Bombay High Court Priyadarshini Education Trust ... vs Ratis (Rafia) Bano D/O Abdul ... on 16 August, 2007 Equivalent citations: 2007 (109) Bom L R 1663, 2007 (6) MhLj 667 Author: N Dabholkar Bench: N Dabholkar, M Gaikwad JUDGMENT N.V. Dabholkar, J. Page 1668 1. The appeal under Clause 15 of the Letters Patent, impugns the judgment and order passed by learned Single Judge of this High Court on 13.2.2004 in Writ Petition No. 3912 of 2000 filed by present Respondent No. 1, thereby allowing the same. 2. The factual matrix of the litigation can be described as follows. Respondent No. 1 (henceforth, referred to as "the teacher" for brevity's sake) was appointed as teacher by present appellant, on 15.6.1987. That appointment was only for one academic year and on temporary basis. She was similarly appointed on temporary basis for the academic years 1988-89 and 1989-90 and she worked (according to the appellants) upto 17.2.1990. It is the claim of the appellant-management (henceforth, "management" for the sake of brevity) that the teacher was again appointed for one academic year, i.e. 1992-93, so also for next academic year 1993-94. Here, the teacher makes a conflicting claim. According to her, she was appointed in the year 1992, on probation for a period of two years. Even the approval granted was for one academic year every time and these appointments as teacher were purely temporary and for a fixed period, which came to an end with the efflux of time. The school was run without any aid from the government till 1993-94 and grants were available since 1994-95. Upon availability of grants, an advertisement was issued by the management on 9.6.2004 and after selection, the teachers were appointed. The respondent-teacher did not apply in response to the said advertisement. Again fresh advertisement was issued in June 1995 and the teachers were appointed after selection. In July 1994, the teacher filed appeal before the School Tribunal, Aurangabad, under Section 9 of Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ("MEPS Act" for short), claiming that she was orally terminated with effect from 13.6.1994. The appeal filed by the teacher was dismissed by the Tribunal vide its judgment and order dated 31.7.1999. Even during pendency of appeal before the school tribunal, there was no interim relief in favour of the teacher. From the narration of facts, as in the judgment of the School Tribunal, it appears that there was unrest amongst the staff and they were complaining of absence of punctuality in payment of salary and there Page 1669 were complaints also of payment of part salary only. It appears that as many as 13 staff members were subjected to enblock oral termination, on 13.6.1994, and 11 of them had approached the School Tribunal and, in fact, by the common judgment dated 31.7.1999, School Tribunal has dismissed appeals of all eleven employees of school. The teacher in present case, challenged dismissal of appeal by school tribunal, by Writ Petition No. 3921 of 2000, which was allowed by the learned Single Judge vide impugned order and rule is made absolute in terms of prayer Clauses (A), (C) and (D) of the petition. Consequently, the management is directed to reinstate the teacher with full back wages from 13.6.1994 and continuity in the service. The management is also prevented from terminating her services without following due process of law. Feeling aggrieved by the said judgment, the management is before us by this Letters Patent Appeal. A copy

of common judgment dated 7.9.2001 delivered by another learned Single Judge of this High Court was produced for ready reference during the course of his submissions, by Advocate Shri Kazi for teacher. By the said judgment, Writ Petitions of as many as eight staff members were heard and disposed of together, which had challenged the same judgment dated 31.7.1999 of the School Tribunal and those Writ Petitions were also allowed, by making the rule absolute in terms of prayer Clauses (A) and (B), except the relief pertaining to back wages. 3. On reference to the judgment of the School Tribunal, it seems that the learned Member of the Tribunal has taken a note that the applicants were Assistant Teachers duly qualified and trained. However, it was observed that none of the appellants had filed the appointment orders in support of their contentions that they were serving since six years prior to filing of appeals. Only the copies of approval, which showed that the appointment was approved for academic years 1992-93 and 1993-94, were produced before the Tribunal and, therefore, the learned Member held that this was not sufficient to demonstrate that the appellants were serving with the management, continuously for a period of six years. The submission of the management that services of the appellants were on temporary basis and only for the academic years concerned, is taken a note. However, learned Judge has simply recorded that there is no record to show the appellants having served any time after academic year 1993-94. It must be said that the learned Member of the Tribunal never referred to the crux of the issue. The appellants have claimed deemed permanency, by virtue of Section 5(2) of the MEPS Act. Observing that the services of the appellants came to an end at the end of April 1994, learned Member held that the appeals filed on 8.7.1994 were time barred. Learned Member took a note of a fact that the management had issued advertisement on 9.6.1994 for filling up the posts of teachers, interviews were held and the candidates were selected. The appellants had not applied for the posts. In the meanwhile, the selected persons were appointed and were also given approval to their appointments, by the authorities in the education department. Thus, those teachers were in the service since 1994 and, therefore, there was no post vacant for accommodating the appellants. Page 1670 In the concluding part, the learned Member of the Tribunal observed that there was nothing to conclude that the management had orally terminated the services of the appellants as alleged, on 13.6.1994. 4. Learned Single Judge, in his judgment took a note of the argument of learned Counsel for the teacher that, the teacher was appointed against a clear vacancy and every year she was shown to have been appointed by a fresh order, in order to deprive her, benefit of permanency. Learned Single Judge has observed that the Presiding Officer in the absence of appointment orders, found it difficult to arrive at a conclusion, whether the teacher had rendered service for more than two years. Learned Single Judge felt that the approach of the Tribunal was superficial and it had not considered that, by specific order dated 5.10.1995, the management was directed to produce all the record pertaining to service of the petitioner-teacher. The management had not complied with the said directions. Learned Single Judge felt that due to non compliance of this specific directions, the School Tribunal ought to have drawn adverse inference against the management and, therefore,

