seek an adjournment of the matter well in advance. Shri S. M. Kulkarni, opened the arguments and both the learned advocates were to mention the matter were sitting in the Court throughout but they even not hinted that they are not in a position to argue the matter. This causes inconvenience to the Court and to Shri S. M. Kulkarni, advocate for the petitioner and his client who is present in the Court. I hope and trust that there may not be any other occasion for this Court to make such observation. The Court expect the members of the Bar to follow the Appellate Side Rules strictly but when I saw leave note, leave note of Shri Talekar, is filed today. If he has to leave Aurangabad for some personal work, at least he should made some arrangement to mention the matter and request for short adjournment well in advance. Be as it may, as the Courts time is over the matter will be continued at 2.15 p.m. on Monday. All this being stated by me, because Hon"ble the Chief Justice looking to the pendency of old matters has fixed the roster to the effect that all old final hearing matters to be taken in the afternoon session. So that some old matters could be disposed of. This writ petition was filed on 8-1-1990 and is pending for final hearing in this Court for 15 years and if there is no active co-operation from the Bar, it will be very difficult for the Court to dispose of the old matters. On Monday i.e. 11th July, 2005, Shri Talekar, learned advocate appeared and tendered his apology for not attending the matter on 8-7-2005 and he prayed that if opportunity is given to him to make submission in reply to Shri S. M. Kulkarni, learned advocate. Accepting the apology, though I had started dictating the order, I deferred it and permitted Shri Talekar, advocate to make submissions. He also assured that such things will not happen again. Thus I permitted Shri Talekar, to make his submissions and he made elaborate submissions which will be referred.

2. By this writ petition the respondents in the appeal before the College Tribunal have challenged the judgment and order dated 13th October, 1989 allowing the appeal filed by the respondent No. 1 and directing the management to reinstate the respondent to the post which he was holding at the time of termination of his

service, the parties to this proceeding will be referred to as appellant and respondent respectively.

3. Before adverting to the rival contentions advanced by the learned counsel, few aspects are required to be noted.

The learned Presiding Officer, Pune/Shivaji College University Tribunal, Pune by the order dated 13th October, 1989 allowed the appeal filed by the appellant. The respondents filed this writ petition in this Court on 8-1-1990. The writ petition was taken up for motion hearing and the Division Bench of this Court rejected the petition summarily. The respondent feeling aggrieved by the order of dismissal, approached the Apex Court by filing Special Leave to Appeal (Civil) No. 5133/1999. The Apex Court on 17-4-1990 passed the following order :

"Issue notice. Mr. S. C. Birla accepts notice on behalf of the respondents. Pending notice, status quo regarding the posts to be maintained and whosoever is manning it out of the two contesting parties shall be paid salaries till further orders." (Rest of the portion is not taken)

Thereafter, SLP was taken up for hearing on 10-7-1990 and the Apex Court granted Special Leave and the appeal came to be numbered as Civil Appeal No. 3277/1990. The Apex Court passed the following order :

"We have heard the parties and are of the view that the High Court should not have dismissed the writ petition in limine and the matter should have been heard. We accordingly direct restoration of the Writ petition before the High Court and same shall be deemed to have been admitted and be disposed of on merit. The High Court shall be free to make any interim order during the pendency of the writ petition and until it makes the order, the interim order made in this Court shall subsist.;

(emphasis supplied)

Accordingly, the writ petition was restored to the file. On 7-3-1991 writ petition was placed for admission hearing. Though in fact, it was not necessary in view of the order of the Apex Court (supra) the Division Bench thus passed the following order :

"Rule. Rule on interim relief returnable within three weeks."

