Mukesh Chandra Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Oct-27-1999

Reported in : 2000(1)AWC221; [2000(85)FLR317]; (2000)1UPLBEC101

Judge : V.M. Sahai, J.

Acts : Constitution of India - Articles 14, 16, 21, 23, 32, 39, 41 and 226; Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 - Sections 19(3); Uttar Pradesh Agriculture Produce Markets Board (Officers and Staff Punishment) Regulations, 1984; Uttar Pradesh Agriculture Produce Market Commttees (Centralised) Service Regulations, 1984; Uttar Pradesh Industrial Disputes Act, 1947 - Sections 6N, 16, 17 and 19

Appeal No. : C.M.W.P. No. 40563 of 1999

Appellant : Mukesh Chandra

Respondent : State of U.P. and Others

Advocate for Def. : S.C. and ;B.D. Mandhyan, Adv.

Advocate for Pet/Ap. : Km. Mahima Maurya, Adv.

Judgement :

V.M. Sahai, J.

1. W h e t h e r appointment by Government of a welfare State or its instrumentality or department against regular vacancies on fixed salary for limited period, its continuance for two to three years and then termination amounts to exploitation under Article 23 of the Constitution ; whether the appointing authority can appoint deliberately against rules and claim that the appointee having been appointed illegally has no right and is not entitled to approach the High Court under Article 226 ; whether such appointments which are contrary to rules and are made under political pressure or for other reasons which means extraneous consideration can lead to tortuous liability of the appointing authority are some of the questions of far-reaching importance that have been raised by the petitioner who has been helpless victim of such illegal action.

2. The petitioner an unemployed youth of the weaker section of the society was appointed on 7.8.1996 against one of six sanctioned posts of clerks in Mandi Pariashad, Kanpur. It would be better to quote the letter dated 7.8.1996 as it gives in detail the number of vacancies, the procedure followed by the officers in appointing the petitioner, the purpose of appointment etc. The letter dated 7.8.1996 is quoted as under :

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vij funs'kd iz'kklu

voxr djkuk gS fd orZeku esa fuekZ.k [k.M dkuiqjesa dsoy nks fyfid fu;fer inksa ij dk;Zjr gSa] tcfd Lohd`r inksa dh la[;k N% gSAQyLo:i vk, fnu dk;kZy; dk;ksZa esa dfBukbZ vuqHko dh tk jgh g SA mYys[kuh; gS fdbl dk;kZy; esa fyfid dk in fjDr gS ftl ij eq[;ky; Lrj ls vHkh rd fdlh deZpkjh dhrSukrh ugha dh xbZ gS] QyLo:i mDr fyfidks ls gh dk;Z ysuk iM+rk g SA vr% dk;kZy;dks Mkd ,oa vU; izi= rS;kj djus esa dkQh dfBukbZ gksrh gS] ftlds dkj.k dk;ksZ dsfu'iknu esa dHkh dHkh dkQh foyEc gks tkrk g SA vHkh tYnh gh ,d fyfid dkLFkkukUrj.k Q:[kkckn gks tkus ds dkj.k vkSj Hkh dfBukbZ gks jgh g SA vr% nksfyfidksa dh furkar vko';drk g SA

Jh vjfoUn dqekj flag dk ,d izkFkZuk i= ukSdjhgsrq izkIr gqvk g SA budh 'kSf{kd ;ksX;rk chO,O gS rFkk budk O;fDrxr lk{kkRdkjHkh fy;k x;k] ftlls ;g Li'V gS fd ;g fyfid in ds fy, cgqr gh mi;ksxh fl)gks ldrs gSaA

Jh eqds'k pUnz dk izkFkZuk i= izkIr gqvk gSAbudh 'kSf{kd ;ksX;rk chO,O gS blds vfrfjDr vk'kq ys[ku esa 70 'kCn izfr feuVrFkk Vad.k esa 40 'kCn izfr feuV xfr g SA

;g vuqlwfpr tkfr ds ik= vH;FkhZ gSa bUgsafu;qfDr dj ysus ls fu/kkZfjr vkj{k.k dksVs dh iwfrZ Hkh gks tk;sxhA dk;kZy; dsVad.k dk;Z esa vkus okyk vojks/k Hkh lekIr gksxkA

mijksDr ifjfLFkfr;ksa dks n`f'Vxr j[krs gq,ifj'kn fgr esa ;fn vki Lohfr iznku djsa rks Jh vjfoUn dqekj flag rFkk Jheqds'k pUnz dks ifj'kn vf/k'Bku en ds vafdr fyfid ds inks ij :O 1]400dh ekfld ikfjJfed ij fu;fer fu;qfDr gksus rd fu;qfDr iznku djds dk;kZy; dk;Zlqxerk iwoZd pyk;k tk ldsA

i;k mijksDrkuqlkj Lohfr iznku djus dkd'V djsaA

gO vLi'V

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vkjOchO flag

mi funs'kd fuekZ.k

e.Mh ifj'kn] dkuiqjA

dsoy 89 fnu ds fy, vFkok fu;fer O;oLFkk gksusrd ds fy, vuqeksfnrA

gO vLi'V

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3. The petitioner thus was appointed against regular vacancy as the work was suffering. He was given appointment, as it would satisfy the requirement of appointing schedule caste. The petitioner was otherwise found suitable both educationally and technically having short hand speed of 70 words per minute and typing speed of 40 words per minute. The Deputy Director (Construction) Mandi Parishad. Kanpur, recommended that he may be appointed on a fixed salary of

Rs. 1,400 and till regular selection was made. It was agreed by the Additional Director Administration for 89 days or till the regular selection was made. He was given extra charge of Kanpur Khand Karyalaya by order dated 11.12.1996. The service of the petitioner was terminated by order dated 11.6.1999 on the ground that his services were no more required. He was paid one month salary as retrenchment compensation under Section 6N of the U. P. Industrial Disputes Act, 1947. The order further stated that if any regular selections are held in future, the petitioner could participate in it. It is this order dated 11.6.1999, Annexure-4 to this petition, which is under challenge in the instant writ petition.