the Tribunal could have been justified in accepting the claim, put forth by the teacher-petitioner. As discussed in paragraph 7 of the impugned judgment, learned Single Judge observed that on perusal of the record, it appeared that the appointment of the petitioner-teacher was on probation. The fact that upon termination of the petitioner-teacher and other teachers, an advertisement was issued for filling up vacancies, clearly indicated that these teachers were working in clear vacancies; that the clear vacancy was occupied by the petitioner-teacher for more than two years and that too on probation, without any adverse inference against her suitability to work. Learned Single Judge was, therefore, of the view that the management could not have terminated services of the teacher in total disregard of the law and more particularly Rule 28 of MEPS (Conditions and Service) Rules 1981. In paragraph 3 of the impugned judgment, the learned Single Judge has also taken a note that probably, the Presiding Officer of the Tribunal was much impressed by subsequent appointments in response to public advertisement and the selection process on the basis of interviews and approval to the teachers so appointed. 5. On behalf of management, it was submitted by learned Counsel Shri V.D.Salunke, that no appointment order demonstrating that the teacher was appointed on probation, is produced for inspection of the court and, therefore, the teacher cannot have benefit of Sub-section (2) of Section 5 of MEPS Act, for claiming deemed permanency. According to him, learned single judge committed an error on the issue of burden of proof, while observing that adverse inference ought to be drawn against the management, because it did not produce the record, regarding either appointment, or service of the teachers. According to learned Counsel, the teacher having approached the court, initial burden of proof was required to be discharged by her. At least the appointment order is a document, which is bound to be in the custody of the person appointed and for non production of such document, the court could not have drawn any adverse inference against the management. If the teacher had worked without any appointment order, the appointment can be seen to be patently illegal and copies of appointment orders now produced, either in the writ petition, or Page 1671 in this appeal, according to Advocate Shri Salunke, indicate that the teacher was appointed by various orders, every time for a limited period of one academic year. He has tried to explain non-scoring out of column regarding appointment on probation period, in the copy of appointment order now produced at Exh.D, by pointing out that the order quotes the appointment to be for one academic year 1992-93. He also argued that, had the teacher been appointed on probation, she would not have been appointed by fresh appointment order for next academic year, every time. Sum and substance of the argument of learned Counsel Shri V.D.Salunke is that, the teacher was never appointed on probation and merely because she occupied a clear vacancy, that will not entitle her to claim deemed permanency, by virtue of Sub-section (2) of Section 5 of MEPS Act. Replying the arguments advanced on behalf of the management, the learned Counsel Shri Kazi for the teacher submitted that the teacher does not admit to have been appointed temporarily. He has contended that the management has not produced any appointment order for the academic year 1993-94. Thus, by virtue of appointment order at Exh.D,

the teacher continued for two academic years 1992-93 and 1993-94, which is an indication of the fact that in June 1992, she was appointed on probation and not for only one academic year. Learned Advocate Shri Kazi also laid emphasis on the fact that, the similarly placed employees have successfully challenged the dismissal of their appeals, by the same judgment dated 31.7.1999 and in order to support this argument, he has produced a copy of common judgment in eight writ petitions delivered by another learned single judge, on 7.9.2001. On going through the same, it can be seen that the judgment presently under challenge, has allowed the writ petition practically on the same line of reasoning, by which earlier learned single judge had allowed writ petitions of eight teachers, whose appeals were dismissed by learned Tribunal, vide composite judgment dated 31.7.1999. Learned Advocate Shri Kazi relied upon some other material for the purpose of persuading this Court to believe that the teacher was appointed on probation and that, she has been working continuously since 1987. He has pointed out that the teacher was issued an experience certificate on 13.2.1988 (Exh. A) that she was working with the school since 15.7.1987. From the certificate at Exh.B, dated 22.3.1988, it is evident that the petitioner-teacher was allowed to join B.Ed. course. Exh.E demonstrates that the services of the teacher were also approved for the academic year 1993-94. Exh.G will demonstrate that the teacher was allowed to draw increment for the academic year 1993-94. According to learned Counsel, all these documents demonstrate that the teacher was appointed on probation. Shri Kazi thus persisted in submitting that once, it can be held that the teacher was appointed on clear vacancy and on probation, she was deemed to be permanent at the conclusion of two academic years and her services could not have been terminated without following due process of law prescribed under MEPS Act and Rules. He thus urged for dismissal of Letters Patent Appeal. Both lawyers have placed reliance upon reported judicial pronouncements, to which we shall refer as and when necessary. Page 1672 6. At the beginning of his arguments, learned Counsel Shri Kazi for the teacher, relied upon judgment of Division Bench of this Court in the matter of Mansaram Sampat v. Sambhu Harchand , wherein it has been observed that an appeal directed against judgment of learned Single Judge in exercise of jurisdiction under Article 227 of the Constitution of India, is not maintainable under Clause 15 of the Letters Patent of the High Court. However, we have benefit of referring not only to the copy of writ petition, but to the writ petition itself, since the record and proceedings was called for ready reference. It may be stated that the writ petition is titled as "In the matter of Articles 14, 16 and 226 of the Constitution of India.". Neither the teacher has approached this Court for the purpose of invoking limited jurisdiction as under Article 227 of the Constitution, nor there is any indication in the judgment of learned Single Judge that he is dealing with the matter only by exercising supervisory powers under Article 227 of the Constitution. On this aspect, following conclusions by Full Bench of Bombay High Court in the matter of Jagdish Balwant Abhyankar v. State of Maharashtra 1993, Mh.L.J. 958, may be referred to. (i). The right to elect or choose a remedy against the order of the subordinate Court or Tribunal, that is, whether to file a petition under Article 226 or under Article 227

