IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 5998 OF 2019

1. Gramin Yuvak Vikas Shikshan
   Mandal Kinhi Naik, Office at
   Kinhi Naik, Taluka Chikhli,
   Buldhana, Through its President.

2. The Head Master, Adiwasi
   Madhyamik Wa Uchmadhyamik
   Ashram Shala Kinhi Naik, Taluka
   Chikhli, District: Buldhana.

.... PETITIONERS.

// VERSUS //

1. Shivnarayan Datta Raut,
   aged about : Adult, R/o. Dhayfal,
   At Post : Tambola, Taluka :
   Lonar, District: Buldhana.

2. The Project Officer,
   Ekatmik Aadivasi Vikas Prakalp
   Akola, Taluka and District: Akola.

.... RESPONDENTS.

Shri M.M.Agnihotri, Shri Mayank Agnihotri, Shri P.L.Sagdeo & Shri S.Z.Quazi, Advocates for Petitioners.
Ms Radhika Bajaj, Shri A.D.Mohgaonkar, Shri D.A.Mohgaonkar, Ms Aakansha Mohgaonkar, Advocates for Respondent No.1.
Ms Ketki Joshi, Addl. G.P. for Respondent No.2.
Shri Uday Dastane, Advocate and Shri S.P.Bhandarkar, Advocate (Proposers)

CORAM : SUNIL B. SHUKRE, AVINASH G.GHAROTE AND ANIL S. KILOR, JJ.
DATE OF RESERVING THE JUDGMENT : 18/11/2022
DATE OF PRONOUNCING THE JUDGMENT: 30/05/2023

JUDGMENT : (Per : Anil S. Kilor, J)

1. Heard.

2. This is a reference made to a Larger Bench by the learned Single Judge on the following questions:

(i) Whether only sub-rule (6) of Rule 15 of the MEPS Rules applies to an employee appointed on probation when the Management seeks to take action under Section 5(3) of the MEPS Act or entire Rule 15 from sub-rules (1) to (6) of the MEPS Rules apply to such an employee appointed on probation?

(ii) Whether judgment of the Hon'ble Supreme Court in the case of **Progressive Education Society and another v. Rajendra and another** (supra) lays down that entire Rule 15 of the MEPS Rules applies to an employee appointed on probation, particularly in the context of power available to the Management under Section 5(3) of the MEPS Act?

(iii) Whether failure to adhere to requirements of sub-rules (3) and (5) of Rule 15 of the MEPS Rules would *ipso facto* vitiate an action taken by the Management under Section 5(3) of the MEPS Act, despite the fact that the Management satisfies requirement of sub-rule (6) of Rule 15 of the MEPS

Rules by ensuring that performance of an employee appointed on probation has been objectively assessed by the Head and record of such an assessment has been maintained?

(iv) Whether non-compliance of sub-rule (5) of Rule 15 of the MEPS Rules would vitiate an order of termination of service simpliciter issued by the Management under Section 5(3) of the MEPS Act when the said sub-rule deems that "work of an employee is satisfactory", while Section 5(3) of the MEPS Act gives power to the Management to terminate the service of an employee appointed on probation not only for "unsatisfactory work", but also for "unsatisfactory behaviour"?

(v) Whether it would be sufficient compliance on the part of the Management while acting under Section 5(3) of the MEPS Act, if it complies with only sub-rule (6) of Rule 15 of the MEPS Rules by ensuring that the performance of an employee appointed on probation is objectively assessed and the Head maintains record of such assessment, and principles of natural justice stand satisfied by issuing notices/warnings for unsatisfactory work to such an employee appointed on probation, considering the limited rights available to such an employee as per law laid down from the case of **Parshotam Lal Dhingra v. Union of India** (supra) in the year 1958 and onwards?

3. The reference was made by the learned Single Judge in the following backdrop:

The petitioner No.1, Society and petitioner No.2, Head of the School filed the Writ Petition No.5998 of 2019, raising a question to the correctness and legality of the judgment and order dated 06/08/2019 passed by the School Tribunal, Amravati, in Appeal No.49 of 2016, thereby quashing and setting aside the termination order dated 09/07/2016, of the respondent No.1 and directing the petitioners to reinstate the respondent No.1 with back wages.

4. In the appeal before the Tribunal, it was the grievance of the respondent No.1 that he was appointed on the post of Shikshan Sevak in petitioner No.2 school on 30/08/2013 and his appointment was approved by the Assistant Commissioner, Tribal Development, Amravati. The services of the respondent No.1 were terminated on 09/07/2016, which was questioned before the School Tribunal by filing an appeal under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Services) Regulation Act, 1977 (hereinafter referred to as "the MEPS Act"). The said appeal was allowed. The petitioners, feeling aggrieved by the same, filed instant writ petition raising various questions for determination.

5. One particular question, which according to the learned Single Judge assumes significance in the light of various conflicting judgments, referred by the rival parties, was the question pertaining to Section 5(3) of the MEPS Act and Rule 15 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (hereinafter referred to as "the MEPS Rules").

6. The learned single Judge after considering the various judgments of the Hon'ble Supreme Court as well as this High Court, has found that there are two sets of views on the same material, namely in one set of the judgments it is held that only sub-rule (6) of Rule 15 of the MEPS Rules applies to an employee appointed on probation and there was no question of applicability of sub-rules (1) to (5) of Rule 15 of the MEPS Rules. Whereas, in the second set of judgments it is held that entire Rule 15 of the MEPS Rules applies to the employees appointed on probation.

7. Therefore, the learned Single Judge has observed that, there appears to be a clear cleavage and conflict in the views expressed in the two sets of views referred herein above.

8. Before we examine the two sets of judgments, referred herein below, it is pertinent to note that the Hon'ble Supreme Court of India, in the case of *Progressive Education Society and Another ..vs.. Rajendra and Another*, reported in **2008 (3) SCC 310** had an occasion to consider the scope of Section 5(3) of the MEPS Act and Rule 14 and 15 of the MEPS Rules, and accordingly, has held thus :

> "15. *On a consideration of the submissions made on behalf of the respective parties, the main issue which, in our view, requires determination in this appeal is whether the provisions of Rules 14 and 15, and, in particular sub-rule (6) of Rule 15 of the MEPS Rules, 1981, would control the powers vested in the Management of the School under Sub-Section (3) of Section 5 of the MEPS Act. The law with regard to termination of the services of a probationer is well established and it has been repeatedly held that such a power lies with the appointing authority which is at liberty to terminate the services of a probationer if it finds the performance of the probationer to be unsatisfactory during the period of probation. The assessment has to be made by the appointing authority itself and the satisfaction is that of the appointing authority as well. Unless a stigma is attached to the termination or the probationer is called upon to show cause for any shortcoming which may subsequently be the cause for termination of the probationer's service, the management or the appointing authority is not required to give any explanation or reason for terminating the services except informing him that his services have been found to be unsatisfactory.*
>
> *16. The facts of this case are a little different from the normal cases relating to probation and the termination of the services of a probationer in that the satisfaction required to be arrived at under sub-Section (3) of Section 5 of the MEPS Act has to be read along with Rule 15 of the MEPS Rules, 1981 with particular reference to sub-*

> *rule (6) which provides that the performance of an employee appointed on probation is to be objectively assessed by the Head during the period of his probation and a record of such assessment is to be maintained. If the two provisions are read together, it would mean that before taking recourse to the powers vested under sub-section (3) of Section 5 of the MEPS Act, the performance of an employee appointed on probation would have to be taken into consideration by the school management before terminating his services.*
> *17. Accordingly, while Rules 14 and 15 of the MEPS Rules, 1981 cannot override the provisions of sub-section (3) of Section 5 of the MEPS Act, it has to be said that the requirements of sub-rule (6) of Rule 15 would be a factor which the school management has to take into consideration while exercising the powers which it undoubtedly has and is recognised under sub-section (3) of Section 5 of the Act.*
> *18. …*
> *19. This merely goes to show that the said documents are not above suspicion and that the requirements of Rule 15(6) and Rule 14 had not been complied with prior to invocation by the school management of the powers under sub-section (3) of Section 5 of the MEPS Act."*

9. Nonetheless, according to the respondent-employee, the judgment in the case of *Progressive Education Society* (supra) had put the controversy at rest as the Hon'ble Supreme Court had clearly held that Rule 14 and entire Rule 15 of the MEPS Rules apply when decision is to be taken under Section 5(3) of the MEPS Act for terminating the service of an employee appointed on probation, for unsatisfactory work or behaviour.