4. Sri B.D. Mandhyan the learned counsel appearing for the respondents sought time on 22.9.1999, to file counter-affidavit. A short counter-affidavit was filed on 27.9.1999. Sri Mandhyan stated that the short counter-affidavit be treated as detailed counter-affidavit as he has filed as Annexure-1 to it which is the counter-affidavit filed in Civil Misc. Writ Petition No. 12200 of 1999, on which he places reliance. He urged that no interim order be passed and the matter may be finally decided on merits. His request was accepted. The learned counsel for the petitioner did not object to acceptance of Annexure-1 filed to the short counter-affidavit.She filed the rejoinder-affidavit. When arguments commenced Sri Mandhyan requested for one day's time for reply as the constitutional questions raised by the learned counsel for petitioner and the issue of accountability of respondents, etc. were very important. His request was accepted. The argument of the learned counsel for the parties were heard at length.

5. Learned counsel for thepetitioner Miss Mahima Maurya urgedthat the impugned tennination orderviolates fundamental rights of thepetitioner guaranteed under Articles 14, 16, 21 and 23 of the Constitutionand Directive Principles of StatePolicy under Article 39(f) and alsoArticle 41 of the Constitution. Sheurged that the respondents madeappointments Intentionally,deliberately and knowingly being fullyaware that such appointments werecontrary to rules, therefore, it was notopen to them to claim that theappointments were illegal and theywere estoppped by their own conductfrom raising such a plea. It was urgedthat the respondents cannot takebenefit of their own wrong and theybeing instrumentality of State havepublic accountability. Learnedcounsel urged that the petitioner'sappointment

was approved for eightynine days or till regular selection wasmade. Since the petitioner wascontinued even after eighty nine days,he was to continue as per his termsof appointment letter till a regularselection was made by respondents.The learned counsel urged that noregular selection having been madeby the respondents, the services ofthe petitioner could not beterminated. She further urged thatunder the regulations applicable toMandi Samitis and Mandi Parishad,there was no provision for makingany ad hoc appointment orappointment on daily wages. Onlyregular appointments could be made.The respondents knew that they weremaking appointment not permitted bythe regulations but in order to exploitthe petitioner appointed him withoutmaking any regular selection on afixed salary which was lower than theminimum pay scale of clerk. Sheurged that the respondents withoutgiving any chance to the petitioner to participate in regular selection have terminated his services which amounts to unfair labour practice and the act of the respondents amounts to taking forced labour from the petitioner being violative of Article 23 of the Constitution. Learned counsel argued that the petitioner was entitled for compensation under tort of misfeasance in public office.

6. On the other hand. Sri B.D. Mandhyan learned counsel for the respondents urged that the petitioners were appointed de hors, the rules, therefore, his appointment was irregular and it did not confer any right to him to continue in service. He urged that Article 23 of the Constitution was not applicable to petitioner. And in any case, the respondents having not applied any force on petitioner or appointees like him to take up the employment with the respondents, there was no question of violation of Article 23. The petitioner was paid wages or salary for the period for which he worked and he was free to leave the service of respondents. He further urged that none of the rights guaranteed to the petitioner under the Constitution have been violated and the petitioner was not entitled for any relief nor the respondents were guilty of any tortuous liability as the appointments were made in discharge of their duty. The learned counsel vehemently argued that the appointing authority could not be held liable for tort of misfeasance in public office. Learned standing counsel adopted the same line of argument as of Sri B.D. Mandhyan.

7. In the short counter-affidavit it is stated that the petitioner was a muster roll employee. It is claimed that he was not employee of Mandi Parishad. He was appointed on a fixed salary which was to be paid from contingency fund of the project and the wages were subject to 2% of the cost of the project. The respondents claim that the petitioner was like a labourer whose services could be terminated on completion of project or being in excess of 2% of cost of project. It is alleged thatappointment and continuation ofpetitioner being in excess of 2%, thedecision was taken by theGovernment on 12.2.1999 followed bythe decision of the Mandi Parishad toretrench the petitioner. It is allegedthat the appointments in MandiParishad are governed by U. P.Agriculture Produce MarketCommittees (Centralised) ServiceRegulations, 1984, which gives indetail the manner and method ofselection but it was not followed andthe petitioner was engaged on musterroll on ad hoc and stop-gaparrangement. Therefore, he had nolegal right to challenge histermination in this Court. In thedetailed counter-affidavit filed in CivilMisc. Writ Petition No. 12200 of 1999filed as Annexure-1 to the shortcounter-affidavit it was stated thatprior to 1.4.1996 and after 1.4.1996.about 2.207 appointments have beenmade illegally without following theprovisions- A chart has been annexedby the respondents whichdemonstrates that about 2,207employees had been appointed by therespondents without making anyregular selection. Annexure-3 to thecounter-affidavit gives details of theposts, which were vacant. It is statedthat 93 vacancies were unfilled inMandi Samitis whereas 372 postswere unfilled in Mandi Parishad. Theaffidavit states that according toSection 19 of the Act, only 10% couldbe spent on establishment but theexpenditure in Mandi Samlts from1995-96 to 1998-99 was 14% to 21%.In paragraph 7 it was alleged thatappointments were madeunauthorisedly, under politicalpressure or for other reasons. Inparagraph 10 the details of vacanciesin different Mandi Samitis and MandiParishad, the sanctioned strengthand the employees working against itwere mentioned. In the nextparagraph it was stated that on27.1.1998 the Director of MandiParishad informed AgricultureSecretary about the irregularappointments whereupon StateGovernment issued an order on12.2.1999 on the subject of illegalappointments and directed that allappointments made after 1.4.1996and before 30.10.1997 may be cancelled forthwith. A copy of the letter has been filed as Annexure-4 to the counter-affidavit. In paragraph 13 of Annexure-1 to the short