It appears that the matter was then placed before the Division Bench on 18-6-1991 and the Division Bench directed that the petition be listed for final hearing peremptorily on 27-6-1991. Thereafter, the petition was not listed for final hearing. The appellant filed Civil Application No. 3568 with the prayer that the management may be directed to give effect to the order of reinstatement passed in favour of the petitioner by the College Tribunal, Pune on 13th October, 1989 in Appeal No. 42/1988 by allowing the petitioner to join the duties to the post of lecturer in Commerce and also pay him all his dues including increment and consequential service benefits. This application was contested by the

respondent and on hearing both the parties, the Division Bench of this Court on 13-6-1995 passed the following order :

"Coram : Deshmukh and Mutalik, JJ.

In the order dated 10-7-1990, the Supreme Court had observed that the High Court shall be free to make an interim order during the pendency of the writ petition and until it makes the order, the interim order made by the Supreme Court shall subsist."

4. On earlier occasion on 15-4-1990, Supreme Court has granted interim relief in following terms :

"Pending notice, status quo regarding the post to be maintained and whosoever is manning it out of the two contesting parties shall be paid salaries till further orders."

The counsel for the Educational institution states that the respondent in Writ Petition is not in service, a person appointed in his place is in service and is getting salaries and his name is included for receiving grant-in-aid and the salaries from the Education Department. In view of this, there is no question of modifying the interim relief and no further interim relief can be granted.

(emphasis by me)

We give liberty to the respondent to move this Court for early hearing in the first week of August, 1995.

Civil Application disposed of."

In the meantime, Bombay High Court Appellate Side Rules came to be amended and as per the amendment rules now writ petitions challenging the judgment and order passed by College Tribunal, has to be heard by a Single Judge, hence, this writ petition was placed for hearing before the learned Single Judge from 1999. Thus, as on today, the post for which the appellant is claiming is not vacant and Shri Sable N.S. is working as lecturer. With these above quoted undisputed facts, I have to proceed now to consider the contentions that are advanced. Before that it will be appropriate to refer the facts which are borne by the record.

5. The respondent is a public trust under Bombay Public Trusts Act and is running an Education institution namely Shri Chatrapati Shivaji Mahavidyalaya at Shrigonda. That college is affiliated to University of Pune since 1982. The appellant was working in the College as Junior Clerk, pursuant to the order of appointment sometime in 1985. The first order of appointment of the appellant in the Junior College is produced on record at Exh.R-2 which indicates that the order of appointment of the appellant as junior clerk is with effect from 1-7-1985. The order indicates that the appointment is made in pay-scale of Rs. 762.70 (Rs. 260-495) and D.A. of Rs. 482/- plus HRA as per rules. This order being purely temporary and is upto 30-6-1986.

6. There were two lecturers working in the Department of Commerce. In the year 1986-87 one post of lecturer in the Department of Commerce is created and to fill up the newly created post an advertisement was published inviting the applications from the eligible candidates as there was backlog of reserved class candidate, therefore, that post was to be filled in from the reserved class candidate. The appellant who was initially working in the College as a clerk applied to the post pursuant to the advertisement as he was holding necessary qualifications. As stated, earlier, one post of lecturer in commerce was created/sanctioned, therefore, the respondent published an advertisement, on 26-11-1986. Before the advertisement, the respondent issued an order, of appointment in favour of the appellant as a full time lecturer in Commerce in Shri Chatrapati Shivaji Mahavidyalaya, Shrigonda with effect from 7-7-1986 in pay-scale of Rs. 700-1600 with D.A. of Rs. 1032/- plus HRA etc. This order is also purely on temporary basis and liable for termination at any time without notice. Pursuant to the advertisement dated 26-11-1986 inviting applications, for the post of lecturer in Commerce in senior college for the academic year 1986-87. (The advertisement is made part of the paper book at Exh.R-4.). In that advertisement the following condition is mentioned.

"Preference will be given from S.T., S.C., N.T., D.N.T. candidates." It appears that after that advertisement, the appellant applied. Though he is from open category, he came to be appointed probably the candidate from reserved class were not available, again by the order dated 20-6-1987 as full time lecturer in commerce in the same pay scale as it was. This appointment is also temporary upto finalisation of candidate by the Selection Committee and was liable to be terminated at any time without notice.

