

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR**

WRIT PETITION NO.4272/2016

PETITIONERS :

(Original
Resp. No.1)

1. The Vidarbha Youth Welfare Society, a society registered under the Societies Registration Act, 1960 and having its registered office at Camp, Amravati through its President.

(Original
Resp. No.2)

2. The Principal, Vadarbha Youth Welfare Society's Polytechnic, Badnera, Anjangan Bari Road, Badnera (Rly.) Dist. Amravati.

...VERSUS...

RESPONDENTS :

(Original
Resp. No.3)

1. The State of Maharashtra through its Secretary, Deptt. of Higher and Technical Education, Mantralaya, Mumbai – 400 032.

(Original
Appellant)

2. Deputy Director of Technical Education, Regional Office, Amravati, Tq. & Dist. Amravati.

3. Shri Manohar Govindram Kalalkar, aged 44 Yrs., Occu : not known, R/o Waruda, Badnera, Amravati, Tq. & Dist. Amravati.

WITH

WRIT PETITION NO.4270/2016

PETITIONERS :

(Original
Resp. No.1)

1. The Vidarbha Youth Welfare Society, a society registered under the Societies Registration Act, 1960 and

having its registered office at Camp,
Amravati through its President.

- (Original
Resp. No.2)
2. The Principal, Vadarbha Youth Welfare Society's Polytechnic, Badnera, Anjangan Bari Road, Badnera (Rly.) Dist. Amravati.

...VERSUS...

- RESPONDENTS :**
1. The State of Maharashtra through its Secretary, Deptt. of Higher and Technical Education, Mantralaya, Mumbai – 400 032.
 - (Original
Resp. No.3) 2. Deputy Director of Technical Education, Regional Office, Amravati, Tq. & Dist. Amravati.
 - (Original
Appellant) 3. Shri Vilas S/o Madhukar Yewale (Yeole), age : 27 years, Occu : not known, R/o Bhankhada (Khu.) Tq. & Dist. Amravati.

WITH

WRIT PETITION NO.4271/2016

- PETITIONERS :**
- (Original
Resp. No.1) 1. The Vidarbha Youth Welfare Society, a society registered under the Societies Registration Act, 1960 and having its registered office at Camp, Amravati through its President.
 - (Original
Resp. No.2) 2. The Principal, Vadarbha Youth Welfare Society's Polytechnic, Badnera, Anjangan Bari Road, Badnera (Rly.) Dist. Amravati.

...VERSUS...

- RESPONDENTS :**
1. The State of Maharashtra through its Secretary, Deptt. of Higher and Technical Education, Mantralaya, Mumbai – 400 032.
- (Original Resp. No.3)
2. Deputy Director of Technical Education, Regional Office, Amravati, Tq. & Dist. Amravati.
- (Original Appellant)
3. Shri Pankaj Rajesh Ingle age : 41 years, Occ : not known, R/o Talvel, Tq. Chandur Bazar, Dist. Amravati.

WITH

WRIT PETITION NO.4269/2016

- PETITIONERS :**
1. The Vidarbha Youth Welfare Society, a society registered under the Societies Registration Act, 1960 and having its registered office at Camp, Amravati through its President.
- (Original Resp. No.1)
2. The Principal, Vadarbha Youth Welfare Society's Polytechnic, Badnera, Anjangan Bari Road, Badnera (Rly.) Dist. Amravati.
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...VERSUS...

- RESPONDENTS :**
1. The State of Maharashtra through its Secretary, Deptt. of Higher and Technical Education, Mantralaya, Mumbai – 400 032.

(Original
Resp. No.3)

2. Deputy Director of Technical
Education, Regional Office,
Amravati, Tq. & Dist. Amravati.

(Original
Appellant)

3. Shri Mohan s/o Bharatram Bhise,
aged : 34 years, Occ : not known,
R/o C/o Shri Mukund Ughale,
Plot No.42, MIG, Colony, New Town,
Badnera, Tq. & Dist. Amravati.

Shri R.D. Bhuihar, Advocate for petitioners in all petitions
Shri S.M. Ukey, Addl. G.P for respondent nos.1 and 2 in all petitions
Shri P.A. Kadu, Advocate for respondent no.3 in all petitions

CORAM : AVINASH G. GHAROTE, J.