counter-affidavit. It has been stated that Mandi Parishad submitted resolution for regularising the services of the employees who were appointed without following the procedure prescribed by the regulations but the Government by its order dated 1.3.1999 did not accept the proposal of regularisation consequently the appointment of the petitioner and others has been cancelled. In paragraph 16 of Annexure-1, it has been stated that though there were 2,207 employees who were appointed irregularly and deserved to be retrenched but the respondents on humanitarian ground retrenched services of those employees only who were appointed after 1.4.1996. Learned counsel for the respondents urged that regular selections have not taken place to fill class III and IV posts but it does not give any right to the petitioner who was appointed without following the regulations consequently he will have no right to continue in service.

8. On the argument of learned counsel for the parties, a very serious question arises for consideration as to whether the State or its instrumentality under its unequal bargaining power can exploit the youths and citizens of this country and take advantage of their poverty by exploiting them knowing that they were being appointed against the rules, therefore, no right would accrue to them. The petitioner was an unemployed youth. The respondents were not holding any regular selection to fill the posts, which were available in their establishment. They were following the practice of making ad hoc appointments without following the procedure prescribed by rules. The respondents offered the petitioner, appointment in 1996 as clerk, which was accepted by him. He was paid fixed salary. The respondents, after taking service from him for three years, terminated hisservice on the ground that his services were no more required. Under the U. P. Agriculture Produce Markets Board (Officers and Staff Punishment) Regulations, 1984 and the U. P. Agriculture Produce Market Committees (Centralised) Service Regulations, 1984, there is no provision for making any ad-hoc or appointment on dally wage basis. The regulations provide for only regular appointment for which detailed procedure have prescribed under the regulations. This fact was well within the knowledge of the respondents. The respondents have not made any regular appointment for many years. In the chart filed as Annexure-1 of Annexure-1 to the short counter-affidavit. It is admitted that even though services of 1.021 employees after 1.4.1996 have been terminated. 1,186 employees appointed prior to 1.4.1996

have been retained. I have already extracted the letter dated 7.8.1996 sent by the Deputy Director (Construction) Mandi Parishad Kanpur, to Additional Director (Administration). The appointment of the petitioner was in construction department against vacant post of clerk. It was not against any project. The allegation in the short counter-affidavit is contrary to the facts. The name of the project has not been disclosed. The allegation that the petitioner was a labourer whose services could be terminated is far from truth. It is contrary to the appointment letter. If it would have been so the petitioner by the order dated 11.12.1996 would not have been directed to work at Kanpur Khand Karyalaya as well for which he was not to be paid any extra salary. The termination order does not mention that the petitioner's services were being terminated as he was working in a project. The reason for termination of petitioner's services can be better appreciated if Annexure-4 of Annexure-1 to the short counter-affidavit is reproduced below :

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fiz; vuqt]

mO izO jkT; f'k mRiknu e.Mhifj'kn esa fofHkUu Js.kh ds inksa ij dh x;h vfu;fer fu;qfDr;ksa ds lEcU/kesa rRdkyhu funs'kd Jh fnus'k flag ds v)Z 'kkldh; i= laO&vf;/k&d; VhOlhO 97 98&2158 fnukad 27-1-98 ,oa v)Z 'kkldh; i= laO&vf;/k&x;&fo;-116@98&1010 fnukad 27-1-98 ds lanHkZesa eq>ls ;g lwfpr djus dh vis{kk dh x;h gS fd i;k izdj.k esa fuEuor~dk;Zokgh lqfuf'pr djus dk d'V djsa%

1- fnukad 1-4-96 ls fnukad 30-10-97 ds e/; e.Mhifj'kn ,oa e.Mh lfefr;ksa esa dh x;h vfu;fer fu;qfDr;ksa dks rRdky fujLrfd;k tk;A ,slh fu;qfDr;ksa dks lekIr djus gsrq fuEuor dk;Zokgh dh tk;s %

d ,slh fu;qfDr;ka] tks fdlh l`ftr@Lohrin ds cxSj dh x;h gS] fujLr djds lEcfU/kr deZpkjh dks lsok lekIr djus esa dksbZfof/kd dfBukbZ ugha gS fdUrq vkns'k esa dkj.k vfHkfyf[kr djuk gksxkA

[k ,sls O;fDr;ksa dh fu;qfDr;ksa dks] tkslEcfU/kr in ds fy, fofgr 'kSf{kd vgZrk ugha j[krs Fks] dks fujLr djds lsok lekIrdjus esa dksbZ fof/kd dfBukbZ ugha gS fdUrq vkns'k esa dkj.k vfHkfyf[kr dj fn;ktk;sA

x ,sls O;fDr] ftUgsa fdlh in ds lkis{kfu;qDr fd;k x;k gS vkSj og ml in ds fy, fofgr 'kSf{kd vgZrk Hkh j[krs gS mudhlsok lekfIr muds fu;qfDr vkns'k esa mfYyf[kr izf;k ds vuqlkj dh tk;sA ;fnfu;qfDr vkns'k esa dksbZ izf;k mfYyf[kr ugha gS rks uksfVl vFkok osrunsdj lsok lekfIr dh tk;sA