7. On 23-5-1987 another advertisement was issued calling applications from the eligible candidates for the post of lecturer in Commerce, Economics etc. The advertisement specifically referred i.e. "posts are reserved for SC/ST/NT/VJ/OBC/, if suitable reserved candidates are not available, others will be considered for appointment for academic year. It appears that pursuant to this advertisement, the order dated 26-6-1987 was issued which is indicative of the fact that the reserved candidate was not available, (underline by me.)

8. Again on 18-5-1988 advertisement was issued calling applications from the eligible candidates for the post of lecturer in Commerce in Senior College. The advertisement refers that posts are reserved only for reserved class candidates. Pursuant to this advertisement, the respondent received applications from 28 eligible candidates and out of 28 candidates applied the respondents called 13 candidates for interview. It is to be noted that out of 12 candidates which were called for interview, only 7 candidates appeared. Out of those 7 candidates, Shri. Sable N. S. who belongs to S.C. category was interviewed along with the appellant. The selection Committee taking into consideration the qualification and experience of the candidates recommended the name of Shri. Sable N.S. who applied to the post of lecturer in Commerce. Accordingly, accepting the

recommendation of Selection Committee, he was appointed to the said post. Upto this stage, there is no dispute between the parties.

9. It so happened that on 9-5-1988, the respondent terminated the services of the appellant. The order of termination is at Exh.R-11 page 79 which reads thus :

"Now you are hereby served with one month's notice w.e.f. 20-3-1988 about termination of services in the aforesaid college in accordance with terms and conditions of services laid down by the University of Poona by virtue of which notice your aforesaid service stand terminated on 20-4-1988."

Therefore, on passing of the order of termination, the appellant approached the College Tribunal by filing an appeal u/s 43-B of the Pune University Act, challenging the order of termination taking various grounds of challenges including the contention that the termination order is mala fide one. He also challenged publishing of the advertisement. He also contended that he was victimised because of the dispute between the management. The appellant prayed that the termination order be set aside or declared illegal and he may be reinstated in service. The appeal came to be filed on 17-6-1989.

10. On filing of the appeal the School Tribunal issued notice to the respondent. Accordingly, the respondents appeared and contested the appeal by filing the written reply to the memo of appeal. It was contended that as there was backlog of four teachers in the backward class category, and the reserved class candidate was not available, the appellant was appointed who was from open category along with one Yadav, without the recommendation of selection committee, as that appointment was without the selection Committee's recommendation, the posts were readvertised. At the end of the academic year 1987-88, the services of the appellant were required to be terminated as the post being one for the backward class candidate and in the year 1988-89 there were six vacancies including that of the appellant and those posts were advertised for reserved class candidates only. As the appellant also applied but one Mr. Sable recommended by the Selection Committee, hence, he was appointed. It is contended that the appointment of the appellant was purely temporary having no right to the post and as such the dismissal order was just and proper, therefore, they prayed for dismissal of the appeal.

11. The learned Presiding Officer of the Tribunal on the basis of the contentions of the parties framed three points for determination which reads thus :

1 Whether the appeal is in time? Yes 2. Whether appellant was appointed in a vacancy for Backward class candidate.? No. 3. Whether the order of termination is against law, contract or is otherwise unjust and improper.? Yes. 4. What order. .. As per order

The Presiding Officer answered the point No. 1 in favour of the appellant and he held

that the appeal was in time. So far as point No. 2 is concerned, the Tribunal recorded a finding that the appellant was not appointed in the vacancy for backward class candidate and as such he declared that the order of termination being against law and thereby allowed the appeal by the impugned order.