or both under Article 226 and Article 227 of the Constitution, rests with the party aggrieved by the said order. (ii). When the party has invoked the jurisdiction of the High Court under Article 226, it is not open to the High Court to exercise jurisdiction under Article 227 of the Constitution when a relief can be granted to the party under the Article invoked. Therefore, there cannot be a test whether the High Court was justified in exercising its powers or the relief granted where under Article 227 of the Constitution. (iii). Where the facts justify filing an application either under Article 226 or under Article 227 and the party chooses to file the application under both these Articles, the Court ought to treat the application as one filed under Article 226, if the substantial part of the order appealed against is under Article 226. If in deciding such an application made under Articles 226 and 227 of the Constitution, the Single Judge of the High Court grants ancillary directions which pertain to Article 227, then by the reason of such ancillary directions being given in the order, the petition should not be treated as one under Article 227, but should be treated as one under Article 226, so that a party is not deprived of his valuable right of an intra-Court appeal under Clause 15 of the Letters Patent. When the writ petition is filed invoking jurisdiction under Article 226 of the Constitution, the conclusions drawn by the Full Bench indicate that the same should be treated as writ petition under Article 226 and not as one under Article 227, merely because some of the reliefs could have been granted Page 1673 under supervisory jurisdiction. In view of the fact that present writ petition was specifically titled as one under Article 226, we are afraid; it is not open for the teacher to claim that the same is under Article 227 and, therefore, the Letters Patent Appeal is not maintainable, and more so when it was a writ petition by the teacher-Respondent No. 1. The submission of learned Counsel Shri Kazi that the decision of learned Single Judge is under Article 227 and therefore, L.P.A. is not maintainable, has no force. 7. As stated earlier, both the sides have relied upon quite a considerable number of judicial pronouncements and we intend to take into consideration, the ratio relied upon by each side on various aspects. , Hindustan Education Society v. Sk. Kalam Sk. Gulam Nabi, was relied upon by Advocate Shri Salunke for the management and his emphasis was upon the following observations. In view of the above (Section 5 of MEPS Act) and the order of appointment, the appointment of the respondent was purely temporary for a 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. In the reported matter, the appointment order clearly indicated that the appointment was purely temporary and for a period of eleven months from 11.6.1992. It also indicated that after expiry of above period, services of Respondent shall stand terminated without any notice. It was, therefore, submitted by Advocate Shri Salunke that where the appointment letter states that the appointment, although in a clear vacancy, is purely temporary, the appointment should be treated as purely temporary

and it cannot be considered to be permanent appointment and the employee cannot be treated as regularly appointed employee. According to Advocate Shri Salunke, Exhibit D, the appointment order dated 13.6.1992, upon which the teacher is placing heavy reliance, states in paragraph 2 that the appointment was only for one academic year 1992-93 and on purely temporary basis, which would come to an end at the end of period mentioned therein, without requiring any notice. In the matter of Nazira Begum Lashkar v. State of Asam 2000 AIR SCW 3959, which was a matter under Asam Elementary Education (Provincialisation) Rules, 1977, it was observed; Since the appointments to the posts are governed by a set of statutory rules, and the prescribed procedure therein had not been followed and on the other hand appointments have been made indiscriminately, immediately after posts were allotted to different Districts at the behest of some unseen hands, such appointments would not confer any right on the appointee nor such appointee can claim even any equitable relief from any Court. Page 1674 Relying upon observations of the Supreme Court in the facts and circumstances of the case, it was submitted by learned Counsel for the appellant that the appointments not made in accordance with statutory rules and without any advertisement, without calling for applications and without constitution of any selection committee and without any interviews, would not confer any right upon the appointee. In the matter of Bharatiya Gramin Punarrachana Sanstha v. Vijay Kumar and Ors. , relying upon observations of the Supreme Court in para 7, it was submitted by Advocate Shri Salunke that provisions in the statute, regarding deemed confirmation as contained in Section 5(2) on completion of statutory period of probation of a person, who was put on probation consequent to his appointment in a permanent vacancy, would not be applicable to a person like Respondent No. 1- teacher, who was appointed only for a specific period and without being put on probation. In the matter of Anna Pethe v. Presiding Officer, School Tribunal 1997 (3) Mh.L.J. 697, relied upon by Advocate Shri Salunke, a Division Bench of the Bombay High Court has observed that, temporary appointees are not entitled to claim permanent status, unless permanent vacancies are filled in as per Section 5 of the Act and the rules thereunder. Lastly, decision of learned Single Judge of this High Court in the matter of A.P. College and Ors. v. Mrs. Pramila N. Kutti 1997 (3) Mh.L.J. 195, is relied upon by Advocate Shri Salunke for the purpose of propounding that there was no necessity to serve a notice, as required by Rule 28 (1) of MEPS Rules, upon the teacher before terminating her services. It is held by learned Single Judge that where appointment of temporary employee is made for a fixed period and services of such temporary employee came to an end on the expiry of that period, notice under Rule 28(1) was not required, nor specific termination order was necessary to be passed. While relying upon these reported judgments, it was contended by Advocate Shri Salunke that Exh.D is an order, by which the teacher was appointed on purely temporary basis for a period of one academic year and her services were to come to an end without requiring notice for the purpose. 8. Advocate Shri Kazi for the teacher, has placed reliance upon couple of judgments on the issue of backwages. In the matter of Progressive Education Society v. Nitin , it was held; When the employee is forbidden from performing