Date of reserving the judgment : 01/10/2021

Date of pronouncing the judgment : 15/11/2021

J U D G M E N T

1. Rule. Rule made returnable forthwith. Heard learned
Counsels for the parties.

2. All these petitions by the employer, challenge the
judgments delivered by the learned School Tribunal, Amravati dated
23/3/2016 in Appeals filed by the employees who were terminated
by the petitioners, which termination has been set aside by the
learned School Tribunal by the impugned judgments. Since a

common question arises in these petitions, as indicated below these petitions have been heard together and are being decided by this common judgment.

3. In Writ Petition No.4272/2016 the respondent no.3- Shri Manohar Govindram Kalalkar, had in pursuance to an advertisement in daily news paper 'Hindustan' published on 12/1/2008 by the petitioner, applied and was initially, by an order dated 1/2/2008 appointed as a Laboratory Attendant on contract basis in the Electronics and Telecommunication Department of the Polytechnic College, run by the petitioner no.1, having been selected in the interview held on 15/1/2008, and having been recommended by the Selection Committee. The appointment was stated to be temporary and on contract basis for the academic session 2007-2008 on fixed remuneration of Rs.2,000/- per month. The said appointment order indicated that on completion of the session, the appointment of the respondent no.3 will be automatically terminated without any prior notice and in case the respondent no.3 agreed to the above terms, he should join duties immediately, which was so done by the respondent no.3. The respondent no.3 thereafter,

was continued for the subsequent academic sessions with artificial breaks after each session. On 1/2/2013 a fresh appointment order came to be issued to the respondent no.3, in which he was again appointed as a Laboratory Assistant, w.e.f 1/2/2013. Clause -1 of the appointment order indicated that the appointment was temporary, however, no period was mentioned. Clause - 2 of the appointment order, indicated that the appointment was on 1-2 years probation, which would commence from the date the respondent no.3 joins. Clause-3 stated that the seniority of the respondent no.3, would be counted from 1/2/2013 to the post of Laboratory Assistant. Clause – 7 indicated that in case the respondent no.3 wanted to leave the employment in the future he would have to give an advance one month's notice or salary of one month in lieu of the same. Clause – 8 required the respondent no.3 to acquire the requisite educational qualifications, as per the Rules in case he did not have it. The services of the respondent no.3 came to be terminated by the order dated 30/4/2014. This order of termination referred to the order of the Hon'ble Joint Charity Commissioner, Amravati in Appeal No.3/2010 and Appeal No.4/2010 dated 13/12/2011, whereby the Management of the petitioner no.1-

Society was declared illegal, which was upheld up to the Hon'ble Apex Court. It further indicated that the Executive Council of the Society in its meeting held on 29/3/2014 had resolved to follow the decisions as rendered in the above matters. It further referred to the order of the Chairman dated 30/4/2014, by which he had communicated that the services of non-teaching staff was appointed without due procedure approved by competent authority and was required to be terminated immediately, placing reliance upon which, the services of the respondent no.3 were terminated with immediate effect. This termination came to be challenged by the respondent no.3 by filing an appeal under Section 9 (1) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, "the MEPS Act", hereinafter), in which by judgment dated 23/3/2016, the learned School Tribunal, Amravati has allowed the same, thereby quashing and setting aside the termination order dated 30/4/2014 and directing reinstatement with all consequent benefits of continuity and back wages, which is the subject matter of challenge in the present petitions.

3.1. In Writ Petition No.4269/2016, the respondent no.3- Shri Mohan Bharatram Bhise, in pursuance of an advertisement in daily news paper ‘Hindustan’ published on 12/1/2008, issued by the petitioner, had applied for the post of Laboratory Attendant, and was interviewed by the Selection Committee on 15/1/2008, which selected him, pursuance to which by an order dated 1/2/2008, he was appointed on temporary/contract basis for the academic session 2007-08 on fixed remuneration. This appointment was continued from time to time with artificial breaks at the end of each academic session and on 1/2/2013, the petitioner was appointed as a Laboratory Attendant. The language of his appointment order is identical with that of the petitioner in Writ Petition No.4272/2016. The respondent no.3, came to be terminated on 30/4/2014. Appeal preferred by him to the School Tribunal came to be allowed on 23/3/2016.