2- bl lEcU/k esa eq>s ;g Hkh lwfpr djuk gSfd fnukad 1-4-96 ls iwoZ ifj'kn ,oa lfefr;ksa esa dh x;h vfu;ferfu;qfDr;ksa ds lEcU/k esa xgu ijh{k.k dj foLr`r fooj.k lfgr lqLi'V vk[;kfnukad 20-2-99 rd miyC/k djkus dk d'V djsaA

3- mDr vfu;fer fu;qfDr;ksa gsrq mRrjnk;h vf/kdkfj;ksads fo:) dk;Zokgh gsrq vfHkys[kh; lk{;ksa lfgr viuk izLrko lqLi'V laLrqfrlfgr 'kklu dks fnukad 18-2-99 rd izR;sd n'kk esa miyC/k djkus dk d'V djsaA

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9. It was a letter issued from the State Government to Director Mandi Parishad. It purported to categorise the appointees in three categories, one those who were appointed against posts which were not created or sanctioned, second those who were not eligible or qualified for the post on which they were appointed, and third who were eligible and qualified and were appointed against regular vacancies. The letter mentioned that there was no difficulty in dispensing with services of appointees mentioned in first two categories but the order must mention the reason. In respect of last category, the letter mentioned that termination should be made in accordance with terms of appointment after giving one months' notice or pay in lieu thereof. I have already extracted the letter of appointment of petitioner. It would show that he was covered in the last category. He was continued after 89 days, therefore in terms of the appointment letter he was to continuetill regular selection was made. The respondents, however, in the counter-affidavit have justified the termination for reasons which I have already mentioned. It appears unnecessary to deal with the allegation that the Mandi Samiti and Mandi Parishad by making large number of irregular appointments were spending much beyond the limit under Section 19 (3) (ii) of Uttar Pradesh Krishi Utpadan Mandl Adhiniyam. 1964, as even assuming it to be so the appointee could not be held responsible for it. These facts could be in the knowledge of Mandl Samiti or Mandl Parishad and if they go on making appointments beyond their limit and continue such persons for years they cannot escape from their liability by just claiming that the appointments were made contrary to regulations. I may also point out that even though Section 6N of the U. P. Industrial Disputes Act, 1947, is mentioned in the termination order but since the appointment in Mandl Samiti or Mandi Parishad are governed by regulations, it is doubtful if the provisions of U. P. Industrial Disputes Act applied in Himanshu Kumar Vidyarthi and others v. State of Bihar and others, AIR 1997 SC 3657, it was held where appointments were regulated by statutory rules, the concept of industry stood excluded. In General Manager, Telecom v. A. Srinivasa Rao and others, (1997) 8 SCC 767, the Court while explaining the test laid down in Bangalore Water Supply and Sewerage Board v.

A. Rajappa, (1978) 2 SCC 213 held that either the undertaking must satisfy the test of predominant nature of its activities being production of goods or services or the unit which can be considered to be industry must be substantially severable. The respondents could not establish that the Mandi Samiti or Mandl Parishad satisfied any of these tests. In fact Sections 16 and 17 of the Act which lay down functions, duties and powers of the committee negate the concept of industry.

10. From the appointment order, it is clear that the petitioner was appointed as a clerk but his services were terminated in pursuance of theorder dated 12.2.1999 of Government because Mandi Parishad had appointed him without following the procedure. Whether such termination was valid or not shall be examined later but it is necessary to mention that Sri Mandhyan argued that since this Court has held in Arvind Kumar v. Director Rajya Krishi Utpadan Mandi Parishad. Lucknow and others, 1999 AWC 1638, that since appointments were made de hors the rules, the petitioner had no right to the post, therefore, he could not claim infringement of his right under Articles 14 and 16 of the Constitution and consequently, could not invoke writ jurisdiction of this Court. Further since the petitioner had no right to file writ petition, he could not claim that his right under Article 21 was violated.

11. In view of the decision given by this Court on Articles 14, 16 and 21. I shall confine myself to basic challenge to the order raised during arguments based on Article 23 of the Constitution. The learned counsel did not raise any factual dispute. Her main argument was that the petitioner having been appointed as clerk on Rs. 1,400, which was much less than the salary of a clerk. It was exploitation as provided in Article 23 of the Constitution. The learned counsel submitted that this being not denied, it was enough to support the challenge raised by her. It is not disputed by Sri Mandhyan that the challenge based on Article 23 was not raised nor decided in earlier petition. But he urged that this article did not apply to Government servants or to the employees appointed by instrumentality of State. Therefore, three questions arise one, whether the petitioner could approach this Court under Article 226 claiming that the order was violative of Article 23, second whether the right guaranteed under Article 23 extends to appointees by the State or its instrumentality and third whether the respondents in appointing petitioner on a fixed salary were guilty of taking begar or forced labour from him. So far the first

question is concerned, there can be no dispute about, it as the Apex Court in People's Union forDemocratic Rights and others v. Union of India and others, AIR 1982 SC 1473, held that where the employer was guilty of taking forced labour ; under Article 23 of Constitution, the aggrieved person was entitled to approach the Court for enforcement of his fundamental right. It does not require further discussion. The next question is whether the article is wide enough to include in its sweep exploitation of a Government servant or employees of instrumentality of State. Article 23 of the Constitution is a right guaranteed to a citizen against exploitation. It is extracted below :

23. (1) Traffic in humanbeings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this Article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

11A. The Article prohibits begar and other similar form of forced labour. The meaning of these expressions and the ambit and scope of the Article has been discussed in detail in People's Union for Democratic Rights (supra). The Court held that the sweep of the article was very wide and unlimited as the Constitution makers were endeavouring to bring about socio-economic regeneration with a view to reach social justice to commonman. The Court held that the Article struck at forced labour in whichever form it manifested itself because it was violative of human values. The Court took notice of social conditions prevailing in our society and observed that poverty and unemployment resulted in unequal bargaining power leading to Hobson's choice either to starve or submit to exploitative terms dictated by the employer giving rise to legitimate presumption that when a person provides labour of service to another person against receipt of remuneration which is less than theminimum wage, he is acting under force of such compulsion which drives him to work though he is paid less than what he is entitled to receive. The Court having explained forced labour thus extended its scope by applying it to situations where a person was forced by economic considerations to accept lesser

remuneration and held that :

'The word 'force' must, therefore, be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leave no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage.....'