his duties for no fault on his part and entirely on account of arbitrary action on the part of the management, certainly the employee would be entitled for the entire backwages. Merely because by way of an interim order, the Tribunal's order was stayed during the pendency and hearing of the petition, that does not create any right in favour of the Management to contend that they would deny the backwages to the employee when the employee Page 1675 was not allowed to perform his duties not on account of any fault on his part but on account of unsustainable decision by the Management. In , Gurpreet Singh v. State of Punjab, the Honourable Supreme Court has laid down that, once the termination was set aside, consequential benefits, such as, continuity of service and backwages, could not be denied. Although, in the reported matter, order denied arrears of salary for the period for which the petitioner had not served, the same was confirmed by the Supreme Court in the facts and circumstances of that case. Other cases relied upon by Advocate Shri Kazi, are pertaining to the circumstances in which the petitioner can be said to be deemed permanent employee and requirements for her removal, aimed at demonstrating that oral termination of the petitioner was illegal. In Ramchandar v. Hyderabad (Sindh) National Collegiate Board, the petitioner was appointed against a clear permanent vacancy of peon. His appointment was also not for a fixed period and hence, it was held; Mere use of the word "temporary" by itself will not make the appointment temporary. The order of the Education Officer granting or refusing to grant approval is not relevant to decide the status of the petitioner because the question of grant of approval is between the Education Officer and the management and the same is relevant only for the purposes of grant-in-aid by the State Government. Thus, when appointment was in clear permanent vacancy and not for a limited period, it was held that the use of word "temporary" in the appointment order, by itself was not sufficient to make the appointment temporary. In the matter at hands, there is debate on the question of fact that the appointment by order dated 13.6.1992 was on probation for a period of two years, or it was purely temporary for one academic year, although there is a room to believe that the appointment was in a clear permanent vacancy, as is evident from the fact that after removal of eleven staff members, the management went in for an advertisement for recruitment. In AIR 1988 S.C.684 G.C. Gupta v. N.K. Pandey, reliance is placed upon paragraph 14 to following effect. If the appointment is to a post and the capacity in which the appointment is made is of indefinite duration, if the Public Service Commission has been consulted and has approved, if the tests prescribed have been taken and passed, if probation has been prescribed and has been approved, one may well say that the post was held by the incumbent in a substantive capacity. It was a case, wherein temporary Assistant Engineers were claiming to be entitled to the benefit of their seniority reckoned according to the date of appointment to the service in terms of Rule 23 of the United Provinces Service of Engineers (Building and Roads Branch) Rules, 1936. Page 1676 In the light of strict test as incorporated in the quotation hereinabove, we are unable to appreciate as to how the observations assist the cause of present respondent No. 1-teacher. Apart from a stray reference in paragraph 4 of the writ petition to the effect, "in

spite of her due selection and appointment as Assistant Teacher", there are no other details / claims that there was an advertisement either in the year 1987 or in 1992, that the petitioner-teacher was subjected to any test, written or oral, and that she was selected after competition with other applicants. In the matter of President, Mahila Mandal, Sinnar v. Sunita Bansidhar Patole 2007 (2) AIR Bom R 583, following observations of learned Single Judge of this High Court in paragraph 14, are relied upon. Once it is clear that the post wherein the respondent was appointed was a permanent vacancy, unless it is specifically disclosed by the Roster that the same was meant to be filled in by appointment of a reserved category candidate, the provisions of Section 5(1) of the M.E.P.S. Act are clearly attracted. In the case in hand, it is not in dispute that the post which was occupied by the respondent was a permanent vacancy. The contention that it was for reserved category candidate is already found to be devoid of substance. Obviously, when the respondent was duly selected and appointed by issuing appropriate order of appointment on 1st July, 1988, the same was to be considered as in terms of the provisions of law comprised under Section 5(1). Once there is an appointment in accordance with the provisions of law comprised under Section 5(1) and the candidate so appointed completes period of two years of service, the provisions of Section 5(2) are naturally attracted. We have highlighted later half for the purpose of emphasis and it indicates that for deemed confirmation to come into play, it is necessary that the teacher must be duly selected and appointed, his appointment must be on a clear permanent vacancy and once these requirements are fulfilled, he would be benefiting by Section 5(2) on completion of service for two years. We have already indicated hereinabove that in the writ petition, there is hardly anything to indicate that the teacher in our case was appointed after due process of selection either in the year 1987 or in the year 1992. Another judgment of learned Single Judge of this High Court in the matter of Niraj Singh (Ms) v. Shishu Vihar Mandal 2007(2) Mh.L.J. 535, was relied upon by the learned Counsel for the teacher, wherein, it is observed; When the appointment is on probation, the management is entitled to termination of services of candidate, by one month's notice or on payment of salary of one month in lieu of such period of notice. In our opinion, the case is not at all applicable to the facts of the case on hands, because it is not the say of the management that the teacher in our case was appointed on probation, or that her services were terminated by the management by giving any notice. It is an admitted position that no notice was served on the teacher, nor salary in lieu of such notice was paid to her, by the management. The management is consistently pleading that the appointment of the teacher was for a limited period. Page 1677 In Shikshan Prasarak Mandal v. Presiding Officer, School Tribunal , the appointment order only specified that the appointment was purely temporary for a particular sessions, without mentioning the nature of vacancy and that at the end of that sessions, services of the respondent shall come to an end without any notice. It was in those circumstances, the removal of respondent, after having put in 17-18 years service without notice under Rule 28(1), was held to bad in law. In Adarsh Education Society v. State of Mah. , it was held that temporary employee cannot be kept in suspended animation for indefinite pe-

riod. The Respondent-teacher, who had put in six years service without break, was held, did not continue in temporary capacity, though initially appointed temporarily. 9. The gist of various cases relied upon by both the counsel can be drawn as under. 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. In the matter at hands, it is the claim of the teacher that she was appointed on probation and for that purpose, she has relied upon order dated 13.6.1992 at Exhibit D, although it is her claim that she is in continuous service since 1987. According to the management, the order is not an order regarding appointment on probation, but the same is an order of appointment purely on temporary basis for one academic year. It is also a question of debate whether the teacher was "duly appointed." In order to demonstrate that the order was regarding appointment for a fixed period and also for claiming that it was an appointment on probation, both the learned Advocates have placed reliance upon Exhibit D. Advocate Shri Salunke for the appellant has pointed out that the order clearly indicates that it was for academic year 1992-93 and it does contain a clause that on expiry of the said period, the services of the teacher shall stand terminated without requiring any notice. As against this, Advocate Shri Kazi pointed out that clause in the order pertaining to appointment on probation, which is in the form as prescribed by schedule D, is not scored out and, therefore, it must be said that the appointment was on probation for a period of two years. As Advocate Shri Salunke pointed out that if the appointment was on probation, the teacher would not have accepted fresh order at the beginning of each academic year, Advocate Shri Kazi replied that no Page 1678 fresh appointment order was issued for academic year 1993-94 and, therefore, order dated 13.6.1992 must be taken as an order of appointment on probation. Shri Kazi has also relied upon other documents, such as, experience certificate issued sometime in the year 1988 and also a certificate, indicating the management having accorded no objection to the teacher going for B. Ed. course and details regarding salary which indicate the teacher having been permitted to draw an increment. Our query that the teacher must demonstrate that she is duly appointed, in order to claim that her appointment was on probation, although the teacher has not come before this Court with support of copy of advertisement in response to which she had applied, or even claiming in the petition that the advertisement had occurred in the newspaper; that she had responded to it; that she was subjected to competitive examination, screening test etc., Advocate Shri Kazi pleaded that the teacher was duly appointed as contended in the petition. In the alternative, he submitted that the teacher does not belong to reserved category and tried to demonstrate from the rules that for open category candidate, there is no need for issuing an advertisement or inviting applications and holding competitive examination. 10. Section 5,