3.2. In Writ Petition No.4270/2016, the respondent no.3- Shri Vilas Madhukar Yewale (Yeole), in pursuance of an advertisement in daily news paper ‘Hindustan’ published on 12/1/2008, issued by the petitioner, had applied for the post of

Laboratory Attendant, and was interviewed by the Selection Committee, on 15/1/2008 which selected him, pursuant to which by an order dated 2/2/2009, he was appointed on temporary/contract basis for the academic session 2008-09 on fixed remuneration. This appointment was continued from time to time, with artificial breaks at the end of each academic session and on 12/2/2014, the petitioner was appointed as a Laboratory Attendant. The language of this appointment order is identical with that of the petitioner in Writ Petition No.4272/2016. The respondent no.3, came to be terminated on 30/4/2014. Appeal preferred by him to the School Tribunal came to be allowed on 23/3/2016.

3.3. In Writ Petition No.4271/2016, the respondent no.3- Shri Pankaj Rajesh Ingle, in pursuance of an advertisement in daily news paper 'Hindustan' published on 12/1/2008, issued by the petitioner, had applied for the post of Laboratory Attendant and was interviewed by the Selection Committee on 15/1/2008, which selected him, pursuant to which by an order dated 1/2/2008, he was appointed on temporary/contract basis for the academic session 2007-08 on fixed remuneration. This appointment was continued

from time to time with artificial breaks at the end of each academic session and on 1/2/2013, the petitioner was appointed as a Laboratory Attendant. The language of his appointment order is identical with that of the petitioner in Writ Petition No.4272/16. The respondent no.3, came to be terminated on 30/4/2014. Appeal preferred by him to the School Tribunal came to be allowed on 23/3/2016.

4. Shri R.D. Bhuihar, learned Counsel for the petitioners submits that:

(a) The appointment of the respondent no.3, by the order dated 1/2/2008, after advertisement, interview, selection and recommendation by the Selection Committee, was on a contract basis for the academic session 2007-2008.

(b) This was continued four times till 2013, in which year by the order dated 1/2/2013, the respondent no.3 was appointed again as a Laboratory Attendant on a temporary basis and therefore, his termination by the order dated 30/4/2014, on the ground that the Management was complying with the declaration regarding the Managing Committee being declared illegal and the employment of

the respondent no.3 was without following due procedure of selection could not be faulted with.

(c) There was no presumption that the appointment was against a clear/permanent vacancy as it existed in 2008 and the appointment was only as a stopgap arrangement.

(d) The Tribunal had disregarded the terms of the appointment dated 1/2/2013. The Format in Schedule-D of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (for short, “the MEPS Rules” hereinafter), is also relied upon to contend that the appointment was not on a permanent basis.

(e) There was no discussion regarding entitlement to full back wages and the relief was merely granted in the operative part.

(f) Even if the Tribunal was of the opinion that the termination was illegal it could have instead of directing reinstatement granted compensation under Section 11 (2) (e) of the MEPS Act.

(g) There was no plea or material before the learned Tribunal to indicate that the respondent no.3 had been appointed on probation.

(h) Relying upon Rule 28 of the MEPS Rules, it is submitted that in case one month's notice is not given, that at the most would entitle the employee, for salary in lieu of notice, which could not be awarded and there was no question of granting any reinstatement on this count. No other argument was advanced.

(i) Shri Bhuibhar, learned Counsel for the petitioners relied upon the decisions in *Ramkrishna Chauhan Vs. Seth D.M. High School and others, 2013 (2) Mh. L.J. 713; Narendra Keshaoora Meshram Vs. Presiding Officer, School Tribunal, Nagpur and others, 2014 (3) Mh.L.J. 881; Navjeevan Shikshan Sanstha, Bhishnur and another Vs. Chandrashekhhar Anandraoji Rewatkar and others, 2015 (1) Mh.L.J. 782* , which has been reversed in *Civil Appeal Nos.842-843 of 2017 (Chandrashekhhar Anandraoji Rewatkar Vs. Navjeevan Shikshan Sanstha and others)*, decided on 23/1/2017 by the Hon'ble Apex Court; *Vasant Shikshan Prasarak Mandal Through Its President and others Vs. Sate of Maharashtra and others, 2017 (1) Mh.L.J. 67; Rajasthan State Road Transport Corporation, Jaipur Vs. Phool Chand (Dead) through Legal Representatives, (2018) 18 SCC 299; Society of Sisters of Saint John, Mhasala, Wardha and another Vs. Arvind s/o Narayan Lajurkar and others, 2020 (3) Mh.L.J. 186.*