This decision was rendered by the Apex Court on a public interest litigation filed for benefit of workers engaged by the contractors to whom the work of construction was entrusted by Delhi Development Authority or Union of India for completing projects during Asiad. The entire decision was based on admission by the Union of India that even though it paid the minimum wages of Rs. 9/25 per worker to the contractor, he deducted Re. 1 as his commission. The worker thus received one rupee less. The importance of the decision lies in that it explains the scope of Article 23. It has been extended to any form of begar or forced labour either due to economic compulsion or otherwise. The words and expressions used in the Article are of wide sweep. They were construed broadly by the Apex Court. The word begar has been described by Molesworth as labour or service extracted by a Government or person in power without giving remuneration for it.' It was approved by the Apex Court in People's Union for Democratic Rights (supra). Therefore, the Article is wide enough and extends to actions of the Government, if it results in taking service without paying any or full remuneration. In Suraj v. State of M. P.. AIR 1960 MP 303, the salary of a teacher was stopped as he was notwilling to work against the terms of his appointment. The Court held that begar includes taking work without remuneration even temporarily. It was observed 'To ask a man to work and then not to pay him any salary or wages, savours of begar. Similarly, if the Government or its instrumentality pays lesser amount than the amount fixed for a particular job, then it is as much begar as paying nothing. For instance, the salary of a clerk in Mandi Samiti is admitted in the counter-affidavit to be Rs. 2,000. But the petitioner who was eligible and qualified was appointed against a regular vacancy on a fixed salary of Rs. 1,400. It was thus begar and Mandi Samiti was guilty of exploiting the helpless unemployed youth.

12. I may now take up the main argument advanced by Sri B.D. Mandhyan, the learned counsel for Mandi Samilis that this Article did not apply to appointments made by the State or its instrumentality. He relied on a Full Bench decision in Rita Mishra and others v. Director Primary Education, Bihar and others, AIR 1988 Pat 26, of the Patna High Court. Before adverting to the proposition of law laid down by the decision. I may point out that the petitioners who had approached the Court under Article 226 had not come with clean hands. They had obtained their appointments by committing fraud and forgery. The question framed by the Full Bench was whether a Government servant who obtained the order by fraud was entitled to a writ of mandamus. A person invoking extraordinary jurisdiction under Article 226 cannot base his claim on forgery and fraud. The petitioners, therefore, had no equity in their favour. A person guilty of fraud could not claim any right. The petition was liable to be dismissed on this ground alone. The decision in my opinion is not helpful even on the principle laid down by it. The Bench while accepting the wide interpretation by the Apex Court observed that joining of Government service voluntarily negates the concept of forced labour, therefore, the petitioners who had entered service on forged letters had never been offered to work,consequently, they could not claim any violation of Article 23. The legal principle laid down by the Court thus was that where a person accepts service voluntarily, he cannot subsequently claim any violation of fundamental right. With great respect to the Judges of the Patna High Court. I may point out that the Bench ignored the well known distinction between statutory right, constitutional right and fundamental right. In Basheshar Nath v. I. T. Commissioner. AIR 1959 SC 149, it was explained thus :

'The rights conferred on citizen may be thus classified : (i) statutory rights (ii) constitutional rights, and (iii) fundamental rights. One need not consider the statutory rights in this context but constitutional rights are those created and conferred by the Constitution. They may or may not be waived by a citizen, as stated in text books and the decisions of the Supreme Court of the United States of America, above referred to. But when the rights conferred are put on a high pedestal and are given the status of fundamental rights which though embodied in the Constitution itself are in express terms distinguished from the other constitutional rights (e.g. fundamental rights which are enshrined in Part III of the

Constitution and are enacted as immune from any legislation inconsistent with or derogatory thereto, and other constitutional rights which are enacted in other provisions, for instance in Articles 265 and 286 and in Part-XIII of the Constitution), they are absolutely inviolable save as expressly enacted in the Constitution and cannot be waived by a citizen.'

13. The fundamental right, therefore, cannot be waived. It is thus clear that a Government servant cannot be prevented from approaching the Court for violation of his fundamental rights only because he accepted the service or job voluntarily. I may further point out that the entire approach that Article 23 would not apply to Government servants was contrary to the principle explained by the Apex Court inPeople's Union for Democratic Rights (supra) as even though it was dealing with contract labour but while discussing the scope of Article, the Court did not confine it to such employees only. The expression 'forced labour' was construed very widely to include in it lesser payment to the employee in service. The test of joining Government service voluntarily to exclude applicability of Article 23 is neither in keeping with the spirit of the Article nor its interpretation by the Apex Court. A citizen of the country has been guaranteed equal opportunity of employment. And Article 39 requires the State to direct its policy to secure adequate means of livelihood. If the State on the other hand indulges in curtailing the adequate means of livelihood determined by it either by paying lesser than the amount fixed or taking more work, then it would be violative of the guarantee. I would not be exaggerating if I say that the problem of unemployment is so grim in our State that if the Government or its departments offers employment on condition that the employee would have to serve for one year without any salary, the number of applicants would have to be decided by holding tests or by drawing lots. If the citizen of this country accepts lesser amount due to economic compulsion, as beggars cannot be choosers, then how does it cease to be exploitation. Forced labour is not a static concept. It may change due to change in social circumstances. The Patna High Court construed the expression used in the Article narrowly. Exploitation or forced labour may arise due to various reasons. Its effect has to be judged by the result. It is not, the acceptance of a service voluntarily but the effect of it that results in exploitation. In People's Union for Democratic Rights (supra), the Union of India had paid wages to the contractor who deducted his