10. On the other hand, it was argued by the petitioner/ management that a proper reading of aforesaid judgment in the case of *Progressive Education Society* (supra) demonstrates that, the Hon'ble Supreme Court had nowhere held that entire Rule 15 of the MEPS Rules applies to an employee appointed on probation. It was submitted that since only sub-rule (6) of Rule 15 of the MEPS Rules refers specifically to an employee appointed on probation, it is only the said sub-rule that applies to such an employee and that sub-rules (1) to (5) of Rule 15 of the MEPS Rules could not be made applicable to such an employee.

11. While referring and relying upon the verdict of the Hon'ble Supreme Court of India in the case of *Progressive Education Society* (supra), the Division Bench as well as Coordinate Benches of this Court, in various judgments, adopted two distinct views, which has given cause for this reference.

12. In the above referred backdrop, it would therefore, be appropriate to refer to the judgments wherein two sets of views are expressed on the same material, which are as follows:

13. The first set of judgments holding that only sub-rule (6) of Rule 15 of the MEPS Rules applies to an employee appointed on probation and there was no question of applicability of sub-rules (1) to (5) of Rule 15 of the MEPS Rules, are as under:

14. This Court in the case of *Savitribai Fule Shikshan Prasarak Mandal ..vs.. Dhananjay,* reported in **2004 (3) Mh.L.J. 18,** has held thus :

> *"8. ... As per sub-rule (6) of Rule 15, the performance of a probationer shall be objectively assessed by the Head during the period of his probation and record of assessment has to be maintained. Considering the scheme of the Act and the Rules, it can be said that sub-rule (6) of Rule 15 is the only relevant rule as far as employees on probation are concerned. On assessment, the Head has to inform to the management for necessary action. It is provided under sub-section (3) of section 5 of the Act that if in the opinion of the Management, the work or behaviour of any probationer during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice or salary of one month in lieu of notice. Therefore, it is the opinion of the Management which weighs with the services of a probationer. If sub-section (3) of section 5 of the Act and sub-rule (6) of Rule 15 of the Rules are read conjointly, it can very well be inferred that adverse remarks need not be communicated to a probationer in order to grant him opportunity to improve upon the same or agitate the same. All that is provided is the assessment of probationer's work by the Head and decision of the Management whether to continue his services or not. Communication of adverse remarks; holding of enquiry; grant of further chance for improvement etc., in my view, is not contemplated*

> *either under Section 5(3) of the Act or Rule 15(6) of the Rules. Therefore, if the management is of the opinion that during the period of probation, the services of a probationer were not satisfactory, it can very well terminate the services of such employee before the probation period comes to an end."*

15. This Court in the case of *High School Education Society & Another ..vs.. Presiding Officer, School Tribunal & Another.,* reported in **2004 SCC OnLine Bom 915** has held thus :

> "18. … *As per sub-rule (6) of Rule 15, the performance of a probationer shall be objectively assessed by the Head during the period of his probation and record of assessment has to be maintained. Considering the scheme of the Act and the Rules, it can he said that sub-rule (6) of Rule 15 is the only relevant Rule as far as employees on probation are concerned. On assessment, the Head has to inform to the management for necessary action. It is provided under sub-section (3) of Section 5 of the Act that if in the opinion of the Management, the work or behaviour of any probationer during the period of his probation, is not satisfactory, the management may terminate his services at any time during the said period after giving him one month's notice or salary of one month in lieu of notice. Therefore, it is the opinion of the Management which weighs with the services of a probationer. If sub-section (3) of Section 5 of the Act and sub-rule (6) of Rule 15 of the Rules are read conjointly, it can very well be inferred that adverse remarks need not be communicated to a probationer in order to grant him opportunity to improve upon the same or agitate the same. All that is provided is the assessment of probationer's work by the Head and decision of the Management whether to continue his services or not. Communication of adverse remarks; holding of enquiry; grant of further chance for improvement etc., in my view, is not contemplated either*

under Section 5(3) of the Act or Rule 15(6) of the Rules. Therefore, if the management is of the opinion that during the period of probation, the services of a probationer were not satisfactory, it can very well terminate the services of such employee before the probation period comes to an end."

16. This Court then, in the case of *Ashok Pandurang Janjal ..vs.. Secy., Tulsabai Kawal Vidyalaya,* reported in **2006(4) Mh.L.J. 759** has held thus :

"*5. The Section 5(3) of the said Act provides thus:*

"If in the opinion of the Management, the work or behaviour of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice or salary of one month in lieu of notice."

6. The sub-rule (6) of the Rule provides thus: "Performance of an employee appointed on probation shall be objectively assessed by the Head during the period of his probation and a record of such assessment shall be maintained."

7. Plain reading of the provisions comprised under Rule 15(6) would disclose that as regards the employees on probation, the question of recording of confidential reports in terms of Rule 15, sub-rules (1) to (5), does not arise. The sub-rule (6) specifically provides that in the case of such type of an employee his performance should be objectively assessed by the Head during the period of his probation and of course the records of such assessment shall be maintained by the Management.

8. In Shri Vitthal Pandharinath Dhere v. Shree Kedarnath Shikshan Sanstha and Ors. reported (1) Bom.C.R. 592,

the Division Bench of this Court while interpreting the said Section 5(3) and the said Rule 15(6), held that even if the work of a probationer is found to be satisfactory on the basis of non-production of any confidential record, as provided under Rule 15(6), the Management would be free to come to a conclusion about the behaviour of such employee to be not satisfactory. It further ruled that the Management is the best judge of the situation as to whom to continue."

17. This Court further in the case of *Mushtaq ..vs.. Haidariya Urdu Edu. Soci.,* reported in **2008(4) Mh.L.J. 734** has held thus :

"*33. The aspect of the Confidential Reports being adverse will not have a direct bearing in case of a probationer, as the Management has to make an objective assessment. In case of a probationer, the performance may be such that anything worth adverse communication may not exist, however, sum effect of a probationer's services could still not be satisfactory.*

34. It is in this background the absence of adverse communication, or otherwise, could be one but not only factor of decisive nature in the matter of act of Management in recording satisfactory performance, or otherwise, of any probationer.

35. Thus, the "satisfactory performance" has to be a sum effect of employee's attendance, performance, behaviour etc. collectively. Irrespective of whether the employee concerned has been communicated any deficiencies or any adversities in relation to performance of services, it would be quite permissible and within the powers of management to dispense with his services if on overall assessment, Management finds that the employee's performance is not satisfactory.

36. The requirement of unsatisfactory services referred to in sub-section [3] of Section 5 of the Act is a matter of satisfaction of the Management and law does not require

that order of termination should spell out said unsatisfactoriness and the factors or grounds leading to such conclusion.

37. The aims and objects leading to enactment of the Act were to bring stability in the administration of the school, give job security and to regulate the service conditions, however, its intention is not to take away power of the management which too inherently exist while hiring, retaining or dispensing with services of a probationer.

38. The discretion of the Management as to satisfaction has to be respected as absolute, unless exercised so grossly in arbitrary and illegal manner so as to render the termination stigmatic. Once an employee becomes permanent, the Management's action thereafter is brought under the control and regulation done under the rules, and thereafter the Management cannot deal with the services of the employee with the ancient rule of governing the relations between master and servant, the rule of hire and fire ceases to apply.

39. It appears that the Act or Rules have nowhere provided or prescribed that the order of termination of service of a probationer should consist of a clause that recording unsatisfactoriness should be disclosed therein. This absence appears to be a conscious omission, probably keeping in view that it would adversely affect the employee's career. There would always be a distinction between dispensation of services at the end of probation with one month's notice and dispensation of a probationer with a sort of certification that he did not perform satisfactorily.

40. The termination at the end of probation or during the period of probation is seen to be only prerogative left to the Management. Had it been that law-makers wanted to make reasons of "unsatisfactoriness of performance" justiciable, law would never have omitted to prescribe that termination order of a probationer should incorporate details thereof. It has to be noted that no such prescription is made."