Sub-section (2), on the basis of which deemed permanency and, therefore, irregularity in the removal, is pleaded, and Sub-section (1) of the said Section which is required to be referred for the purpose of determining whether the teacher was "duly appointed", may usefully be reproduced hereinbelow, including proviso to Sub-section (1). ". Certain obligations of Management of private Schools: (1) The Management shall, as soon as possible, fill in, in the manner prescribed, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy; [Provided that unless such vacancy is to be filled in by promotion, the Management shall, before proceeding to fill such vacancy, ascertain from the Educational Inspector, Greater Bombay, [the Education Officer, Zilla Parishad, or as the case may be, the Director or the officer designated by the Director in respect of schools imparting technical, vocational, art or special education] whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools; and in the event of such person being available, the Management shall appoint that person in such vacancy]. (2). Every person appointed to fill a permanent vacancy shall be on probation for a period of two years. Subject to the provisions of Sub-sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed. It is evident that, Sub-section (1) contains a clause,"... fill in, in the manner prescribed, every permanent vacancy in a private school... " . It is thus, evident that there is some manner prescribed and every permanent vacancy is required to be filled in by following the prescribed method. In fact, on reference to the proviso, it is evident that no appointment in a permanent Page 1679 vacancy will be without previous intimation to the Educational Inspector, Greater Bombay in the metropolitan city and to the Education Officer, Zilla Parishad, in other area of the State. The school is required to make a reference to the authorities concerned, before filling in any permanent vacancy, so that the persons declared surplus elsewhere, of which the account is required to be kept by the Education Officer, can be accommodated first. Although Rule 28 of MEPS Rules was repeatedly relied upon by learned Advocate Shri Kazi for the teacher, we are of a considered view that, the said rule is not required to be considered for the purpose of present matter, in the light of factual claims by the parties. Relevant portion of Rule 28(1) reads thus; 28. Removal or Termination of Service: (1) The services of a temporary employee other than on probation may be terminated by the Management at any time without assigning any reason after giving one calender month's notice or by paying one month's salary (pay and allowances, if any) in lieu of notice. It must be remembered that the teacher has come with a case that she was appointed on probation. If such an argument can be upheld, the teacher does not require assistance of Rule 28. If such a contention is not upheld, it is the claim of the management that she was appointed for a limited period and her appointment came to an end by efflux of time, on expiry of period for which she was appointed and the management is well supported in claiming that in such a case, notice under Section 28 (1) is not required, by the judgment of this Court in the matter of A.P. College v. Smt. Pramila Kutti 1997 (3) Mh.L.J. (supra). Rule 9 of the MEPS Rules, is regarding appointment of staff. For the purpose

of matter before us, we may reproduce Sub-rules 2, 3 and 8 of Rule 9 which read thus; 9. Appointment of staff: (1) xxxxxxxxxxx (2) Appointments of teaching staff (other than the Head and Assistant Head) and those of non-teaching staff in a school shall be made by the School Committee; Provided that, appointments in leave vacancies of a short duration not exceeding three months, may be made by the Head, if so authorised by the School Committee. (3). Unless otherwise provided in these rules for every appointment to be made in a school, for a teaching or a non teaching post, the candidates eligible for appointment and desirous of applying for such post shall make an application in writing giving full details regarding name, address, date of birth, educational and professional qualifications, experience etc., attaching true copies of the original certificates. It shall not be necessary for candidates other than those belonging to the various sections of backward communities for whom posts are reserved under Sub-rule (7) to state their castes in their applications. Page 1680 4. xxx 5. xxx 6. xxx 7. xxx 8. For the purpose of filling up the vacancies reserved under Sub-rule (7) the Management shall advertise the vacancies in at least one newspaper having wide circulation in the region and also notify the vacancies to the Employment Exchange of the District and to the District Social Welfare Officer [and to the associations or organizations of persons belonging to Backward Classes, by whatever names such associations or organizations are called and which are recognized by Government for the purpose of this Sub-rule] requisitioning the names of qualified personnel, if any, registered with them. If it is not possible to fill in the reserved post from amongst candidates, if any, who have applied in response to the advertisement or whose names are recommended by the Employment Exchange or the District Social Welfare Officer [or such associations or organizations as aforesaid] or if no such names are recommended by the Employment Exchange or the District Social Officer [or such associations or organizations as aforesaid] within a period of one month, the Management may proceed to fill up the reserved post in accordance with the provisions of Sub-rule (9). The constitution of school committee referred in Sub-rule 2 of Rule 9 is as provided in schedule A. It consists of four representatives of management, including president or his nominee to be the chairman, a member from amongst the permanent teachers and any member from amongst the non-teaching staff. While referring to all these provisions of the Act and rules, we must remind ourselves the purpose in legislating the Act, which we find place in its preamble which reads; WHEREAS, it is expedient to regulate the recruitment and conditions of service of employees in certain private schools in the State, with a view to providing such employees security and stability of service to enable them to discharge their duties to the pupils and their guardians in particular, and the institution and society in general, effectively and efficiently.... It is thus evident that one of the purposes for enacting MEPS (Conditions of service) Regulation Act, is to regulate the recruitment and, therefore, the provisions either of the Act or Rules relating to recruitment/appointment must be read as a provisions enabling the State to control the actions of the private schools in that region. 11. It was argued by Advocate Shri Kazi that Rule 9 is the only rule, regarding the manner of appointment of staff and, therefore, the procedure as contained in