commission from it. The Court held it to be forced labour because the labour was paid less than what was payable. The inference of exploitation was raised because of the result of getting lesser than the amount fixed as minimum wages. Theappointments made by the Government have constitutional protection. For instance, one cannot be terminated without notice nor he can be reduced in rank. His salary cannot be curtailed. But if the Government of a State or its department or its instrumentality resorts to offering employment on lesser salary, it cannot be said that since the appointee accepted it voluntarily. It does not amount to exploitation or it is not forced labour. In People's Union Jor Democratic Rights (supra). It was observed fundamental rights guaranteed under Part-III operates as limitation on the power of the State, which can neither enact a law which can breach it nor act in a manner which is violative of it. A person selected for a post is entitled to the salary which the post carries. But if he is made to accept lesser amount either due to economic compulsion or because of the power of the State, he cannot be told that since he accepted the employment voluntarily, he had no remedy. If an appointee is paid lesser than what is payable, it would be as much exploitation as paying nothing. In People's Union for Democratic Rights (supra) the Apex Court observed as under:

'Now the next question that arises for consideration is whether there is any breach of Article 23 when a person provides labour or service to the State or to any other person and is paid less than the minimum wages for it. It is obvious that ordinarily no one would willingly supply labour or service to another for less than the minimum wages, when he knows that under the law he is entitled to get minimum wages for the labour or service provided by him. It may therefore be legitimately presumed that when a person provides labour or service to another against receipt of remuneration which is less than the minimum wages he is acting under the force of some compulsion which drives him to work though he is paid less than what he is entitled under law to receive. What Article 23 prohibits is forced labour that is labour or service which a person isforced to provide and 'force' which would make such labour or service 'forced labour' may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it

may even be compulsion arising from hunger and poverty, want and destitution.....'

14. Coming to the third question, the petitioner a graduate, offered himself for the job of a clerk. His request was accepted subject to two conditions, one that he shall be paid fixed amount of Rs. 1,400 and other that it shall be for limited period or till regular selection was held. The method of selection and appointments of clerks in Mandi Samiti is governed by regulations. Any person appointed in accordance with it is entitled to salary as determined from time to time. Admittedly no selection has been held by the Mandi Parishad. In fact it is not clear whether Mandi Parishad ever held selections and appointed clerks in Mandi Samitis in accordance with the regulations. But if regular selections are not held and the appointments are made temporarily or ad hoc for fixed period or till regular selection is held, it does not empower the authorities to appoint a person on lesser salary than is payable. And if the Government or its instrumentality resorts to such abuse of power, then it amounts to exploitation or forced labour under Article 23. Ours is over-populated and under-employed country. There are more persons than the jobs. The poverty is also at the extreme. The economic compulsion of the masses is a matter of concern. The young and educated have multiplied in years. The job has not risen in that proportion. There is no social security or unemployment allowance. The result is that the educated youth is willing to work on any terms. Like a drowning man, he clutches any straw offered by a Government department or anyinstrumentality of the State for survival for the time being and hope of settlement in future. I do not want to illustrate, it but every day petitions have come before me of teachers who claim to be working for years without any salary in the hope that they may be regularised.

15. The argument of the petitioner that regular appointment was never made by the respondents could not be denied by Sri Mandhyan. The petitioner was also appointed by the respondents ad hoc obviously because of unemployment compelling the petitioner to accept appointment on whatever terms it was offered to him. If the State or its instrumentality intentionally, knowingly and deliberately offers appointment to citizens against the rules and after taking work for some years dispenses with his service for no rhyme or reason, then it is taking advantage of his social weakness resulting in exploitation. The respondents

appointed the petitioner as clerk on a fixed salary of Rs. 1,400 per month, which was much below the salary of a regular clerk. The respondent might have done so for securing monetary advantage to the employer by reducing expenditure on work force but in law, it was unfair and unjust. The Apex Court in People's Union for Democratic Rights (supra) held that rule of law does not mean that protection of law must be made available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests. The poor too have civil and political rights and the rule of law is meant for them also, though today it exists only on paper and not in reality. The Court held that the problem of unemployment coupled with lack of equality of bargaining power was so acute that a contract of service on the face of it may appear to be voluntary but in reality it may be involuntary because while entering into the contract, the employee by reason of his economic helplessness, might have been compelled to undertake the service either to save himself of starvation or to submit to the exploitation on the terms fixed by the powerful employer.

16. The appointment of the petitioner on lesser salary than what was payable to him thus satisfied all the requirements in law which go to make it exploitation under Article 23 of the Constitution. Even though the petitioner offered himself for being appointed a clerk in Mandi Parishad and he voluntarily accepted lesser payment, it could not preclude him from approaching this Court claiming that his fundamental right under Article 23 has been violated because the Article applies to a Government servant or an employee of its instrumentality as well who accepted the job voluntarily. Facts mentioned earlier do not leave any doubt that the exploitation is writ large on the face of it. The offer and acceptance of the job was immaterial nor the reason for acceptance was of any consequence. Once he was denied just and minimum wages payable to a clerk, the manner and method of it became irrelevant as the ultimate result of it was begar or forced labour as visualised by Article 23 of the Constitution. The order appointing petitioner on lesser salary on the post of clerk was in violation of fundamental right guaranteed by Part III of the Constitution.