18. Now moving to another set of judgments wherein it has been held that entire Rule 15 of the MEPS Rules applies to the employees appointed on probation, the same are as follows :

19. A Division Bench of this Court in the case of *Vinayak Vidhyadayani Trust ..vs.. Aruna,* reported in **2011(1) Mh.L.J. 550** has held thus :

> *"13. ... Thus, the appointment on probation and the termination of the service of the probationer are governed by the provisions of sub-sections (2) and (3) of Section 5 of the MEPS Act. In addition, Rules 14 and 15 of the MEPS Rules, 1981, have elaborately set out the procedure for the assessment of the probationer's performance and writing of his confidential reports. When a special statute like the MEPS Act has provided for a specific procedure to be followed while terminating the employment of a probationer on the ground of unsatisfactory performance, the said procedure is mandatory and non compliance thereof would vitiate the order of termination and the School Tribunal will be fully justified to interfere with the same and set it aside by directing reinstatement of the appointee/appellant.*
> *14. ...*
> *15. … The Supreme Court in the case of Progressive Education Society and anr. Vs. Rajendra and anr. 2008 Mh.L.J. (SC) 715 = AIR 2008 SC 1442 had an occasion to consider the scheme of Section 5(3) of the MEPS Act and Rule 15 of the MEPS Rules. It held that while Rules 14 and 15 of the MEPS Rules cannot override the provisions of Section 5(3) of the MEPS Act, it has to be said that the requirements of sub-rule (6) of Rule 15 would be a factor which the school management has to take into consideration while exercising the powers which it undoubtedly has and is recognized under the said section.*

> *It further held that there ought to be sufficient material to be brought by the school management before the Tribunal so as to support the order of termination passed at the end of the probationary period and such record must also inspire confidence being bona fide. Such material cannot be cooked up material and it must be genuine confidential records maintained from time to time and communicated to the teacher. It is also clear from sub-rule (5) of Rule 15 of the MEPS Rules, that failure to write and maintain confidential reports and to communicate adverse remarks to the employee within the period prescribed in sub-rule (3) shall have the effect that the work of the employee concerned was satisfactory during the period under report. ..."*

20. This Court, in the case of *Anjuman-E-Taleem ..vs.. State of Mah.,* reported in **2015(3) Mh.L.J. 98,** has held thus :

> *"13. In the case of Progressive Education Society (supra), the Hon'ble Apex Court has held that "appointing authority is at liberty to terminate the services of the petitioner if it finds the performance of petitioner to be unsatisfactory. However, in case of employees governed by the said Act or the said rules, the satisfaction as to unsatisfactory performance is hedged by the provisions of rule 15 of the said rules. Therefore if the provisions contained in section 5(3) of the said Act and rule 15 of the said Rules are read together, it would mean that before taking recourse, the powers vested under section 5(3) of the said Act, the performance of the employee appointed on probation shall have to be taken into consideration by the appointing authority in the manner prescribed by Rule 15 before terminating services on the ground of unsatisfactory performance". Similarly, Division Bench of this Court in the case of Vinayak Vidhyadayini Trust(supra) has held that the provisions contained in Rule 15 of the said Rules are mandatory and breach thereof would vitiate termination order."*

21. Thereafter, a learned single Judge of this Court in the case of *Prajwala Bhatu Khalane ..vs.. Mahatma Fule Vidya Prasarak Sanstha, Deoku and others,* reported in **2017(1) Mh.L.J. 348**, after referring to the judgment of the Hon'ble Supreme Court of India in the case of *Progressive Education Society* (supra) and the Division Bench judgment of this Court in the case of *Vinayak Vidhyadayani Trust* (supra) held in favour of employees appointed on probation on the basis that entire Rule 15 of the MEPS Rules applied to such employees.

22. Similar view was taken by this Court in the case of *Daruwala Education Society & anr. ..vs.. The State of Maharashtra & oth., in* **W.P. No.5906/2003,** decided on 19/09/2017.

23. We have heard the learned Advocates for the respective parties and the learned Advocates who in response to the notice issued in general, appeared and assisted the Court.

24. Shri Agnihotri learned counsel for the petitioner argues that considering the scheme of the MEPS Act and the MEPS Rules since inception the rights of a Probationer were dealt with separately *qua* the 'permanent' or 'temporary' employee. It is submitted that right of the

probationer is governed by Sections 5(2) and 5(3) of the MEPS Act. Section 5(2) and 5(2)(a) of the MEPS Act specifically carves out the right in favour of the probationer that after completion of his probation period he shall be deemed to have been confirmed. It is submitted that Section 5(3) of the MEPS Act gives right to the Management to terminate the services of the probationer if the work or behaviour of the probationer is not satisfactory during the probation period.

25. Shri Agnihotri, learned counsel for the petitioner further submits that the requirement of maintaining assessment record under Rule 15(6) of the MEPS Rules, is for the purpose to assess the performance of the employee and he or she shall not be terminated in capricious/ arbitrary manner and in case of judicial review in such matters, such record shall be available.

26. It is submitted that, the provisions of the MEPS Act or the MEPS Rules do not provide for compliance of the principles of natural justice before terminating the services of the probationer by an innocuous order, which does not cast any stigma on the future prospects of securing any job. It is submitted that, had it been the intention of the legislature to give a right to the probationer of being communicated his adversities or shortcomings through Confidential Reports as mentioned

in Rules 15(1) to 15(5) of the MEPS Rules, in that case there was no requirement to include sub-rule (6) to Rule 15 of the MEPS Rules. It is therefore, submitted that the legislature has consciously excluded the requirements as mentioned in Rule 15(1) to 15(5) of the MEPS Rules, for the probationer.

27. It is further argued that under the provisions of the MEPS Act and the MEPS Rules, there is no obligation on the Management to communicate the adverse remarks to the probationer. It is submitted that communication of adverse remarks is a facet of principles of natural justice which has no application in case of termination of services of a probationer during the period of probation, in absence of any right to hold the post. It is therefore, submitted that Rule 15(1) to 15(5) of the MEPS Rules are not applicable to the probationer but only Rule 15(6) will apply.

28. It is submitted that Section 5(3) of the MEPS Act not only grants absolute power to the employer but also casts a duty upon the employer to have an objective assessment to consider the services of the probationer and upon recording the satisfaction or dissatisfaction, either to terminate or regularize the services.

29. It is submitted that even if the work of an employee is satisfactory, however, the behaviour is unsatisfactory, the Management can still terminate the services and vice-versa as well.

30. Shri Agnihotri, learned counsel for the petitioner submits that there is a distinction between a permanent employee and a probationer. Rule 10 of the MEPS Rules lays down the categories of the employees, which are viz. permanent, temporary or probationer. It is further submitted that the permanent or temporary employees have right to continue on the post till the end of the period of appointment. However, there is no such right in favour of the probationer, whose services can be terminated at any time during the probation. It is therefore, submitted that the probationer cannot be equated with the permanent employee or the temporary employee and thereby Rules 15(1) to 15(5) of the Rules 1981 cannot be interpreted in a way to make it applicable to the probationer otherwise it will create anomalous situation.

31. Mrs. Ketki Joshi, learned Government Pleader argues that the MEPS Act was enacted to regulate the recruitment and conditions of service of the employees in private schools, to provide them security and

stability of service. It was found to be in the interest of the public to lay down the duties and function of employees with a view to ensure that they become accountable to Management and contribute their mite for improving the standard of education, which can be seen from the preamble of the Act.

32. She further argues that the intention behind the MEPS Act was not to take away the power of the Management which inherently exists to hire, retain or dispense with the service of a probationer. It is submitted that the word probation or probationary is not defined in the MEPS Act or the MEPS Rules. The employment on probation from its very nature is of a transitory character and the employee is not vested with any right. His services are liable to be terminated if his work or performance is not found to be satisfactory. The probationer has no right to hold the post during the period of probation. His position cannot be equated with a confirmed employee. The probationer has no right to claim to be heard before he is terminated and principles of natural justice have no application in his termination.

33. She further submitted that Rule 14 of the MEPS Rules contemplates self-assessment, which may or may not be accepted by the

Management. The requirements as spelt out in Rules 15(1) to 15(5) of the MEPS Rules do not appear to be feasible for application to a probationer.

34. She further submits that on plain reading it can be seen that, Section 5(3) of the MEPS Act vests an absolute power in the Management to terminate the service of a probationer if in its opinion the work or behaviour of the probationer is not satisfactory. The assessment by the Management in relation to a probationer pertains not only to his work but also his behaviour which is not tangible. Satisfactory performance is the sum effect of the probationer's attendance, conduct, performance, behaviour etc. The satisfaction of the Management has not been abridged by the legislature but it would lead to those consequences if sub-rules (1) to (5) of Rule 15 of the MEPS Rules are made applicable to a Probationer.

35. Mrs. Joshi, further submits that considering the distinction of status of a Probationer and of a confirmed employee, the legislature has consciously used the words 'an employee appointed on probation' in sub-rule (6) of Rule 15 of the MEPS Rules in consonance with Section 5(3) of the MEPS Act to protect the right of the Management to terminate the probationer, who is on trial.

36. She further submits that non-compliance of sub-rules (1) to (5) of Rule 15 of the MEPS Rules would not vitiate an order of termination effected under Section 5(3) of the MEPS Act.