5. Shri P.A. Kadu, learned Counsel for the respondent no.3 submits as under :

(a) The advertisement dated 12/1/2008, does not indicate that the posts were temporary. Interview was conducted on 15/1/2008 by the Selection Committee, the respondent no.3 was selected and it is only on the recommendation of the Selection Committee that the respondent no.3 was appointed and therefore the entire due process for selection and appointment as required by law was duly followed.

(b) The respondent no.3 was continued for the subsequent sessions till 2013, though with technical breaks, which would indicate the continued existence of the vacancy, occupied by the respondent no.3.

(c) Though the initial appointment was on a temporary basis the same had to be regarded as being an appointment on probation. He submits that the judgment of the Full Bench in ***Ramkrishna Chauhan*** (supra) was not attracted.

(d) There was no dispute about the respondent no.3 not fulfilling the required educational qualifications for the post of Laboratory Attendant.

(e) Reliance is also placed upon the Resolution of the Local Management Committee, which had resolved to regularize the services of all employees working on limited emoluments in its meeting dated 8/11/2012.

(f) Relying on Section 5 of the MEPS Act, it is submitted that the Act does not permit the Management to engage the services of employees on temporary basis for years together, which could only be done as a stopgap arrangement and not as a continuous practice, and therefore, in light of the language of Section 5 of the MEPS Act, it could only be held that the appointment was on probation for a period of two years. It is therefore submitted that the first appointment dated 1/2/2008 itself, should be treated as an appointment on probation.

(g) Once the order of termination is found to be bad in law, contrary to the requirements of Rule 28 (1) of the MEPS Rules, reinstatement should follow.

(h) In so far as back wages granted by the learned School Tribunal is concerned, it was submitted that para 3 records that the respondent no.3 was not gainfully employed, to which there was no counter and therefore, in view of what was stated by the Hon'ble

Apex Court in *Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others, (2013) 10 SCC 324* the grant of back wages could not be faulted with. No other arguments were advanced.

(i) Shri Kadu, learned Counsel for the respondent no.3 relies upon the decisions in *Shikshan Prasarak Mandal, Wani Vs. Presiding Officer, School Tribunal, Amravati and another, 2005 (4) Mh.L.J. 485; Ramchandar Ramadhar Yadav Vs. Hyderabad (Sind) National Collegiate Board and another, 2006 (2) Mh.L.J. 532; Rehana Begun d/o Sk. Safdar Vs. Khwaja Baba Urdu Education Society, Amravati and others, 2009 (3) Mh.L.J. 665; Abdul Rafique Abdul Hamid Vs. Yavatmal Islamia Anglo Urdu Education Society and others, 2014 (3) Mh.L.J. 99; Shri Bhagwan Mahavir Primary School and another Vs. Presiding Officer, School Tribunal, Amravati Division and others, 2014 (3) Mh.L.J. 161; Shamin Azad Education Society, Giroli and others Vs. Presiding Officer, School Tribunal, Amravati and others, 2014 (4) Mh.L.J. 723; Maulana Azad Educational Trust, Aurangabad and others Vs. Uzma Khanam Mirza Moin Ullah Baig and another, 2016 (5) Mh.L.J. 325; Anil s/o Govindrao Korde Vs. Siddheshwar Krida Mandal, Sillod and others,*

2016 (6) Mh.L.J. 933; Jeevan Shikshan Mandal, Umred and another Vs. Umesh Gangadharrao Mohod and another, 2019 (6) Mh.L.J. 728.

6. The Full Bench of this Court in ***Ramkrishna Chauhan*** (supra) while considering the question of appointments made by the managements under Section 5 of the MEPS Act, held as under :

“12. 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.

13. 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 fulfil 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 Ratan Lal v. State of Haryana, as it would be hit by Articles 14 and 16 of the Constitution of India.