17. Since fundamental rights of the petitioner was violated he was entitled to invoke extraordinary jurisdiction of this Court under Article 226. The next question

is whether the petitioner is entitled to any relief for violation of his right under Article 23. This would depend to a large extent on the evaluation of the effect of making illegal appointment against regulations under political pressure and for other reasons by the appointing authorities of Mandi Samiti and Mandi Parishad. For this, it is necessary to examine the administrative law as developed by Courts from time to time and the law of public accountability of officers entrusted with public duty with special reference to tortuous liability of misfeasance by persons in power. In the counter-affidavit filed by the respondents in Civil Misc. Writ Petition No. 12200 of 1999, two important facts were admitted, one that the appointments in MandiSamiti and Mandi Parishad before and after 1.4.1996 were not made in accordance with regulations, two that Mandi Samitis and Mandi Parishad have been making appointments under political pressure or for reasons. In absence of any detail, it would be reasonable to assume that such other reasons were extraneous reasons. Both the reasons are contrary to the constitutional provisions and rule of law. Every citizen is constitutionally entitled to equality of opportunity in the matters of employment. The State or its instrumentality by resorting to such methods of appointment deprive thousands and lakhs, thus violates the constitutional rights of the citizens of this country. The stand in the counter-affidavit it shocking. It is like announcing from the house top that we would not follow the rule of law on which our society is structured because it does not give rise to any cause of action which can be challenged in a court of law. According to the counter-affidavit. such appointments are not in hundreds but thousands. And the officers of the department are misusing their authority, by appointing persons for extraneous reasons. Such action has two aspects, one from the point of view of the employee and other for employer. What rights flow to the employee shall be examined later, the employer cannot say that an appointee has no right as he was appointed illegally. In my opinion, such stand is contrary to rule of law on which our system is structured. It is not open to any one much less a Government or an instrumentality of the State to mock at law. In services where selections are made after advertising and test, etc., it is not uncommon that if selections are not held or delayed for a long time, then appointments are made either by appointing authority due to administrative exigency or persons on coming to know of the vacancies make applications to the department concerned and the employer being satisfied

about eligibility, etc. appoints him temporarily, ad-hoc or stop-gap till regular selection is made or exigencyis over. Such appointments have been subject-matter of various decisions given by the Apex Court and this Court. It has been held that the appointee has no right to claim that he may be regularised or made permanent. The Court explained this recently in Ashwani Kumar and others v. State of Bihar and others. (1997) 2 SCC 1. At the same time, the employer cannot terminate without any reason to appoint similar other persons. It raises issue of administrative law. The State and its department or its instrumentality are expected in our system to work as model employer. The obsolete principle of hire and fire died fifty years ago. The Apex Court has been lamenting that backdoor entry by State or its instrumentality be stopped but it had only remained a declaration of law which the appointing authorities have neither inclination nor will to follow. The Apex Court in Karnataka State Private College Stop-Gap Lecturers Association v. State of Karnataka and others. (1992) 2 SCC 29 observed as under :

'Ad hoc appointments, a convenient way of entry usually from backdoor, at times even in disregard of rules and regulations, are comparatively recent innovation to the service jurisprudence. They are individual problems to begin with, become a family problem with passage of time and end with human problem in a Court of law. It is unjust and unfair to those who are lesser fortunate in society with little or no approach even though better qualified, more meritorious and well deserving. The infection is wide spread in Government or semi-Government departments or State financed institutions. It arises either because the appointing authority resorts to it deliberately as a favour or to accommodate someone or for extraneous reasons ignoring the regular procedure provided for recruitment as a pretext under emergency measure or to avoid loss of work etc. or the rules or circulars issued by the department itself empower the authority to do so as a stop-gaparrangement. The former is an abuse of power. It is unpardonable. Even if it is found to have been resorted to as a genuine emergency measure the Courts should be reluctant to grant indulgence. Latter gives rise to equities which have bothered Courts every now and then.'

18. In State of Haryana and others v. Piara Singh and others, (1992) 4 SCC 118, the Court held at page 139 :

'.....The Courts comes into picture only to ensure observance of fundamental rights, statutory provisions. Rules and other instructions. If any, governing the condition of service. The main concern of the Court in such matters is to ensure the Rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be.....'

19. But the declaration of law by the Apex Court has fallen on deaf ears. The State and its instrumentalities have continued with their policy of making ad hoc appointments contrary to the rules and regulations, terminating their service for no reason and replacing them with another set of employees either due to political pressure or for extraneous reasons. This cannot be permitted to go on. Our country became independent 52 years ago. The Constitution guaranteeing fundamental rights to its citizens, has been in force for 50 years. Yet the aspirations of Article 41 could not be fulfilled. And the State or its instrumentality are abusing it flagrantly for reasons which need no elaboration. The Court cannot shut its eyes to such actions of the State or its instrumentalities. It has the constitutional obligation to ensure and protect the citizens not only against discrimination butexploitation as well. There is no doubt that the State or its officers or its instrumentality, in running the administration of the country, should have free hand so that they may have confidence and feel independent for sake of running the administration efficiently and smoothly. But these principles do not apply when the authorities act under political pressure or for other reasons. Such actions are social crime and constitutionally invalid, it must be dealt severely. Today, the State regulates the national life in multifarious ways. Therefore, discretion in every sphere. It must vest in the administrative authority. But it must be exercised bona fide and in public interest. The discretionary power does not mean arbitrary power. The power should be exercised by authority bona fide with responsibility. It must conform to rule of law. A public servant has protection and