12. Shri Kulkarni, learned advocate for the petitioner submitted that the Tribunal has committed manifest error apparent on the face of record in holding that the post which was advertised was not reserved for Backward class candidate. Shri Kulkarni, submitted that this finding recorded by the learned Presiding Officer goes contrary to the advertisements itself which were produced on record and which were not seriously disputed or correctness of it was challenged by the appellant. Shri Kulkarni, therefore, submitted that in all three advertisements which were produced on record it was specifically mentioned that the posts are reserved for candidate belonging to backward class. Shri Kulkarni, also pointed out that it is also stated in the advertisement that in case candidate from reserved class is not available then the other candidates from open candidates will be considered. With this backdrop, all three advertisements which were produced on record. The appointment orders of the appellant has to be considered to find out whether i) he was appointed against the reserved post; ii) whether by such orders any right to the post (to which) the appellant was appointed is created. Shri Kulkarni, pointed out that all the three appointments being only for one academic year, these orders of appointments were issued with the background as the candidate belonging to the backward class was not available. Shri Kulkarni, therefore, submitted that the appellant was appointed as purely temporary on a post of lecturer though, the post for lecturer of commerce was a permanent post but it was reserved for the reserved class candidate hence, those appointments were rather stop gap appointment, till the candidate from that class is available. He submitted that merely three orders appointments are issued, the Tribunal cannot jump to the conclusion that the appellant has a right to the post and that post is not meant for reserved class candidate. Shri Kulkarni, submitted that initially there were two posts of lecturers in Commerce, one post was subsequently created and the third post (new) which was- created was really meant for the reserved class candidate. Shri Kulkarni, therefore, submitted that the Tribunal fallen into error in entertaining a contention of the appellant that he was appointed on a post which is not reserved for the reserved class candidate. Shri Kulkarni, therefore, submitted that the finding so recorded are thus contrary to the record which is produced by the respondent, such as roster to indicate that the post of lecturer of Commerce was created was reserved for backward class candidate. Shri Kulkarni, took me through the roster which is produced on record at page 54. The recruitment for 1986-87 as indicated in the said roster shows that Shri M. D. Shitole is from open category was appointed on 1-1-1986 on a newly created posts which are reserved for S.C. Shri Kulkarni, therefore, submitted that the appellant was working on a post which was reserved for SC candidate and the appellant being not from that category cannot, claim the right to that post. Shri Kulkarni, then submitted even

assuming that the case of the appellant being true and he was appointed on the post meant for open candidate, he has no right to the post because of the appointments were purely temporary and meant for one academic year. To substantiate, this contention Shri Kulkarni, placed strong reliance on the judgment of the Apex Court in case of Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others, . On the same line the learned counsel has relied on the judgment of Malikarjun Shikshan Prasarak Mandal Dist. Solapur, through its President v. R. V. Rajmane and Ors. reported in 1993, C.T.J. 67. Shri Kulkarni, submitted that the College in which the appellant was working is affiliated to the Pune University and the services of the employees working under the College are governed and regulated by the statute framed by the University in exercise of its power u/s 42 of the University Act. Shri, Kulkarni, submitted that recruitment of the teachers of affiliated college is provided under statute 415. Statute 415, Sub-clause (3) authorised the management to fill up the temporary posts. Statute No. 416 provides for reservation of posts and statute 417 deals with probation. Shri Kulkarni, on the basis of these statutes submitted that the appellant was not appointed as a probationer but he was appointed as a temporary lecturer for a period of one academic year as the post was reserved for candidate belonging to Scheduled Caste and the candidate from that category was not available. Shri Kulkarni, therefore, submitted that looking to the question raised in this petition from all angles, the appellant has no right to the post and once, this Court comes to the conclusion that the appellant has no right to the post, there is no necessity for the Tribunal to set aside the order of termination on the grounds which are stated in the order. According to Mr. Kulkarni, learned counsel that the learned Presiding Officer has really missed the point which was raised by the respondent. He submitted it was a specific case made out by the respondent that the post of lecturer of Commerce which is newly created post was kept reserved for scheduled caste candidates. Admittedly, learned counsel says that the appellant was from open category and by no stretch of imagination, one can say that the appellant can claim any right to that post. Further Shri Kulkarni, contended that the appellant was not eligible for being appointed as lecturer in Commerce, because he lacks qualification as admittedly he has not having qualification of M.Phil. Therefore, on this count also the appellant cannot be considered for being appointed as a lecturer in the said College. Lastly, Shri Kulkarni, contended that the order of reinstatement with payment of backwages is thus patently illegal as the appellant has no cause or right to make any complaint about the order of termination. He submitted all the three appointment orders which are issued by the respondent without any reservation says that the appointment of the appellant being temporary and liable to be terminated without assigning any reason. Therefore, Shri Kulkarni, submitted that the order of termination dated 9-5-1988 being in terms of order of appointment and as the appointment of the appellant was not in accordance with the advertisement dated 23-5-1988, whereby the post was reserved for backward class candidate. Shri Kulkarni, submitted that the order of the Tribunal being patently erroneous and illegal, this Court under Article 227 of the