37. Shri Dastane, learned counsel submits that sub-rule (6) of Rule 15 of the MEPS Rules apply only to the probationer and not to other employees. It is submitted that sub-rule (6) of Rule 15 of the MEPS Rules is an exception carved out by the legislature intentionally, indicating that sub-rules (1) to (5) of Rule 15 of the MEPS Rules do not apply to the probationer. It is therefore, submitted that sub-rule (6) of Rule 15 of the MEPS Rules is distinct and separate from the sub-rules (1) to (5) of Rule 15 of the MEPS Rules. It is submitted that the said distinction between sub-rules (1) to (5) of Rule 15 of the MEPS Rules and sub-rule (6) of Rule 15 of the MEPS Rules can be seen from the words used in the said provisions. He points out that there is no requirement of reviewing the confidential reports in Form under Schedule "G" by the Reviewing Authority in case of probationer, under sub-rule (6) of Rule 15 of the MEPS Rules and as required under sub-rule (2) of Rule 15 of the MEPS Rules.

38. Shri Dastane, learned counsel further submits that as per Service Jurisprudence, the probationer has no right to the post and it is

the discretion of the Management to confirm or not to confirm the probationer on the basis of his assessment as contemplated under Section 5(3) of the MEPS Act. It is submitted that if in the opinion of the Management, the work or behaviour of the probationer is not found satisfactory, the Management can refuse to continue the probationer in employment. Thus, it is submitted that the successful completion of the period of probation depends upon the work or behaviour of the probationer during the probation period and therefore, not only satisfactory work but satisfactory behaviour is also relevant. He, therefore, submits that sub-rule (6) of Rule 15 of the MEPS Rules is carving out the exception and is an independent provision.

39. Shri Bhandarkar, learned counsel reiterates the submissions of the learned counsel Shri Agnihotri and Shri Dastane and submits that from the language of Rule 15 of the MEPS Rules, it is evident that sub-rules (1) to (5) of Rule 15 of the MEPS Rules do not apply to the probationer. But the plain reading of the said provisions would make it clear that sub-rule (6) of Rule 15 of the MEPS Rules is applicable to the probationer. It is submitted that Rule 14 and 15 of the MEPS Rules cannot override the provisions of Section 5(3) of the MEPS Act, which provides for termination of services of the probationer by the

Management on finding the work or behaviour of the probationer unsatisfactory. He, therefore, submits that the only requirement provided under sub-rule (6) of Rule 15 of the MEPS Rules, is to objectively assess the work of the probationer and record shall be maintained by the Head as the probationer has no right to the post.

40. The learned counsel for the petitioners in support of their contentions rely on the following judgments :

i) *Savitribai Fule Shikshan Prasarak Mandal ..vs.. Dhananjay*, reported in **2004(3) Mh.L.J. 18**;

ii) *High School Education Society & Another ..vs..Presiding Officer, School Tribunal & Another*, reported in **2004 SCC OnLine Bom 915**;

iii) *Ashok Pandurang Janjal ..vs.. Secy., Tulsabai Kawal Vidyalaya*, reported in **2006(4) Mh.L.J. 759**;

iv) *Mushtaq ..vs.. Haidariya Urdu Edu. Soci.*, reported in **2008(4) Mh.L.J. 734**;

41. Mrs. Radhika Bajaj, learned counsel for the respondent No.1 argues that the main challenge in the matter is the cleavage between Rules 15(1) to 15(5) and 15(6) of the MEPS Rules. But Rules 14 and 15 of the MEPS Rules use the word 'employee' and the term 'Probationer' is included in that definition. Hence, when Rule 14(1) and 14(2) of the MEPS Rules which mention the term 'employee' would apply to a

probationer, there is no reason for Rules 15(1) to 15(5) of the MEPS Rules to not apply to the probationer.

42. It is submitted that, Schedule 'G' (Form of the Confidential Report for Teaching Staff) also includes 'See Rule 14(2) and Rule 15(1)' below its title. Accordingly, when Rules 14(2), 15(1), 15(2) would apply to a probationer, then there is no reason for Rule 15(3) to 15(5) of the MEPS Rules to not apply and then directly for Rule 15(6) of the MEPS Rules to apply to a probationer.

43. It is submitted that Rule 15(6) states the word 'assessment' and not confidential report nevertheless, confidential report is maintained. If at all, only Rule 15(6) were to apply to a probationer, then the reports would not have been prepared, maintained, reviewed, and communicated in the first place. Thus, it is submitted that it would not be proper to hold that Rules 14 and 15 will not be applicable to a probationer when the fact is that in practice they are being followed by complying with the provisions of Rules 14 and 15 (1) to 15(5) of the MEPS Rules.

44. The learned counsel further argues that a probationer needs protection of Rules 14 and 15 much more than a permanent employee

because permanent employees already have the umbrella of Rules 36 and 37 of the MEPS Rules. To substantiate her contention she relies on the judgment of the Coordinate Bench of this Court in the case of *Anjuman-E-Taleem ..vs.. State of Mah.,* reported in **2015(3) Mh.L.J. 98.**

45. It is further submitted that if only Rule 15(6) of the MEPS Rules applies to a probationer, the power to terminate or confirm *de facto* relegates upon the Headmaster, which is not permissible due to the embargo of Rule 38 of the MEPS Rules. The opinion of the management has to reflect at the time of termination of a probationer. The management cannot opine without hearing or reading or knowing both sides, and if it is done, it would lead to violation of the principles of natural justice as well as Article 21 of the Constitution of India. If the management opines, without hearing or reading or knowing both sides but simply on the basis of plain reading of the confidential reports which have not even been shown to the employee, it would constitute grave injustice and violation of Article 21 of the Constitution of India by which the livelihood of a person cannot be snatched away except according to procedure established by law.

46. The learned counsel argues that improvement is the main reason behind communication of adverse remarks. For this purpose she

emphasized on Schedule "G". She states that Part-I of the said Schedule provides format for Self-assessment Form. Part-II of the Schedule provides format for confidential report to be prepared by the respective Reporting Authorities. Part III of the said Schedule provides the format of remarks of the Reviewing Authority which provides a question for the Reviewing Authority that whether the Reviewing Authority agrees with the Reporting Authority, or it wishes to modify or add to the assessment provided. As the probationer is required to fill this, the confidential report is also written for him, there would be no point of the Headmaster keeping his objective assessment to himself. Thus, for the employee to improve his service, he needs to be communicated the same. She relies on the judgment of the Division Bench of this Court in the case of *Vinayak Vidhyadayani Trust ..vs.. Aruna,* reported in **2011(1) Mh.L.J. 550.**

47. She further submits that the Communication of confidential reports can give an opportunity to the probationer to provide a justification or explanation for his alleged faults. For this purpose she relies on the judgment of this Court in the case of *Panchsheel Shikshan Prasarak Samiti Vs. Presiding Officer, School Tribunal,* reported in **2018 (2) Mh.LJ 956**.

48. She further submits that Object of confidential reports is that transparency is maintained if adverse remarks are communicated. The reason behind applying the entire Rule 15 to a probationer is to curb any arbitrary power vested in the Management. The Management should not have unbridled power or unfettered control to throw out the services of a probationer.

49. Mr. Mohgaonkar, learned counsel reiterates the submissions of learned counsel Mrs. Radhika Bajaj and in sequel submits that considering the growing tendency of the managements of the private schools to terminate the services of the probationers, who question unethical practices of the Management, is placing teachers in a state of eternal uncertainty and it is destructive of the cause of education. He further submits that even the probationers are being subjected to extortionate demands by management. He, therefore, submits that some protection is granted from illegal termination under Rules 14 and 15 of the of the MEPS Rules. He further submits that Rule 15(3) of the MEPS Rules binds the management to communicate the adverse remarks, which gives opportunity to the employee to improve his performance. He therefore, submits that any interpretation taking away the applicability of sub-rules (1) to (5) of Rule 15 of the MEPS Rules will

help to grow tendency of the management of private schools to terminate the probationer on not fulfilling the demands, on the ground that the services of the employee were not found satisfactory.

50. The learned counsel for the respondents, in support of their contentions, also rely on the judgment of this Court at Principal Seat in the case of *Daruwala Education Society & anr… ..vs.. The State of Maharashtra & oth*. delivered in **Writ Petition No. 5906 of 2003**, on 19/09/2017.

51. In light of the rival contentions, we have perused the record and the authorities cited.

52. Having considered the questions framed and referred by the learned Single Judge, it is evident that the whole controversy is as to whether while terminating the services of an employee appointed on probation by the Management by taking recourse to Section 5(3) of the MEPS Act on the ground of unsatisfactory work or behaviour, only sub-rule (6) of Rule 15 of the MEPS Rules applies or sub-rules (1) to (6) of Rule 15 of the MEPS Rules apply to such an employee.