14. -----

15. -----

16. *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.

17. 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 sub-section (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 fill 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.

18. 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.

19. -----

20. 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.

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23. -----

24. 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 Kalpataru Vidya Samasthe (supra). 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 demur. 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.

28. 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.”

Thus, though the right of the Management to appoint a person on a temporary basis in a permanent vacancy cannot be disputed and the Tribunal cannot disregard the terms of appointment and assume as matter of fact that the appointment made against a clear and permanent vacancy is deemed to be on probation, certain riders have been put, namely :

- (a) 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 persons or different persons on contractual or temporary basis for limited duration, may be for an academic session, at a time, against a permanent vacancy, on year to year basis.
- (b) 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.
- (c) 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.

Thus, in all cases where the Management resorts to filling a clear and permanent vacancy on a temporary basis or on contract basis, it will have to satisfy, the test of the riders as put upon the exercise of its powers as spelt out in ***Ramkrishna Chauhan*** (supra) and where an employee is able to point out that these tests are not satisfied then he would be entitled to call for a presumption of being appointed on probation, depending upon the facts and circumstances of each case, for the reason as held in ***Ramkrishna Chauhan*** (supra) that 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, which mandate flows from conjoint reading of sub-section (1) and (2) of Section 5 of the MEPS Act.

7. The law as laid down in ***Ramkrishna Chavan*** (supra) has been taken into consideration by this Court in ***Shamin Azad Education Society*** (supra) [which judgment has been stayed by the Hon'ble Apex Court in SLP (C) No.14377/2014 by its order dated 4/7/2014; ***Abdul Rafique Abdul Hamid*** (supra); ***Shri Bhagwan***

Mahavir Primary School (supra) [SLP (C) No.10392/2014, against which has been dismissed by the Hon'ble Apex Court on 2/5/2014] ; ***Ramchandar Ramadhar Yadav*** (supra); ***Uzma Khanam Mirza Moin Ullah Baig*** (supra) wherein the practice of the management of appointing employees on temporary basis on clear permanent vacancies for years together was frowned upon and the termination is set aside directing reinstatement. ***Shikshan Prasarak Mandal, Wani*** (supra) has already been considered in ***Ramkrishna Chauhan*** (supra).

8. In ***Priyadarshini Education Trust and others Vs. Ratis (Rafia) Bano d/o Abdul Rasheed and others, 2007 SCC OnLine Bom 720 : 2007 (6) Mh. L.J. 667***, the learned Division Bench of this Court, while considering the provisions of Section 5 of the MEPS Act, relating to appointments, has held as under :-

“44. In order to claim benefit of deemed permanency, a teacher must be duly selected, he must be appointed in clear permanent vacancy, his appointment must not be for a fixed/limited period, and preferably it ought to indicate that the appointment is on probation. If and only if these conditions are fulfilled, a teacher will be able to claim deemed permanency on completion of service of two years from the date of appointment

on probation or at least by an appointment fulfilling all above conditions, even though the order may not specifically indicate that he is appointed on probation.”

9. The position therefore has to be tested on the basis of facts as availing in the present matters and the riders / tests as laid down in **Ramkrishna Chauhan** (supra) and **Priyadarshini Education Trust** (supra) being satisfied.

10. The question of suitability of the respondent no.3, in all these petitions does not arise, as all of them had appeared before the Selection Committee, were duly interviewed, their educational qualifications examined and all of them having been found suitable for the posts, were selected by the Selection Committee, only after which they were appointed. There is nothing on record to indicate any subjective satisfaction on part of the petitioner, that even though the respondent no.3 in all these petitions were duly qualified, the vacancies were permanent, they complied with the educational qualifications, were found suitable for the post by the Selection Committee, why the petitioner took a decision to appoint them for a

limited period, which subjective satisfaction is required to be recorded as is held by the Hon'ble Full Bench in ***Ramkrishna Chauhan*** (supra). Nor is it a case where the selection process could not be taken to its logical end, requiring the petitioner to resort to a temporary/contractual appointment. The petitions thus fail the test of the riders as laid down in ***Ramkrishna Chauhan*** (supra) as there is nothing on record placed by the petitioner before the learned School Tribunal or in these petitions, to indicate that the riders as put by the Hon'ble Full Bench in ***Ramkrishna Chauhan*** (supra) were satisfied. This being the position, then considering the mandate of Section 5(1) of the MEPS Act, as elucidated in ***Ramkrishna Chauhan*** (supra) itself, the appointment of the respondent no.3, in all these petitions, ought to be considered on probation since the date of their appointment, itself.