Constitution of India, should interfere in the said order. Lastly, Shri Kulkarni, contended that even if this Court comes to the conclusion that the order of termination being bad, no relief can be granted to the appellant as Shri Sable, is working in the said post since 1990 and no vacant post is available to accommodate the appellant. He therefore, submitted that on this ground also this Court may interfere in the order passed by the Tribunal.

13. Per contra, Shri Talekar, learned counsel appearing for the appellant submitted that he is not challenging or not questioning the selection of Shri Sable, to the post as lecturer in Commerce, which is made by the Selection Committee on 24-7-1988. Shri Talekar, learned counsel submitted that in terms of the statute the appellant having acquired the status of permanency, his services cannot be terminated by passing an order dated 9-5-1988. The learned counsel submitted that though the order of appointment being temporary one but his termination on the ground stated in the order being illegal, and that sounds that the termination is with some reason, and if the termination is on some reason such as the appellant has not acquired M. Phil, then there should have been an enquiry to that effect or the appellant should have chance to complete or acquire the qualification as per the various Government circulars and Resolutions. He submitted that the management has to fill up every permanent post by adopting a procedure as contemplated under Statute 415. He submitted it was incumbent on the respondent to make initial appointment of 24 months as per statute No. 417 read with Statute 420, the management on their own whims cannot make an appointment contrary to the statute of the University. Shri Talekar, submitted that the management with purpose have not issued appointment in terms of the statute but the appointments were made for one academic year, with intention to deprive the appellant the benefit of permanency as contemplated under statute 417. Shri Talekar, therefore, submitted that the orders which are produced on record establish that the appellant has worked with the College as lecturer in Commerce for a period of 3 years and he submitted for the purpose of confirmation of probation all the three appointments must be construed to be one as made in terms of Statute 415(2). Shri Talekar, submitted that it is a specific stand taken by the respondent before the Tribunal that the post was reserved for backward class candidate and in order to substantiate this stand the respondent relied on the roster. Shri Talekar submitted that as per the roster post No. 22 and 26 were for open candidate and not the post on which the management alleges that they have appointed the appellant. He therefore, submitted that the termination of service by the respondent on the basis of the advertisement dated 23-5-1988 is per se bad. He submitted that the advertisement dated 23-5-1988 (18-5-1988) no doubt refers to the fact that the post so advertised are only for backward class candidate but the learned counsel submitted that the appointment of the appellant which was issued does not refer to the fact that the appointment of the appellant was against the post reserved for the backward class candidate. Shri Talekar, then pointed out that when the appellant was appointed earlier, the Registrar of Pune