53. Hence, to ponder over the above referred questions and to find out answers to it, it is necessary to examine the relevant provisions

of the MEPS Act and the MEPS Rules. However, before considering the relevant provisions, it is necessary to refresh the basic Rules of Construction of the provisions of the statute.

54. The Hon'ble Supreme Court of India in the case of *M/s. Hiralal Ratanlal ..vs.. STO*, reported in **AIR 1973 SC 1034** has held that, in construing a statutory provision the first and foremost Rule of Construction is the literary construction. All that the Court has to see at the very outset is what does the provision say. If the provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other Rules of Construction of Statutes. The other Rules of Construction are called into aid only when the legislative intent is not clear.

55. In the case of *Swedish Match AB ..vs.. Securities and Exchange Board, India*, reported in **AIR 2004 SC 4219** the Hon'ble Supreme Court of India has held that, it is well-settled principle of law that where wordings of a statute are absolutely clear and unambiguous, recourse to different principles of interpretations may not be resorted to but where the words of a statute are not so clear and unambiguous, the other principles of interpretation should be resorted to.

56. The Hon'ble Supreme Court of India in the case of *Commissioner, Income Tax ..vs.. Keshab Chandra Mandal*, reported in **AIR 1950 SC 265** has held that, hardship or inconvenience cannot alter the meaning of the language employed by the legislature if such meaning is clear on the face of the statute.

57. Further the Hon'ble Supreme Court of India in the case of *Ombalika Das ..vs.. Hulisa Shaw*, reported in **2002 (4) SCC 539** has held that, resort can be had to the legislative intent for the purpose of interpreting a provision of law when the language employed by the legislature is doubtful or ambiguous or leads to some absurdity.

58. Keeping the above referred principles in mind, we now proceed to consider the relevant provisions namely, Section 5(3) of the MEPS Act and Rules 14 and 15 of the MEPS Rules, which read thus:

> "*5. **Certain obligations of Management of private schools.** -*
> *(1) ...*
> *(2) …*
> *(3) If in the opinion of the Management, the work or behaviour of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice or salary or honorarium of one month in lie of notice.*

Rules:

"14. Assessment of employees work.
(1) At the beginning of each term, the teacher shall prepare the plan of his academic programme and at the end of the academic year, prepare a report of the work done by him and submit it to the Head.
(2) Each employee on the teaching and non-teaching staff of a school shall submit the report of self-assessment in the respective Form in Schedule "G" within one month after the end of a year.

15. Writing of confidential reports etc.
(1) The confidential reports shall be written annually in the respective Form in Schedule "G". The reporting authorities in respect of the employees and the Head shall be the Head and the Chief Executive Officer respectively. Confidential reports shall be written in respect of the employee or the Head who had worked for six months or more during an academic year commencing from June. If the Head or a teacher is the Secretary of the Management the confidential report in his respect shall be written by the President of the Management.
(2) The confidential reports so written in respect of the employees and the Head shall be reviewed by the Chief Executive Officer and the President of the Management, respectively. The confidential report of the Head or a teacher written by the President shall be reviewed by the Managing Committee.
(3) The respective reporting authority shall arrange to communicate confidentially in writing adverse remarks, if any, to the concerned employee or the Head, as the case may be, before the end of August every year.
(4) Representation, if any, from any employee against the adverse remark communicated to him in accordance with sub-rule (3) above shall be decided by the School Committee. Similar representation, if any, from the Head shall be decided by the Managing Committee.

> *(5) Failure to write and maintain confidential reports and to communicate adverse remarks to the employees within the period prescribed in sub-rule (3) shall have the effect that the work of the employee concerned was satisfactory during the period under report.*
> *(6) Performance of an employee appointed on probation shall be objectively assessed by the Head during the period of his probation and a record of such assessment shall be maintained.*"

59. After a plain reading of the above referred relevant provisions, the position may be summarized as follows:

60. The word "employee" defined under Section 2(7) of the MEPS Act, means any member of the teaching and non teaching staff of a recognized school and includes Assistant Teacher Probationery. Thus, it is evident that word "employee" includes a 'probationer'.

61. Section 5(3) of the MEPS Act empowers the Management to terminate the services of any probationer at any time during the period of his probation, if in the opinion of the Management, the work or behaviour of any probationer, is not found satisfactory.

62. Rule 14(1) mandates that, at the beginning of each term, the teacher shall prepare the plan of his academic programme and at the end

of the academic year, prepare a report of the work done by him and submit it to the Head.

63. Rule 14(2) says that each employee shall submit the report of self-assessment in the respective form in Schedule "G" within one month after the end of a year.

64. Rule 15(1) mandates that the confidential report of the employees and Head, shall be written annually in the respective form in Schedule "G" by the Reporting Authority stated therein.

65. Rule 15(2) stipulates that such confidential report shall be reviewed by the Authorities as stated therein.

66. Rule 15(3) mandates the Reporting Authority to communicate adverse remarks, if any, to the concerned employee or the Head, as the case may be, before the end of August every year.

67. Rule 15(4) facilitates the employee to make representation against the adverse remarks communicated to him.

68. Rule 15(5) creates a fiction in case of failure to write and maintain confidential report and to communicate adverse remarks to the

employee shall have the effect that the work of the employee concerned was satisfactory.

69. Rule 15(6) of the MEPS Rules provides that the Head shall assess the performance of a probationer, objectively and maintain a record of such assessment.

70. If it is held that Rule 15 (1) to 15(6) of the MEPS Rules are applicable to the probationer, the effect of it would be that, the Head has to write confidential report of the employee appointed on probation under Rule 15(1) and at the same time in addition to confidential report he has to maintain a record of objective assessment of the performance of such employee.

71. The conjoint reading of sub-rules (1) to (6) of Rule 15 of the MEPS Rules therefore, raises following questions for consideration :

a) If the word 'employee' includes a 'probationer', then why thus Rule 15(6) of the MEPS Rules refers to and uses the phrase "an employee appointed on probation" ?

b) If under Rule 15(1) of the MEPS Rules, confidential report is to be written of the probationer, then, why there is a need

to again maintain a record of objective assessment of such employee under Rule 15(6) of the MEPS Rules, particularly when both aim at evaluation of performance of the employees ?

72. Thus, the literal interpretation of Rule 15 of the MEPS Rules, instead of resolving the controversy has given rise to the above mentioned two questions. Therefore, it is necessary to find out the legislative intent. Accordingly, we proceed further.

73. In support of the argument that, Rule 15 of the MEPS Rules as a whole applies to an employee appointed on probation, much emphasis has been placed on Schedule "G" in the MEPS Rules and the definition of the word 'employee' as defined under Section 2(7) of the MEPS Act.

74. It is a settled law that, in case of doubtful words in the enactment, a 'scheduled form' may be utilized for the purpose of throwing light on their meaning. Hence, before we comment on and examine the definition of the word 'employee', we will first refer to relevant part of Schedule "G", which reads thus:

"Schedule "G"

[See rule 14(2) and rule 15(1)]

Form of Confidential Report for teaching staff

Part I

Self-Assessment Form

1. Name

2. Post held

3. Length of Service In the present or similar post.

4. Give a brief description of your duties indicating the objectives given to you during the year.

5. How would you assess your own performance during the past year against the targets set for you.

6. Can you mention any specific item(s) of good work done by you.

Signature, name and designation of the person

Remarks of the Reporting Officer

1. Please state whether you agree with the assessment and if not, the reasons therefor.

2. What according to you are the faults and responsibilities of the teacher for the shortfall, if any.

3. Please give your general assessment regarding the teacher's integrity and relations with the public.

Signature, name and designation of the Reporting Authority.

Part II

Form of Confidential report for Head or teacher of a school

For the period from- - - - - - - - - - - - -

Name of the teacher in full - - - - - - - - -

Qualifications - - - - - - - - - - - - -

Designation - - - - - - - - - - - - - -

Status (Permanent or temporary)

Length of service in the institution on 1st June

Scale of pay- - - - - - - - - - Pay on 1st June- - - - - - - - - - -

…

…

…

I have formed the following opinion about the teacher's ability, work etc. for the period from ___ to ___.

...

Place :

Date :

Signature of Headmaster.
Chief Executive Officer, President."
(emphasis supplied)

75. Thus, from the Schedule "G" it is evident that in Part II of it there is a column namely 'Status' which relates to categories of employees namely 'permanent' or 'temporary'.