11. There is no dispute that in all the petitions the appointment of the respondent no.3/employee at the initial stage, was after inviting the application by publishing advertisement, which was so published in the local daily 'Hindustan' on 12/1/2008, conducting of interview by the Selection Committee on 15/1/2008,

in which they were declared successful, having also satisfied the educational criteria for the post for which they were selected. It is also not disputed that the appointment of these persons was in clear and permanent vacancies, as is indicated by their continuation in the said post from 2008 till 2014, though with formal orders of termination, after each session.

12. A perusal of the advertisement dated 12/1/2008, as published in the local daily 'Hindustan', clearly demonstrates that applications were being invited for filling the five (5) vacant posts of Laboratory Attendants, available with the petitioner. The advertisement though states that these vacant posts were to be filled in on limited monthly remuneration of Rs.2000/- it does not state that such an appointment would be either on contract or temporary basis or for a limited duration. The *modus operandi* of the Management, in spite of the availability of clear and permanent vacancies, of appointing employees on temporary or contract basis for years together has been time and again frowned upon by the Courts, as such an action, does not ensure stability in the field of education.

13. It is also material to note that the minutes of the Local Managing Committee dated 8/11/2012, vide Resolution No.9 A, placed on record indicate that the Local Managing Committee had resolved to regularise the services of such Laboratory Attendants, who had completed 5 years of service with the petitioner, which again supports the position that the appointment of the respondent no.3, in all the petitions was in a clear and permanent vacancy.

14. That the appointment of the respondent no.3 in all the petitions was in a clear and permanent vacancy is a position which is also not disputed by the petitioner and the procedure and requirement as clarified by this Court in *Priyadarshini Education Trust* (supra) also stood complied with/ fulfilled.

15. Thus in absence of the petitioner passing the riders as enunciated in *Ramkrishna Chauhan* (supra) it will have to be held that the dictum of Section 5(2) of the MEPS Act, which mandates that every person appointed to fill a permanent vacancy shall be on probation for a period of two years, on completion of which he shall be deemed to have been confirmed, will have to be applied to the

respondent no.3, in all these petitions, which has been so applied by the learned School Tribunal and in my considered view rightly.

16. The object of the MEPS Act, as is evident from the preamble is to regulate the recruitment and conditions of service of employees in certain private schools in the State, with a view to provide such employees security and stability of service to enable them to discharge their duties towards the pupils and their guardians in particular, and institution and society in general, effectively and efficiently. This being the purpose for enactment of the MEPS Act, the Managements cannot be permitted to appoint and continue such appointments, on contract or temporary basis, with formal orders of termination, after each session, contrary to the riders as put in *Ramkrishna Chauhan* (supra) as permitting the Management to do so, would defeat the very purpose of the enactment.

17. Even presuming otherwise, and taking into consideration the argument of Shri Bhuibhar, learned Counsel for the petitioners that the appointment orders dated 1/2/2013 and

12/2/2014, vide Clause no.1, specifically stated that the appointment was temporary, Clause no.2 in the same order cannot be lost sight of, which specifically states that the appointment of the respondent no.3, was on probation of 1-2 years, which would commence from the date of joining and considering the purpose of the enactment, the provisions will have to be beneficially interpreted in favour of the employee, and it will have to be held that the appointment was on probation, and therefore the same could not have been terminated without following the mandate of Section 5(3) of the MEPS Act [see *Rehana Begum d/o Sk. Safdar* (supra)], which is not spelt out from the termination orders, considering which also the termination order could not be sustained. So also considering what has been held regarding the appointment of the respondent no.3, in all these petitions, the provisions of Rule 28 (1) of the MEPS Rules, would clearly not be attracted in view of which *Narendra Kesharao Meshram* (supra) would not be applicable on the facts of the present matter. So also as this is not a case of termination on the ground of misconduct, *Umesh Gangadharrao Mohod* (supra) would also not be attracted.