University has granted approval on 18-9-1987. While granting approval the Registrar has referred to two conditions (i) that the appointment is approved subject to the condition that the teacher will be required to acquire M.Phil qualification within 8 years from the date of his appointment. The approval also refers that is granted for a particular period but unfortunately, the document Exh.R-8 which is produced on record, as that part i.e. period of approval is kept blank, in my judgment it is not being complete one, it will not be appropriate on my part to place any reliance on the said document. As original of that document from which the copy is made is not produced at the time of hearing, it will not be possible for me to accept the contention of Shri Talekar, on the backdrop of the fact that the appointment of the appellant was approved by the University. Be that as it may, nothing will turn on this aspect, Shri Talekar, submitted that once the appellant has worked more than two years, he acquires the status of the permanent lecturer in the College and therefore, he submitted that the order of termination which according to the counsel is being bad in law, the Tribunal was justified in allowing the appeal. He therefore, submitted that the Tribunal did not accept the specific contention which is raised by the respondent about the fact that the post for which the appellant was appointed was reserved for scheduled caste candidate. Shri Talekar, therefore, submitted once the Tribunal on the basis of the roster produced before it records a finding that the post was not reserved for scheduled caste candidate and that finding being a finding based on roster which was produced on record which in the opinion of the learned counsel is a finding of fact to which this Court will not interfere in the petition filed under Article 227 of the Constitution of India. No doubt, the contention of Shri Talekar, appears to be attractive but not convincing as noticed from the finding recorded by the Tribunal, the respondent came with a case that the post on which the appellant was appointed was reserved for reservation class candidate and that was not accepted by the Tribunal merely, because the roster which is produced on record does not support the contention that is not a sufficient fact but looking to the advertisement which is produced on record which do indicate that the posts are reserved for reservation class candidate. The roster produced on record refers to two posts of the lecturer in Commerce. It is the case of the respondent that initially there were two posts of lecturer in Commerce in the respondents college and a new post of lecturer in Commerce is created and that newly created post is meant for reserved class candidate. This stand of the respondents is more probable than the stand of the appellant. Moreso, all the three appointment orders produced on record are for only one academic year and that to temporary. With these facts emerging from record favours the respondent than the appellant.

14. Now let me consider the provisions of the statute. Statute 415 deals with recruitment of the teachers of affiliated college. To consider the submission of Shri Talekar, the appointment of the teacher shall be by the selection Committee for making recommendation to the management for appointment of teachers. It is brought on record and not even disputed by the appellant that first two

appointments which were made earlier by which the appellant was appointed as lecturer in Commerce were not made by the Committee, constituted under statute 415, the two appointments were without recommendation of Committee. Thus it will have to be held that the appointment of the appellant was for temporary vacancies as contemplated in Statute 415(3). It is to be noted that the statute 415 lays down the procedure which includes of advertising the post with giving all particulars those are required. After publication of advertisement the applications are to be received from the eligible candidates, then the Selection Committee as contemplated under Sub-clause (1) of statute 415 has to be constituted and that Committee will have to interview the candidate and recommend the names of the selected candidates. So far as case in hand Shri Sable was selected by duly constituted Committee. The report of the Committee is placed on record at Exh.C page 12. It is to be noted that though the advertisement published in daily Kesari clearly indicates that the posts so advertised are meant for the reserved class candidate, still the appellant pursuant to the advertisement applied and he was amongst the 12 candidates who were called for interview. This probably in anticipation that the candidate from reserved class may not be available. The interview was attended by 7 candidates, out of which Shri Sable N. S. who belongs to SC was interviewed and he was found suitable and thereby his name was recommended. Therefore, looking into these undisputed aspects which are not much in dispute, in my judgment there was no necessity or an occasion for the Tribunal to bank upon the question of roster when the advertisement clearly indicates that the posts are reserved for scheduled caste candidate and more particularly, when the appointment of the appellant being for temporary period, in no case it can be considered to be a valid one.