76. Hence, it can be said that Part II of Schedule "G" only speaks about 'permanent' and 'temporary' employees.

77. Rule 10 of the MEPS Rules speaks about the categories of employees.

"*10. Categories of Employees. -*

(1) Employees shall be permanent or non-permanent. Non-permanent employees may be either temporary or on probation.
(2) A temporary employee is one who is appointed to a temporary vacancy for a fixed period."

78. Rule 10 of the MEPS Rules refers to permanent and non-permanent categories of employees. The Rule further clarifies that non-permanent employee may be temporary or on probation. It further clarifies that a temporary employee is one who is appointed to a temporary vacancy for a fixed period.

79. Thus, it can be said that under the MEPS Act, there are following categories of employees :

(i) Permanent,

(ii) Temporary, who is appointed for a fixed period; and

(iii)Probationer

80. Therefore, it takes us to the conclusion that Schedule "G" does not apply to a probationer as it refers only to the employees who are permanent or temporary.

81. We will explain and clarify in detail why Schedule "G" only refers to permanent and temporary employee, in the later part of our judgment while dealing with the rights of a probationer.

82. Nonetheless, the above referred discussion is leading us to the conclusion that, Rule 14(2) and Rules 15(1) to 15(5) of the MEPS Rules do not apply to the probationer.

83. But, yet, as we have not taken into consideration the definition of word 'employee', let us therefore, examine the definition of word 'employee' for further clarity and certainty. However, we will first examine the principles of interpretation as regards definition clause.

84. The Hon'ble Supreme Court of India in the case of *V.F. & G. Insurance Co. vs.. M/s. Fraser & Ross*, reported in AIR 1960 SC 971 has held thus :

> "6. … *It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statutes generally begin with the qualifying words similar to the words used in the present case, namely, unless there is anything repugnant in the subject or context. Therefore in finding out the meaning of the word " insurer " in various sections of the Act, the meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be*

> *sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word has been used and that will be giving effect to the opening sentence in the definition section, namely, unless there is anything repugnant in the subject or context. In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. …*"

85. The Hon'ble Supreme Court of India in the case of *Mukesh K. Tripathi ..vs.. Senior Divisional Manager, LIC*, reported in **(2004) 8 SCC 387**, has held thus:

> "*40. In Ramesh Mehta v. Sanwal Chand Singhvi it was noticed : (SCC p.426, paras 27-28)*
> *"27. A definition is not to be read in isolation. It must be read in the context of the phrase which would define it. It should not be vague or ambiguous. The definition of words must be given a meaningful application; where the context makes the definition given in the interpretation clause inapplicable, the same meaning cannot be assigned."*

86. The Hon'ble Supreme Court of India in the case of *Nahalchand Laloochand (P) Ltd. .vs.. Panchali Coop. Housing Society Ltd.*, reported in **(2010) 9 SCC 536**, has held thus:

> "*31.Justice G.P. Singh in the `Principles of Statutory Interpretation' (12th edition, 2010) says that the object of a definition of a term is to avoid the necessity of frequent repetitions in describing all the subject matter to which that word or expression so*

> *defined is intended to apply. In other words, the definition clause is inserted for the purpose of defining particular subject-matter dealt with and it helps in revealing the legislative meaning. However, the definitive clause may itself require interpretation because of ambiguity or lack of clarity in its language.*"

87. The Hon'ble Supreme Court of India in the case of *DDA ..vs.. Bhola Nath Sharma*, reported in **(2011) 2 SCC 54**, has held thus:

> *"25. The definition of the expressions "local authority" and "person interested" are inclusive and not exhaustive. The difference between exhaustive and inclusive definitions has been explained in P. Kasilingam v. P.S.G. College of Technology in the following words: (SCC p.356, para 19)*
>
> > *"19. .. A particular expression is often defined by the Legislature by using the word `means' or the word `includes'. Sometimes the words `means and includes' are used. The use of the word `means' indicates that "definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in definition". (See: Gough v. Gough; Punjab Land Development and Reclamation Corpn. Ltd. v. Labour Court, SCC p.717, para 72.) The word `includes' when used, enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the clause declares that they shall include. The words "means and includes", on the other hand, indicate "an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions. …"*

88. From the above referred authoritative pronouncements, it is evident that the object of a definition of a term is to avoid the necessity of frequent repetitions in describing all the subject matter to which that word or expression so defined is intended to apply. A definition is not to be read in isolation. It must be read in the context of the phrase which it defines, realizing that the function of a definition is to give precision and certainty to a word or phrase, but not to contradict it or supplant it altogether.

89. It is further clear that, the definition of words must be given a meaningful application; where the context makes the definition given in the interpretation clause inapplicable, the same meaning cannot be assigned. It may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why, all definitions in statutes generally begin with the qualifying words, unless there is anything repugnant in the subject or context. In view of this qualification, the Court has to not only look at the words but also to look at the context, the collocation and object of such words relating to such matter and interpret the meaning intended to be conveyed by the words used under the circumstances.

90. Keeping the eye on the above referred principles, we now refer to the definition of the word "employee" as given under Section 2(7) of the MEPS Act, which reads thus:

> "*2.* ***Definitions.***
>
> *In this Act unless the context otherwise requires,-*
>
> *(7) "**Employee**", means any member of the teaching and non-teaching staff of a recognised school and includes Assistant Teacher (Probationary); (emphasis supplied)*

91. The definition Section begins with qualifying words "*In this Act unless the context otherwise requires.*" Let us, therefore, find out whether in the context of the provision of Rules 14(2) and 15(1) to 15(5) of the MEPS Rules, the defined meaning of expression "employee" can be assigned to the word 'employee' used in Rules 14(2) and 15(1) to 15(5) of the MEPS Rules.

92. On a plain reading of Rules 14(2) and 15(1) to 15(5) of the MEPS Rules it is clear that if we give the defined meaning to expression "employee" occurring in the said provisions, it would mean that for the probationer the Head will have to not only write confidential report under Rule 15(1) but also to maintain assessment record under Rule 15(6) of the MEPS Rules, which would make Rule 15(6) redundant.

93. If Rule 15(1) to 15(5) of the MEPS Rules is interpreted in a way to make it applicable to the probationer, it would amount to equating the probationer with the permanent and temporary employees, which is not the intention of the legislature. Therefore, an exception is carved out by the legislature by providing distinct and separate provision by way of Rule 15(6) of the MEPS Rules, for the probationer.

94. Furthermore, as observed by the Coordinate Bench of this Court in case of *Mushtaq Shah Mehboob Shah* (supra) that, in case of a probationer the adversities, if any, to be communicated in August in next year and if the services of a probationer are terminated any time during the probation period i.e. before August, the communication of adverse remarks, if any, afterwards does not have any bearing and the fiction of satisfactory performance under Rule 15(5) of the MEPS Rules by itself turns out to be redundant, since if the services are not satisfactory and power to record satisfaction to be exercised before completion of the period of probation, the communication of adverse remarks, if any, afterward will be futility.

95. We are therefore, afraid that the defined meaning of the expression "employee" cannot be assigned to the expression "employee" occurring in Rule 14(2) and Rule 15(1) to 15(5) of the MEPS Rules. In

the present case, the context therefore, does not permit or requires to apply the defined meaning to the word "employee" occurring in Rules 14(2) and 15(1) to 15(5) of the MEPS Rules.

96. To make further attempt to interpret Rule 14(2) and 15(1) to 15(6) of the MEPS Rules, we will now examine the rights of a probationer coupled with the powers of the Management to terminate a probationer during the period of probation.