18. The reading of Section 5 of the MEPS Act, does not indicate that the prior permission of the Education Officer is necessary to fill in a vacancy. What the proviso to Section 5(1) mandates is that in case of the Management intending to fill in a vacancy by appointment, before doing so, it shall ascertain from the Education Officer, whether there is any suitable person available on the list of surplus persons maintained by the Education Officer, for absorption in other schools and in case of such person being available, to appoint such person in such vacancy. The purpose behind this is obvious, to continue the employment of a person, who was already appointed by following the due process of law. This is an obligation, obviously upon the management and not upon the person who is appointed after due selection in a clear vacant post, and thus such appointee cannot be penalised due to the default on part of the Management in this regard, more so, when such appointee, has been permitted to continue in employment for years together. That apart there is nothing on record to indicate that there was any failure on part of the petitioner/Management in regard to the requirement of the proviso to Section 5(1) of the MEPS Act and that the Education Officer on this count had initiated any action

against the petitioner/Management. Had there been any such a failure, the Education Department would not have permitted the continuation of the respondent no.3, in all the petitions for years together. ***Vasant Shikshan Prasarak Mandal*** (supra) relied upon by Shri Bhuibhar, learned Counsel for the petitioners, therefore on facts would not be attracted. ***Chandrashekhar Anandraoji Rewatkar*** (supra) has been set aside by the Hon'ble Apex Court in SLP No.842-843 of 2017 decided on 23/1/2017 and is of no assistance to Shri Bhuibhar, learned Counsel for the petitioners.

19. The contention that the Managing Committee, which appointed the respondent no.3, in all these petitions, was declared as illegal by the learned Joint Charity Commissioner, Amravati, in Appeal No.3/2010 and Appeal No.4/2010, by the judgment dated 13/12/2011, has to be viewed in the context of the background in which it was passed. The Managing Committee which appointed the respondent no.3, in all these petitions, initially by the appointment orders dated 1/2/2008 and 2/2/2009, which were continued thereafter, from time to time, with formal orders of termination, after each session, claimed that it was elected in the meeting held on

3/12/2006. A change report filed under Section 22 of the Maharashtra Public Trusts Act, for recording this change vide Enquiry No.135/2007, was accepted by the Incharge Deputy Charity Commissioner, Amravati, vide his judgment dated 7/12/2009. Appeal filed against this judgment was allowed on 13/12/2011, which thereafter was carried up to the Hon'ble Apex Court, which is said to have maintained the judgment in appeal. There is however, no order placed on record, which would indicate that there was any restraint upon the Managing Committee which had appointed the respondent no.3, in all these petitions, to do so, in view of which the appointment of the respondent no.3, in all these petitions cannot be faulted with.

20. In ***Phool Chand*** (supra) relied upon by Shri Bhuibhar, learned Counsel for the petitioners, after considering ***Deepali Gundu Surwase*** (supra) relied upon by Shri Kadu, learned Counsel for the respondent no.3, the Hon'ble Apex Court has held as under :

"11. In our considered opinion, the courts below completely failed to see that the back wages could not be awarded by the Court as of right to the workman consequent upon setting aside of his dismissal/termination order. In other words, a workman

has no right to claim back wages from his employer as of right only because the Court has set aside his dismissal order in his favour and directed his reinstatement in service.

12. It is necessary for the workman in such cases to plead and prove with the aid of evidence that after his dismissal from the service, he was not gainfully employed anywhere and had no earning to maintain himself or/and his family. The employer is also entitled to prove it otherwise against the employee, namely, that the employee was gainfully employed during the relevant period and hence not entitled to claim any back wages. Initial burden is, however, on the employee.