Turning to the judgment of Hindustan Education Society (supra) which is relied on by Shri Kulkarni. The case before the Apex Court arose out of the judgment and order passed by this Court. In that case the Apex Court was considering appointment of a teacher made under the provisions of Maharashtra Employees of Private Schools (Conditions of Service) Regulation 1977. The respondent was appointed by the management by the order dated 10-6-1992 against the clear vacancy for 11 months i.e. 11-6-1992 to 10-5-1993. The appointment thus was not in accordance with the provisions of Section 5, though it appears that the respondent in that case continued in the said service till his services were terminated. He approached the Tribunal, challenging the order of termination and later on in the High Court. The management being aggrieved by the orders passed by the Tribunal and the High Court, approached the Apex Court. The Apex Court noted down the provisions of Section 5 and noticing the provisions of Section 5 and the appointment order, the Apex Court held "that the appointment of the respondent was purely temporary for the limited period. Obviously, the approval given by the competent authority was for that temporary appointment. As regards permanent appointments, they are regulated by sub-sections (1) and (2) of Section 5 of the Act according to which the Management shall, as soon as

possible, fill up, in the manner prescribed every permanent vacancy in a private school by appointment of a person duly qualified to fill in such vacancy. Every person so appointed shall be put on probation for a period of two years subject to the provisions of sub-sections (4) and (5). He shall, on completion of the probation period of two years, be confirmed." Therefore, the Apex Court found that the appointment which was made by the management was not the appointment, considered to be a permanent appointment, therefore, the Apex Court set aside the judgment of this Court. Thus the law declared by the Apex Court is applicable to the case in hand on facts and law. Now I will refer to judgment of this Court Rajmane's case (supra). The Division Bench of this Court in case of Rajmane, was again considering the provisions of the M.E.P.S. Act, 1977. The Division Bench thus observed on the facts brought on record :

"3. Shri Chandurkar, learned counsel appearing on behalf of the Management, submitted that the provisions of Sub-section (4) of Section (5) of the Act have no application whatsoever, to the facts of the case and the Tribunal is misdirected in setting aside the order of termination by reference to the provisions of Sub-section (4) of Section 5 of the Act. The submission is correct and deserves acceptance. The Tribunal very rightly held that the appointment of respondent No. 1 was purely temporary and was made only because the candidate belonging to the reserved category was not available. Sub-section (4) of Section 5 of the Act provides that if the services of a probationer teacher are terminated and such probationer is reappointed by the Management within a period of one year from the date of termination, then the period of probation undergone shall be taken into consideration in calculating the required period of probation for the purpose of Section 2. We are unable to appreciate how Sub-section (4) of Section 5 of the Act has any, application to the facts of the case. The question of computing period to determine the probation period did not arise as respondent No. 1 was not holding the post as probationer. The appointment of respondent No. 1 was purely temporary due to the non-availability of the candidate belonging to reserved category and it was permissible for the Management to terminate the service by giving one month's notice. In our judgment, the order of the Tribunal is entirely perverse and is required to be quashed."

As I narrated the facts supra, one thing is clear that the appellant was not appointed in terms of the statute. Statute 417 deals with probation which reads thus :

"Statute 417. Probation :

1. The period of probation of the teacher shall in no case be, more than 24 months, on the expiry of which he will be deemed to be confirmed unless after assessment of his work by the Committee, his services are terminated by giving him one month's notice or one month's salary in lieu of notice.
2. The Principal of the conducted College or the Head of the University Department concerned shall maintain Assessment Reports of the teacher on

probations in the proforma prescribed for the purpose by the Vice Chancellor, for every six months, and complete if at the end of each term of the academic year. The Principal of the conducted College or the Head of the University Department under whom the teacher is working shall send to the Registrar at least two months before the date of expiry of the period of probation, his assessment report with definite recommendations for confirmation in service or otherwise. In case the teacher appointed on probation for a period of less than 24 months is not to be confirmed at the end of his probationary period or his probationary period is to be extended, a confidential report justifying the decision should be attached and such cases be referred to the Vice-Chancellor for further instruction. The Executive Council shall be the deciding authority in these cases. In the case of teachers of Affiliated Colleges, the Principal will maintain Assessment Reports in a similar manner and forward the recommendations to the Chairman, governing Body for further instructions. The Governing Body shall be the deciding authority in these cases.