this rule, must be taken as "in the manner prescribed" as contemplated by Sub-section (1) of Section 5. He also referred to Sub-rule (8) and pointed out that the the said sub-rule makes a provision for advertisement of the vacancy in at least one newspaper having wide circulation, when the Page 1681 management desires to fill in the vacancies reserved for SC/ST/DTNT/OBC. According to him, Sub-rule (3) makes no such provision and, therefore, it must be inferred that there is no necessity to issue an advertisement for the purpose of filling up vacancies of open category. We are unable to appreciate, much less accept, such an argument. Referring to proviso to Sub-section (1) of Section 5 of the Act, it is evident that, as soon as there is vacancy, the management is required to communicate with the Education Officer, Zilla Parishad. The vacancy is to be filled in, from the list of surplus persons maintained by the Education Officer. This is the first indication of control of the State over the recruitment and appointment of staff, even of private schools. Even on reference to Sub-rule (3) of rule 9, the candidate eligible for appointment and desirous of applying for such post, is required to apply in writing, by giving full details. We are unable to visualise a possibility of deserving candidate knowing about the vacancies in any private schools, unless the school invites applications by advertisement. The persons, who may learn about vacancies without advertisement, may only be kith and kins or those in close contact with the management or at the most staff members. If argument of Advocate Shri Kazi is to be accepted, it will be tantamount to accepting that rule 9 is drafted in such a manner as to promote nepotism, so far as appointments of open category candidates to teaching and non-teaching posts in private schools are concerned. If the argument of Advocate Shri Kazi is to be accepted, rule 9 will have to be read in a fashion, where reserved category candidates are required to enter the service by competing amongst themselves, but an open category candidate may be in a position to seek an appointment without competing. Legislature could not have intended to prescribe a manner of recruitment which would discriminate between reserved and un-reserved categories in respect of manner in which they can seek appointments. A legislation making it easier for a reserved candidate, may be justified, in view of Article 15(4) of the Constitution. But, a reverse position cannot be justified by any line of argument. Article 14 guarantees equality before law and Article 16 gives equality of opportunity in the matter of public employment. Article 16(1) reads; 16. Equality of opportunity in matters of public employment. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. In case we are to accept the submission as advanced by Advocate Shri Kazi, Rule 9 not only creates a discrimination in the recruitment and appointments of candidates between reserved and unreserved categories (making it more difficult for the reserved categories), but it also denies equal opportunity for all citizens desirous of seeking employment/appointment. In the absence of any advertisement, only those favoured by nepotism will be able to seek employment/appointments at the cost of all equally placed and desirous candidates, who are ignorant of such vacancies. Any procedure for recruitment/appointment, which does not afford equal opportunity to all eligible and deserving candidates to compete for seeking appointment

and employment, must be seen and termed as unconstitutional as being violative of Articles 14 and 16(1). Page 1682 On reference to Rule 9 Sub-Rule 2, it can be seen that appointments of teaching and non-teaching staff are required to be done by the School Committee and only the short term appointments in leave vacancies, of a duration not exceeding three months are permitted to be done by the Head, if so authorized by the School Committee. In this context, we may also refer to the text of Sub-Section 2 of Section 5, which is already re-produced hereinabove. From the opening part "every person appointed to fill in permanent vacancy shall be on probation for a period of two years. . . ", it is evident that once a person is selected in the manner prescribed and duly appointed, the Management or the School Committee has no option. Such a person must be appointed on probation. If there is a permanent vacancy and if a person duly qualified is selected in the manner prescribed and then duly appointed, the Management has no choice or option to appoint him for a limited period such as one academic year or shorter than that. Thus, although Sub-rule (3) of rule (9) does not specifically speak of requirement of publication of vacancies by an advertisement and inviting applications from candidates eligible and desirous of seeking appointment, as Sub-rule (8) speaks for the purpose of filling up the vacancies reserved under Sub-rule (7), requirement of such an advertisement must be read within the provisions for the reasons discussed hereinabove and which may be summarized, at the cost of repetition as follows. (i) Statute is enacted for the purpose of regulating the recruitment in private schools in the State. (ii) Interpretation that Sub-rule 3 of rule 9 does not prescribe publication of advertisement, when read in the light of Sub-rule 8, would be discriminatory and capable of promoting arbitrariness and nepotism. (iii) Such an interpretation would be against the spirit of Articles 14 and 16 of the Constitution, and therefore, interpretation which would make rule 9 unconstitutional will have to be rejected. (iv) When Sub-section 2 of Section 5 compels the Management to appoint eligible, duly selected candidate only on probation, the backdoor entry of a person who alone knows about existence of vacancy cannot be accepted as palatable interpretation either of Rule 9 or Section 5 read with Rule 9. 12. In the matter of Narendra Kumar v. State of Haryana , which was a case of an employee physically incapacitated due to disease, while directing his absorption in another suitable post, the Hon'ble the Supreme Court has observed that Article 21 protects the right to livelihood as the integral facet of right to life. In the matter of All India Statutory Corporation and Ors. v. United Labour Union and Ors. , following observations Page 1683 regarding right to work in the light of Article 21 read with Article 14 of the Constitution find place in paragraph 50 of the judgement. All essential facilities and opportunities to the poor people are fundamental means to development, to live with minimum comforts, food, shelter, clothing and health. Due to economic constraints, though right to work was not declared as a fundamental right, right to work of workman, lower class, middle class and poor people is a means to development and source to earn livelihood. Though, right to employment cannot, as a right, be claimed but after the appointment to a post or an office, be it under the State, its agency, instrumentality, juristic person or private entrepreneur, it is required to be dealt