97. The Hon'ble Supreme Court of India in the case of *P.L.Dhingra ..vs.. Union of India*, reported in **AIR 1958 SC 36** has held thus :

> *"26. The foregoing conclusion, however, does not solve the entire problem, for it has yet to be ascertained as to when an order for the termination of service is inflicted as and by way of punishment and when it is not. It has already been said that where a person is appointed substantively to a permanent post in Government service, he normally acquires a right to hold the post until under the rules, he attains the age of superannuation or is compulsorily retired and in the absence of a contract, express or implied, or a service rule, he cannot be turned out of his post unless the post itself is abolished or unless he is guilty of misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the service rules read with Art. 311(2). Termination of service of such a servant so appointed must per se be a punishment, for it operates as a forfeiture of the servant's rights and brings about a*

premature end of his employment. Again where a person is appointed to a temporary post for a fixed term of say five years his service cannot, in the absence of a contract or a service rule permitting its premature termination be terminated before the expiry of that period unless he has been guilty of some misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the rules read with Art. 311(2). The premature termination of the service of a servant so appointed will prima facie be a dismissal or removal from service by way of punishment and so within the purview of Art. 311(2). Further, take the case of a person who having been appointed temporarily to a post has been in continuous service for more than three years or has been certified by the appointing authority as fit for employment in a quasi-permanent capacity, such person, under R.3 of the 1949 Temporary Service Rules, is to be deemed to be in quasi-permanent service which, under R. 6 of those Rules, can be terminated (i) in the circumstances and in the manner in which the employment of a Government servant in a permanent service can be terminated or (ii) when the appointing authority certifies that a reduction has occurred in the number of posts available for Government servants not in permanent service. Thus when the service of a Government servant holding a post temporarily ripens into a quasi-permanent service as defined in the 1949 Temporary Service Rules, he acquires a right to the post although his appointment was initially temporary and, therefore, the termination of his employment otherwise than in accordance with R. 6 of those Rules will deprive him of his right to that post which he acquired under the rules and will prima facie be a punishment and regarded as a dismissal or removal from service so as to attract the application of Art. 311. Except in the three cases just mentioned a Government servant has no right to his post and the termination of service of a Government servant does not, except in those cases, amount to a

> *dismissal or removal by way of punishment. Thus where a person is appointed to a permanent post in a Government service on probation, the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment, for the Government servant, so appointed, has no right to continue to hold such a post any more than the servant employed on probation by a private employer is entitled to do. Such a termination does not operate as a forfeiture of any right of the servant to hold the post, for he has no such right and obviously cannot be a dismissal, removal or reduction in rank by way of punishment. ..."*

98. The Hon'ble Supreme Court of India in the case of *Bishan Lal vs.. State of Haryana*, reported in **AIR 1978 SC 363** has held thus :

> "*17. There is, however, another point of view also, already indicated above, from which the case could be considered. It is that the High Court held that this was not really a case of punishment. On this aspect of the case, the High Court rightly seems to us to have proceeded on the view that there should be atleast some difference, as to the nature of or the depth of the inquiry to be held, as between a probationer whose services can be terminated by a notice and a confirmed Govt. servant who has a right to continue in service until he reaches a certain age. It is true that neither can be "punished" without a formal charge and inquiry. But, a less formal inquiry may be sufficient, as it was here, to determine whether a probationer, who has no fixed or fully formed right to continue in service (treated in the eye of law as a case of "no right" to continue in service), should be continued. A confirmed Govt. servant's dismissal or removal is a more serious matter. This difference must necessarily be reflected in the nature of the inquiries for the two different purposes. We are*

> *satisfied that, on facts found, the findings on petitioner's suitability to continue in service were rightly not interfered with. It was, in the eye of law, not a case of punishment but of termination of service simpliciter. The petitioner should he thankful that a more serious view was not taken of his shortcomings.*"

99. The Hon'ble Supreme Court of India in the case of *Krishanadevaraya Education Trust ..vs.. L.A. Balakrishna*, reported in **(2001) 9 SCC 319** has held thus :

> "*5. There can be no manner of doubt that the employer is entitled to engage the services of a person on probation. During the period of probation, the suitability of the recruit/appointee has to be seen. If his services are not satisfactory which means that he is not suitable for the job than the employer has a right to terminate the services as a reason thereof. If the termination during probationary period is without any reason, perhaps such an order would be sought to be challenged on the ground of being arbitrary. Therefore, naturally services of an employee on probation would be terminated, when he is found not to be suitable for the job for which he was engaged, without assigning any reason. If the order on the face of it states that his services are being terminated because his performance is not satisfactory, the employer runs the risk of the allegation being made that the order itself casts a stigma. We do not say that such a contention will succeed. Normally, therefore, it is preferred that the order itself does not mention the reason why the services are being terminated.*
>
> *6. If such an order is challenged, the employer will have to indicate the grounds on which the services of a probationer were terminated. Mere fact*

> *that in response to the challenge, the employer states that the services were not satisfactory would not ipso facto mean that the services of the probationer were being terminated by way of punishment. The probationer is on test and if the services are found not to be satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the services.*"

100. The Hon'ble Supreme Court of India in the case of *Rajasthan High Court v.. Ved Priya*, reported in **2020 SCC OnLine SC 337** has held thus :

> "*14. The present case is one where the first respondent was a probationer and not a substantive appointee, hence not strictly covered within the umbrella of Article 311. The purpose of such probation has been noted in Kazia Mohammed Muzzammil v. State of Karnataka :*
>
> *"25. The purpose of any probation is to ensure that before the employee attains the status of confirmed regular employee, he should satisfactorily perform his duties and functions to enable the authorities to pass appropriate orders. In other words, the scheme of probation is to judge the ability, suitability and performance of an officer under probation. …"*
>
> *15. Similarly, in Rajesh Kumar Srivastava v. State of Jharkhand it was opined:*
>
> *"… A person is placed on probation so as to enable the employer to adjudge his suitability for continuation in the service and also for confirmation in service. There are various criteria for adjudging suitability of a person to hold the post on permanent basis and by way of confirmation. At that stage and during the period of probation the action and*

activities of the probationer (appellant) are generally under scrutiny and on the basis of his overall performance a decision is generally taken as to whether his services should be continued and that he should be confirmed, or he should be released from service. …"

16. It is thus clear that the entire objective of probation is to provide the employer an opportunity to evaluate the probationer's performance and test his suitability for a particular post. Such an exercise is a necessary part of the process of recruitment, and must not be treated lightly. Written tests and interviews are only attempts to predict a candidate's possibility of success at a particular job. The true test of suitability is actual performance of duties which can only be applied after the candidate joins and starts working.

17. Such an exercise undoubtedly is subjective, therefore, Respondent No.1's contention that confirmation of probationers must be based only on objective material is far-fetched. Although quantitative parameters are ostensibly fair, but they by themselves are imperfect indicators of future performance. Qualitative assessment and a holistic analysis of nonquantifiable factors are indeed necessary. Merely because Respondent No.1's ACRs were consistently marked 'Good', it cannot be a ground to bestow him with a right to continue in service.

18. Furthermore, there is a subtle, yet fundamental, difference between termination of a probationer and that of a confirmed employee. Although it is undisputed that the State cannot act arbitrarily in either case, yet there has to be a difference in judicial approach between the two. Whereas in the case of a confirmed employee the scope of judicial interference would be more expansive given the protection under Article 311 of the Constitution or the Service Rules

> *but such may not be true in the case of probationers who are denuded of such protection(s) while working on trial basis.*
>
> *19. Probationers have no indefeasible right to continue in employment until confirmed, and they can be relieved by the competent authority if found unsuitable. Its only in a very limited category of cases that such probationers can seek protection under the principles of natural justice, say when they are 'removed' in a manner which prejudices their future prospects in alternate fields or casts aspersions on their character or violates their constitutional rights. In such cases of 'stigmatic' removal only that a reasonable opportunity of hearing is sine-qua-non. …"*

101. From the above observations of the Hon'ble Supreme Court of India, it is evident that mainly there are three categories of employees in the Service Jurisprudence, primarily :

(a) A person who is appointed substantively to a permanent post;

(b) A person who is appointed to a temporary post for a fixed term; and

(c) A person who is appointed on probation.

102. As we have already discussed and observed that, under the MEPS Act there are three categories of employees as well, namely:

(i) Permanent,

(ii) Temporary, who is appointed for a fixed period and

(iii) Probationer.

103. From the above referred judgments of the Hon'ble Supreme Court of India, the rights of each of the above referred category of employee, can be summarized as under :

Sr. No.	Category of Employee	Rights of the Employee
1.	A person who is appointed substantively to a permanent post	He acquires a right to hold the post until under the Rules, he attains the age of superannuation or is compulsorily retired and in the absence of a contract, express or implied, or a service Rule, he cannot be turned out of his post unless the post itself is abolished or unless he is guilty of misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the Service Rules. Termination of service of such employee per se be a punishment, for it operates as a forfeiture of his rights and brings about a premature end of his employment
2.	A person who is appointed to a temporary post for a fixed period	His services cannot in the absence of a contract or a Service Rule permitting its premature termination be terminated before the expiry of that period unless he has been guilty of some misconduct, negligence, inefficiency or other disqualification and appropriate proceedings are taken under the Rules. The premature termination of the service of an employee so appointed will *prima facie* be a dismissal or removal from service by way of punishment.
3	A person who is appointed on probation	The termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment. Such employee has no right to continue to hold such post. Such termination does not operate as forfeiture of any right of the servant to hold the post, for he has no such right and cannot be a dismissal, removal or reduction in rank by way of punishment.