3. The Assessment Report of the Principal of Conducted College/Head of the University Department on probation shall be maintained by the vice Chancellor, or the Principal of Affiliated College by the Chairman of the Governing Body and will be placed before the Competent Authority at least two months before the date of expiry of the period of probation with definite recommendations of confirmation in service or extension of probationary period or otherwise.

4. If the University/Governing Body terminates the services of the teacher on probation on the ground of reduction in work load or abolition of the post and if he is reemployed by the same College or a College under the same management subsequently within a year, the period spent by a teacher on probation during his first appointment shall be counted towards the total period of probation of 24 months. He shall be eligible for annual increment, condonation of break-in-service and confirmation, subject to his carrying good Assessment Report."

On noticing the above provisions of Statute 417, it is not possible for me to accept the submission of Shri Talekar, that all the three different appointments should be clubbed together for the purpose of Statute 415 Clause (2) and then apply provisions of Statute 417(1) and then to held that the appellant must be deemed to be a confirmed lecturer. It is not possible because according to statute the teacher so appointed shall be on probation which shall not be more than 24 months. The statute further requires that on expiry of the said period, if he is in service shall be deemed to be confirmed unless assessment of his work by the Committee, his services can be terminated by giving one month's notice. In the present case, such situation did not arise at all because every appointment of the appellant was for only one academic year. Therefore in my judgment, provisions of statute 417 are not at all attracted and therefore, there is no question of deemed confirmation of the appellant as tried to be contend by Shri Talekar. In my judgment there is no substance in the contention of Shri Talekar. Looking to the record produced with the petition, in my judgment, all the

three appointments of the appellant being temporary one, thus he has no right to that post and in my judgment, the termination being simpliciter without any stigma. Therefore, the said termination being valid and proper, in my judgment the Tribunal erroneously bank upon the question to find out whether the post was actually reserved or not. The advertisements which are published clearly indicate that the posts were reserved for backward class candidate, therefore, in my judgment the order of the Tribunal cannot be approved and sustained and required to be set aside.

15. Another contention of Shri Talekar, which required to be noted that the petitioner's services were terminated on the ground that he has not completed or acquired the degree of M.Phil. He submitted that if approval is considered in proper perspective, it will have to be assumed that the appellant was appointed as per the Statute 415 read with Statute 417 and he was permitted to complete M.Phil qualification within 8 years from the date of appointment. He therefore, submitted that the appellant's services cannot be terminated on this aspect. Shri Talekar, then brought to my notice the last appointment order dated 27-7-1987 which incorporates a clause that the appointment is purely temporary and is on a clear understanding that the appellant should improve academic performance and acquire M.Phil or Ph.D within the time limit prescribed. Shri Talekar, therefore, submitted that the order dated 27-7-1987 if read along with the approval granted by the Registrar, Pune University on 18th September, 1987 will clearly indicate that the appellant was appointed in a vacant post and he was required to complete M.Phil within 8 years. In my judgment this submission has no force at all as I have already held that it is not possible for me to rely on the letter of approval which is produced on record. However, it is clear that even though the order dated 27-7-1987 does refer to the acquisition of qualification by the appellant but that does not mean that his appointment as against clear vacancy as it is brought on record by the respondent that the post was reserved for backward class candidate and in no circumstances, open candidate can have a right on that post. Therefore, looking from this aspect also, in my judgment, three appointment orders of the appellant are not in terms of statute. Therefore, they cannot be called as legal one by applying the law declared by the Apex Court in Hindustan Education Society (supra) and the Division Bench of this Court in R. V. Rajmane. Therefore, I have to accept the contention of Shri Kulkarni, and reject the contention of Shri Talekar. Accordingly, petition succeeds. Rule made absolute in terms of prayer Clause (B). As the respondent is not in service, hence no order as to costs.