with as per public element and to act in public interest assuring equality, which is a genus of Article 14 and all other concomitant rights emanating therefrom are species to make their right to life and dignity of person real and meaningful. The observations speak about right to employment, even as against private entrepreneur and not only regarding public employment. The fundamental rights guaranteed by Articles 14 and 16 cannot be denied to the citizens even by the private entrepreneur. We are tempted to borrow the observations of the Apex Court in the matter of Olga Tellis v. Bombay Municipal Corporation , which are borrowed in Delhi Transport Corporation v. D.T.C. Mazdoor Congress , which are to the following effect. In Olga Tellis v. Bombay Municipal Corporation pages 193-94, this Court further laid that an equally important facet of the right to life is the right to livelihood because no person can live without the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.... That, which alone can make it possible to live, leave aside which makes life liveable, must be deemed to be an integral component of the right to life.... The motive force which propels their desertion of their hearths and homes in the village is the struggle for survival, that is the struggle for life. So unimpeachable is the nexus between life and the means of livelihood. Right to life does not only mean physical existence but includes basic human dignity. In the same paragraph 239 of the judgement in the matter of Delhi Transport Corporation, observations of the Hon'ble Chinnappa Reddy, J. in the matter of State of Maharashtra v. Chander Bhan (1983) 3 SCR 387 are also borrowed which read thus. Public employment opportunity is a national wealth in which all citizens are equally entitled to share and Varadarajan, J. held that public employment is the property of the nation which has to be shared equally. Page 1684 Lastly, we may refer to some observations of the Hon'ble Apex Court in the matter of Secretary, State of Karnataka v. Umadevi . We are referring these observations, which remind us of keeping in mind the interest of all citizens and equality guaranteed by Articles 14 and 16 i.e. equality before the law/equal protection of law and equality of opportunity in the matter of public employment. The observations also provide an answer to possible argument that the management is at fault in not appointing the teacher in the due manner and after having served for number of years, it is desirable that the teacher should be protected, because MEPS Act is enacted also for the purpose of providing security and stability of service to the teachers. The Hon'ble Apex Court has observed thus, in paragraph 51 of the judgment; In the name of individualising justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. In spite of rejecting the argument that right to life protected by Article 21 of the Constitution would include right to employment, the Supreme Court observed that it will be more consistent with that policy, if the courts recognize that an appointment to a post in government service,

or in the service of its instrumentality can only be by way of proper selection in the manner recognized by the relevant legislation in the context of relevant provisions of the Constitution. In para 5 of the reported judgment, the Supreme Court has observed; ... Equality for the handful of people who have approached the court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for competing for employment ? When one side of the coin is considered, the other side of the coin has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the constitutional scheme, certainly tend to water down the constitutional requirements. Helplessness of the person, who accepted the employment/engagement by irregular means, or of temporary nature, because he is not in a position to bargain and the claims, therefore, either for regularization or permanency, are dealt with as under, by observations in paragraph 45. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain-not at arm's length- since he might have been Page 1685 searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. The judgment in the reported matter opens with following observations in paragraph 2; Public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated as equals. No doubt, the observations borrowed by us from the matter of Umadevi (supra), as also Article 16, speak about employment or appointment to any office under the State or its instrumentality. When we drew attention of learned Advocate Shri Kazi for the teacher to the observations of the Supreme Court in Umadevi's case, he could have argued that the management is neither "State" nor "instrumentality of State". However, it cannot be ignored that the school is a grant-in-aid school and, therefore, as is the practice in the State, it must be receiving entire amounts required for paying salaries and allowances to the teaching and non-teaching staff, by way of grants. It must also be enjoying non-salary grants. Although under the scheme in vogue in the State, the management is required to run the school without grant-in-aid for first three years and grants start flowing thereafter, intially 25 per cent, then 50 per cent, 75 per cent and thereafter 100 per cent, it may not be out of place to say here that after about 7 to 8 years since commencement of the school, financial assistance of the State by way of salary and non salary grants is so much that, it nearly meets almost entire expenditure. By virtue of Articles 41 and 45, as contained

in the chapter for directive principles of State policy, it is the responsibility of the State to endeavour to provide free and compulsory education for all children until they complete the age of 14 years and make effective provison for securing right to education, although subject to financial constraints. It cannot be denied that as a social welfare State, it would be the responsibility of the State to ensure sufficient means for imparting proper education to children of all age groups and, therefore, to some extent, it must be said; the school performs function of public interest and shares responsibility, which is the responsibility of the State. Since the grant-in-aid is released by the State, the State exercises some control for ensuring proper utilization of grants by the management, although not very deep and pervasive. In view of these elements, even if an educational institution may not be "State", or "instrumentality of State" or "other authority" as contemplated by Article 12 of the Constitution, it will not be in a position to act as an autonomous body, having no responsibility to Page 1686 ensure protection of fundamental rights conferred by Article 14 and 16 upon the citizens. The educational institutions shall not be able to treat themselves at par with private employer who pays salaries and allowances from his own pockets, even when initially the school is being run by the management with its own expenses, but in anticipation of receipt of grants-in-aid from 4th academic year as per permission to run the school is granted. In view of the provisions as contained in Section 5 of the MEPS Act and Rule 9 of MEPS Rules read with Articles 14 and 16 of the Constitution and the observations of the Hon'ble Apex Court in the reported judgment which guide us, we draw following conclusions; (i). "duly appointed, in the manner prescribed" would be an appointment of a person who is eligible (qualified for the post) for appointment, who is selected by due process of selection i.e. by competition amongst all eligible and desirous candidates, and who is appointed on a permanent vacant post. In other words, inviting applications, as also holding of screening tests, enabling all eligible and desirous candidates to compete for selection and appointment, is a must. (ii). Once an eligible candidate (duly qualified as required) is selected by selection process as above, for filling in a permanent vacancy, there is no option for the management and it is obligatory on it to appoint such person on probation for a period of two years. It is neither open for the management to appoint him for one academic year or any period shorter than two years probation period, nor it is open for Education Officer to grant approval for such shorter period.(in fact, in view of requirement as in Clause (i) above, the process of grant of approval by Education Officer should begin with examination of selection process and its validity.) (iii). The candidate thus selected with due process and appointed on probation shall enjoy statues of deemed permanency on completion of two years, unless extension of probation is informed, or termination is ordered. (iv). The appointment of a person not belonging to reserved category, in a post reserved for a particular category, because the candidate of that category is not available, shall be absolutely temporary and on an year to year basis, governed by Sub-rule (9) of Rule (9), although in a permanent vacancy. 13. Coming to the facts of the case before us, following are the details in the Writ Petition, regarding appointment of the petitioner-teacher. ". She is appointed as an As-