13. In some cases, the Court may decline to award the back wages in its entirety whereas in some cases, it may award partial, depending upon the facts of each case by exercising its judicial discretion in the light of the facts and evidence. The questions, how the back wages are required to be decided, what are the factors to be taken into consideration awarding back wages, on whom the initial burden lies, etc. were elaborately discussed in several cases by this Court wherein the law on these questions has been settled. Indeed, it is no longer res integra. These cases are, M.P. SEB v. Jarina Bee [M.P. SEB v. Jarina Bee, (2003) 6 SCC 141 : 2003 SCC (L&S) 833], Haryana Roadways v. Rudhan Singh [Haryana Roadways v. Rudhan Singh, (2005) 5 SCC 591 : 2005 SCC (L&S) 716] , U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey [U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey, (2006) 1 SCC 479 : 2006 SCC (L&S) 250], J.K. Synthetics Ltd. v. K.P. Agrawal [J.K. Synthetics Ltd. v. K.P. Agrawal, (2007) 2 SCC 433 : (2007)

1 SCC (L&S) 651] ,Metropolitan Transport Corpn. v. V. Venkatesan [Metropolitan Transport Corpn. v. V. Venkatesan, (2009) 9 SCC 601 : (2009) 2 SCC (L&S) 719] , Jagbir Singh v. Haryana State Agriculture Mktg. Board [Jagbir Singh v. Haryana State Agriculture Mktg. Board, (2009) 15 SCC 327 : (2010) 1 SCC (L&S) 545] and Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya [Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya, (2013) 10 SCC 324 : (2014) 2 SCC (L&S) 184] .

14. The Court is, therefore, required to keep in consideration several factors, which are set out in the aforementioned cases, and then to record a finding as to whether it is a fit case for award of the back wages and, if so, to what extent.”

In **Allahabad Bank and others Vs. Krishan Pal Singh**, Civil Appeal No.5808/2021 [arising out of SLP (C) No.19648 of 2019], decided by the Hon’ble Apex Court on 20/9/2021, it has been held that reinstatement with full back wages is not automatic in every case, where termination/dismissal is found to be not in accordance with procedure prescribed under law and in circumstances it would be permissible to award compensation instead.

The Learned School Tribunal, has while narrating the averments in the Application under Section 9 in the impugned

judgment, has not made any mention regarding the pleas contained therein regarding the claim for entitlement for back wages. The impugned judgment/s also do not speak of any such averment by the respondent no.3, much less anything on record, so as to enable the learned School Tribunal to have arrived at the conclusion that while directing reinstatement, full back wages were to be awarded. There is absolutely no discussion whatsoever in the impugned judgment/s in this regard. Full back wages have been awarded merely for the asking, which clearly would not be permissible in view of what has been said in *Phool Chand* (supra) and *Allahabad Bank* (supra), considering which the grant of back wages by the learned School Tribunal cannot be sustained.

21. In so far as the Format in Schedule-D is concerned, a Format in itself does not confer any right whatsoever, and is only a method in which the requirement can be depicted/solicited, and digression from a Format would not mean denial of a right conferred by Statute or accruing to a person, due to his selection.

22. As regards the contention of Shri Bhuibhar, learned Counsel for the petitioners, that the learned School Tribunal ought to have exercised the powers under Section 11(2)(e) of the MEPS Act and awarded compensation instead of reinstatement by relying on *Arvind Narayan Lajurkar* (supra), it is necessary to note that *Arvind Narayan Lajurkar* (supra) was a case in which while directing compensation instead of reinstatement, what weighed with the Court was that there were series of complaints against the teacher, whose services were terminated, regarding his unruly and abusive behaviour in the school and the charges as levelled against the employee in this regard were also proved, the termination being set aside on account of not granting an opportunity to cross-examine the witnesses, and the Tribunal, instead of directing holding of a *de novo* enquiry, had directed reinstatement. In the instant case there is no such unruly or abusive behaviour alleged against the respondent no.3 in all these petitions and there was no enquiry conducted, on account of which the case is clearly distinguishable on facts. That apart, Section 11(2)(e) of the MEPS Act, would only be attracted where the learned School Tribunal, comes to a conclusion not to reinstate an employee, in which case the question of granting any

compensation can be considered, so as to compensate the employee on account of loss of employment and possibility of getting or not getting suitable employment, which is not the case in the present matter as the learned School Tribunal, has directed reinstatement, which as indicated above, is being upheld by this Court.

23. In the result, the petitions are partly allowed. The direction of the learned School Tribunal granting back wages in all the impugned judgments, is hereby quashed and set aside. Rest of the judgment is maintained. Rule is made absolute in the above terms. No order as to costs.

(AVINASH G. GHAROTE, J.)

Wadkar