104. Thus, it is evident that, except the employees of first two categories namely permanent and temporary employees, the probationer has no right to his post and the termination of service of probationer does not amount to dismissal or removal by way of punishment.

105. It is further evident that the probationer is on test and if the services are found not to be satisfactory, the employer has the right to terminate his services. The purpose of any probation is to ensure that before the employee attains the status of confirmed employee, he should satisfactorily perform his duties and functions. The entire objective of probation is to provide the employer an opportunity to evaluate the probationer's performance and test his suitability for a particular post.

106. The written test or interviews held before the appointment of probationer are only attempts to predict a candidate's possibility of success at a particular job. The true test of suitability is the actual performance of duties which can only be applied after the candidate joins and starts working.

107. The probationers have no indefeasible right to continue in employment until confirmed, and they can be relieved if found unsuitable. The probationers in case of termination have protection

under the principles of natural justice if removal is stigmatic and it prejudices prospects or casts aspersions on their character or violates their constitutional rights.

108. Whereas, so far as the employees namely a permanent employee and an employee appointed on temporary basis for fixed period, termination of service of such employee amounts to punishment and it operates as a forfeiture of the employees' right and brings about a premature end of his employment. Further it is evident that the termination of such employee cannot be made unless the post itself is abolished or unless he is guilty of misconduct, negligence, inefficiency or other disqualification and appropriate proceedings are taken under the Service Rules.

109. Thus, to initiate disciplinary proceedings or departmental enquiry, the Annual Confidential Report written under Rule 15(1) of the MEPS Rules and other relevant material could be the part of such proceedings to prove the charges levelled against such employee.

110. Whereas, as observed herein-above that in the case of probationer, he has no right to his post and whose termination of service does not amount to a dismissal or removal by way of punishment, there

is no requirement to initiate disciplinary proceedings or departmental enquiry to terminate the service of a probationer on the ground of unsatisfactory behaviour or performance. In the case of probationer, therefore, the objective assessment of performance, during the period of his probation by maintaining the record of such assessment under Rule 15(6) of the MEPS Rules, is sufficient. Hence, there is no requirement to write and maintain confidential report of the probationer.

111. Having considered that the principles of natural justice are not required to be followed while terminating the services of an employee appointed on probation if the order of termination is innocuous and which does not cast any stigma, it is not necessary to communicate adverse remarks or to facilitate such an employee to make representation as provided under sub-rule (4) of Rule 15 of the MEPS Rules. Therefore, the legislature has consciously excluded the requirements as mentioned in Rules 15(1) to 15(5) of the MEPS Rules for the probationer.

112. From the above discussion, it can be summed up by holding that the plain reading of Rule 15 of the MEPS Rules does not indicate that Rules 15(1) to 15(5) apply to a probationer along with Rule 15(6) of the MEPS Rules.

113. Moreover, considering the language of Section 5(3) of the MEPS Act, it is evident that the requirement of unsatisfactory service referred to in sub-section (3) of Section 5 of the MEPS Act, is a matter of satisfaction of the management and the management has to see not only the satisfaction as regards work of a probationer but also his behaviour during the period of probation.

114. We have, therefore, no hesitation to hold that in the judgments of (i) *Savitribai Fule Shikshan Prasarak Mandal (supra), (ii) High School Education Society* (supra), (iii) *Ashok Pandurang Janjal* (supra) and (iv) *Mushtaq* (supra) correct law has been laid down, whereas, in the judgments of (i) *Vinayak Vidhyadayani Trust* (supra), (ii) *Anjuman-E-Taleem* (supra), (iii) *Prajwala Bhatu Khalane* (supra) and (iv) *Daruwala Education Society* (supra) the law laid down is not in accordance with the legislative intention.

115. Now we proceed to record our answers to the questions formulated by the learned Single Judge, as under :

Q.(i) Whether only sub-rule (6) of Rule 15 of the MEPS Rules applies to an employee appointed on probation when the Management seeks to take action under Section 5(3) of the MEPS Act or entire Rule 15 from sub-rules (1) to (6) of the MEPS Rules apply to such an employee appointed on probation?

Answer to Question No.(i) : Only sub-Rule (6) of Rule 15 of the MEPS Rules applies to an employee appointed on probation when the management seeks to take action under Section 5(3) of the MEPS Act and not the entire Rule 15 from sub-rule (1) to (6) of the MEPS Rules.

Q.(ii) Whether judgment of the Hon'ble Supreme Court in the case of **Progressive Education Society and another v. Rajendra and another** (supra) lays down that entire Rule 15 of the MEPS Rules applies to an employee appointed on probation, particularly in the context of power available to the Management under Section 5(3) of the MEPS Act?

Answer to Question No.(ii) :

Progressive Education Society (supra) does not hold that the entire Rule 15 of the MEPS Rules applies to the employee appointed on probation, particularly in the context of power available to the Management under Section 5(3) of the MEPS Act. The *Progressive Education Society* (supra) in fact supports the view which we have taken, as it categorically holds that the power of termination of a probationer lies with the appointing authority which is at liberty to terminate the services of a probationer if it finds performance of a probationer unsatisfactory during the period of probation and the assessment has to be made by the appointing authority itself and no explanation or reason for termination is required to be given, except informing the employee that his services were unsatisfactory unless it was stigmatic.

Q.(iii) Whether failure to adhere to requirements of sub-rules (3) and (5) of Rule 15 of the MEPS Rules would *ipso facto* vitiate an action taken by the Management under Section 5(3) of the MEPS Act, despite the fact that the Management satisfies requirement of sub-rule (6) of Rule 15 of the MEPS Rules by ensuring that performance of an employee appointed on probation has been objectively assessed by the Head and record of such an assessment has been maintained?

Answer to Question No.(iii) : Failure to adhere to the requirement of sub-rule (3) and (5) of Rule 15 of the MEPS Rules will not *ipso facto* vitiate an action taken by the Management under Section 5(3) of the MEPS Act if the Management satisfies requirement of sub-rule (6) of Rule 15 of the MEPS Rules by ensuring that performance of an employee appointed on probation has been objectively assessed by the Head and record of such an assessment has been maintained.

Q.(iv) Whether non-compliance of sub-rule (5) of Rule 15 of the MEPS Rules would vitiate an order of termination of service simpliciter issued by the Management under Section 5(3) of the MEPS Act when the said sub-rule deems that "work of an employee is satisfactory", while Section 5(3) of the MEPS Act gives power to the Management to terminate the service of an employee appointed on probation not only for "unsatisfactory work", but also for "unsatisfactory behaviour"?

Answer to Question No.(iv) : Non-compliance of sub-rule (5) of Rule 15 of the MEPS Rules would not vitiate an order of termination of service simpliciter issued by the Management under Section 5(3) of the MEPS Act as it covers termination of an employee appointed on probation on both the counts i.e. unsatisfactory work and also for unsatisfactory behaviour.

Q.(v) Whether it would be sufficient compliance on the part of the Management while acting under Section 5(3) of the MEPS Act, if it complies with only sub-rule (6) of Rule 15 of the MEPS Rules by ensuring that the performance of an employee appointed on probation is objectively assessed and the Head maintains record of such assessment, and principles of natural justice stand satisfied by issuing notices/warnings for unsatisfactory work to such an employee appointed on probation, considering the limited rights available to such an employee as per law laid down from the case of **Parshotam Lal Dhingra v. Union of India** (supra) in the year 1958 and onwards?

Answer to Question No.(v): As per the law laid down in the case of *Parshotam Lal Dhingra* (supra) that where a person appointed on probation, the termination of his service during or at the end of the period of probation will not ordinarily or by itself be a punishment because such employee has no right to continue to hold such post, the termination will not operate as forfeiture of right to hold

such post. Therefore, it would be sufficient compliance on the part of the Management while acting under Section 5(3) of the MEPS Act, if it complies with only sub-rule (6) of Rule 15 of the MEPS Rules. Further, as the principles of natural justice do not apply to the probationer unless the termination is stigmatic, issuance of notice/ warnings for unsatisfactory work to such an employee appointed on probation is not contemplated under the MEPS Act or MEPS Rules.

116. Having answered the questions of law, as formulated by the learned Single Judge for reference, now we direct the matter to be placed before the learned Single Judge for disposal in accordance with law. Keeping in view the importance of the questions involved in the present case, we leave the parties to bear their own costs.

117. Considering the intricacies of the questions referred to us, we place on record our appreciation for all the learned counsel, who have addressed us on this issue and have rendered fruitful assistance to us, which has helped us in answering the questions.

(ANIL S.KILOR, J) (AVINASH G.GHAROTE, J) (SUNIL B.SHUKRE, J)

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