sistant Teacher in the National Urdu High School, Beed, under the control of Respondent Nos. 1 and 2 herein, on 15.6.1987" (para 1)" She is continuously working as Assistant Teacher, since then i.e. 15.6.1987. Though the appointment order was not given to her every year in spite of her "due selection" and on appointment as an Assistant Teacher, she was signing muster roll maintained by the school administration, since then. (para 4). Page 1687 Thus, it is evident that although the petitioner-teacher claims her appointment after due selection and working since 15.6.1987, admittedly, no appointment order is issued to her by the management for all these past years (learned Single Judge has drawn adverse inference against the management, because in spite of order passed by the Tribunal, the management did not produce service record of the teacher. In fact, it is the case of the teacher that she was not issued any appointment orders in the past.) While arguing the matter before us, the appointment order (Exh.D) dated 13.6.1992, is relied upon. It is not pleaded in the petition that there was any advertisement soon before June 1992 to which the petitioner had responded, or that she was subjected to selection process. Except bare words "due selection", there are no other details about the manner of selection of the petitioner in June-1987. It is, therefore, factually difficult to accept that the teacher is a candidate appointed by following due process of selection. If that be so, it would not be obligatory on the management to appoint her on probation. Exhibit A is the experience certificate issued by the Head Master on 13.2.1988 stating that the teacher is working since 15.6.1987. By certificate (Exh.B) dated 22.3.1988, it is certified that the management has granted the teacher, permission to join B.Ed. (vacation) course commencing on 3.5.1988. In Exh.C, nature of approval to the appointment of the teacher for academic year 1992-93 is not indicated in the column reserved for the purpose. In Exh.E, approval to appointment of the teacher is limited for academic year 1993-94. None of these documents relied upon by the learned Counsel Shri Kazi for the teacher, can convince us that the appointment of the teacher was on probation. No doubt, in Exhibit G which is said to be a copy of salary bill for April 1994 to 12.6.1994, basic pay of the teacher is shown to be Rs. 1440/= in the pay-scale of Rs. 1400-2600 and, therefore, there is room to believe that she might have been allowed to draw one increment, but Exhibit D is the main document which is the order of appointment dated 13.6.1992, which is in the form prescribed in Schedule D and unfortunately, no portion from Clause (2) is scored-out as "inapplicable" part. The later half of Clause (2) is regarding appointment being on probation for a period of two years. This part will be available to the teacher only if first part is scored out which states that the appointment of the teacher is for a limited period, of temporary nature and the same would come to an end on expiry of period, without any notice. Although later half of Clause (2) is not scored out, in the first part of Clause (2), education year 1992-93 is inserted. In view of the fact that the period of appointment is quoted in the appointment order (Exh.D), it must be treated as an appointment for a limited period of one academic year. Although it appears that the teacher continued for academic year 1993-94 and probably she was also allowed to draw an increment, illegalities committed by mutual consent cannot confer legal sanction

to the appointment of the petitioner. Page 1688 14. Learned Single Judge has found the judgment of the tribunal to be not sustainable, because he was of the view that the fact of subsequent selection of teachers from the candidates in response to advertisement issued in June 1994 and June 1995, has impressed the tribunal and the tribunal did not give consideration to the fact that the petitioner-teacher has continuously worked for more than two years in a clear permanent vacancy. Learned Single Judge felt compelled to draw adverse inference against the management, because it did not produce service record of the teacher in spite of directions. We have demonstrated from the contents of the petition that there is no service record prior to 1992 and the appointment order dated 13.6.1992 is produced by the petitioner-teacher. It cannot be forgotten that the teacher having approached the court, initial burden of proof lies on the petitioner. Adverse inference, as drawn by learned Single Judge, could have been justified, only after satisfaction that the petitioner has discharged initial burden. The appointment order in the custody of the petitioner is the primary evidence and unless she could have made out a case of having acquired right to lead secondary evidence, neither management could have been invited to produce the document, nor any adverse inference could be drawn against it. Appointment order is a document, original of which ought to be in the custody of the candidate appointed. We are, therefore, unable to concur with the learned Single Judge that non-production of the documents by the management can provide a key for success to the teacher-petitioner. 15. Learned Counsel Shri Kazi for the teacher, relied upon the judgment of the learned Single Judge by which writ petitions of eight other staff members of this very management are allowed and the said decision is acquiesced to by the management. Being a decision of learned Single Judge, the same is not binding on us, nor we are required to follow the same as a judicial discipline, as we could have done so in the case of a decision of coram of equal strength or larger strength. 16. For all the reasons discussed hereinabove, we are unable to accept the contention of the teacher that she was appointed on probation for a period of two years. On the contrary, the teacher has not been able to satisfy that she is appointed by following due process of selection. The writ petition, therefore, ought to have been dismissed. 17. We are, therefore, inclined to allow the Letters Patent Appeal. The judgment and order passed by the learned Single Judge dated 13.2.2004, making rule absolute in terms of prayer Clause (A), (C) and (D) of Writ Petition No. 3912 of 2000 is, therefore, quashed and set aside. Writ Petition is dismissed. Rule discharged and the Letters Patent Appeal is, accordingly, disposed of.