immunity to enable him discharge his duty properly. But if he acts under political pressure or makes appointment for other reasons, the immunity under law comes to an end. When such action is brought before the Court, it, intervenes not only to prevent powers being exceeded or being abused, but for upholding the rule of law. The Courts in such circumstances have constitutional duty to discharge their responsibility with fresh approach to meet such challenges raised by employers which even though unjust and unfair may not be technically illegal. I do not propose to elaborate as the Apex Court in People's Union for Democratic Rights (supra) has elaborately dealt with the cases rendered by American Supreme Court as far back as 1910 and 1943 when the Courts placed human dignity at higher pedestal and struck down provisions which enabled employer to secure forced labour or service under agreement. We are marching into new millennium. Let the Government or its department not act unfairly and unjustly. The respondents, instead of being regretful are taking pride in announcing that they have acted illegally but the Courts are helpless as they have appointed the petitionerwithout following procedure, therefore, he has no remedy to file a writ petition under Article 226. This is reducing constitutional remedy to a rope of sand. When such challenges are raised which threaten to erode the creditability of law and that too by a Government department, the Courts have to evolve new method to curb it.

20. This raises the issue of public accountability of the officer entrusted with the responsibility to run the administration. The act of the appointing authority in not following the law declared by the Apex Court has left little option except that the appointing authority should be held publicly accountable. In Annexure-4 filed to the counter-affidavit, the Government while asking the appointing authority to terminate services of persons appointed illegally called for explanation for such appointments. But the counter-affidavit is silent whether any action has been taken against such officers. The result is that the persons responsible for such appointments thrive. It leads to corruption and dishonesty. When the appointments are made for extraneous reasons, the appointing authorities are guilty of acting against social morality and are liable for criminal action. Corruption and dishonesty prosper in the society due to such brazen action. It is unfortunate that there is no public resistance to it. The lack of courage in commonman, activates the feeling of helplessness. It is damaging for the society. An ordinary citizen instead of fighting

succumbs to the pressure of undesirable functioning in offices due to various constraints. It is the constitutional duty of the Courts to remedy such malady. Constitution is a living document. The Courts all over the world have construed and interpreted constitutional provisions for social betterment by meeting the new challenge with a fresh approach. The entire law of discrimination of Negros was revolutionised by the American Courts. The concept of life and liberty in Article 21 reached a watershed in Olga Tellis and others v. Bombay Municipal Corporation and others, AIR 1986 SC 180. Law has to grow tosatisfy the needs of changing society. In Smt. Nilabati Behera alias Lalita Behera v. State of Orissa and others, AIR 1993 SC 1960, the Court extracted following observations from Union Carbide Corporation v. Union of India, 1991 (4) SCC 584,

'.....We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future.... there is no reason why we should hesitate to evolve such principle of liability....'

21. The frankness of the respondents in admitting the illegality of their officers shows that the time has come to bury the old outworn theories and enforce principle of public accountability of administrative authorities towards the citizens and society with full vigour. The unfortunate state of affairs in making appointments without following the rules is prevalent today, as the Courts have not reacted strongly to such illegal appointments and abuse of power. The result is that the appointing authorities are violating public law with impunity for extraneous reasons. Karnataka State Private College Stop-Gap Lecturers Association (supra), Piara Singh (supra), and Ashwani Kumar (supra) demonstrate that the malady of making appointment without following the rules, ad hoc or stopgap is prevalent not only in our State but probably all over the country. The Courts criticised such appointments, made observations expecting that it would not recur but it was belied and instead of working as corrective, it emboldened the appointing authority to perpetuate, consequently the illegality has multiplied so much so that today the respondents are not able to defend their own officers. It gives an impression that the humanitarian approach adopted by the Courts to such problems created by illegal appointments has been counter-productive. It generated attitude of apathy

to the law declared by the Courts. I am constrained to say that the appointing authoritieshave come to assume that they can go on with such illegalities and it cannot touch them personally. It appears that the general feeling created is that the Courts while dispensing justice tempered with mercy would take care of illegal appointments and in any case whatever may happen whether the appointees continue or regularised or terminated, they are immune even if they make appointments under political pressure or for other reasons.

22. Therefore, the appointments made against the statutory rules raise important constitutional issue. The Constitution guarantees equality of law and equal opportunity in public service. An appointment made against the rules without following the procedure is destructive of the constitutional guarantee to common man. The appointing authority by resorting to it is guilty of violating constitutional provisions for which he must be held accountable. In Vineet Naratn and others v. Union of India and another, (1998) 1 SCC 226, the Apex Court held that holders of public office are accountable for their decisions and actions to the public. An officer making an appointment due to political pressure or for other reasons is publicly accountable. An officer entrusted with public duty cannot ignore the rules deliberately and knowingly. The power in democracy is based on rule of law. It is to be exercised in public interest alone and not for personal benefit. Any deviation from it cannot be condoned as it is breach of public faith. A public servant enjoys immunity for any action in discharge of official functions. But illegal act done deliberately and knowingly by a public officer brings an end to the immunity enjoyed by him. The Apex Court in N. Nagendra Rao & Co. v. State of Andhra Pradesh, AIR 1994 SC 2663, held as under :

'But there the immunity ends. No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interests has changed withstructural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the Stale without any remedy, front sincerity, efficiency and dignity of State as a juristic person, propounded in Nineteenth Century as sound sociological basis for State immunity the circle has gone round and the emphasis

now is more on liberty, equality and the rule of law. The modern social thinking of progressive socielics and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other judicial legal entity..... The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligently. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken.'

23. The exercise of power for improper purpose is invalid. Improper purpose is very wide. It extends to malice or personal dishonesty. An appointment under political pressure is malice in law and if made for extraneous reasons, then it is criminal. The Apex Court in Common Cause, A Registered Society v. Union of India and others, JT 1999 (5) SC 237, observed that where actual malice was proved, it rendered the action both ultra Hires and tortious. The Court explained that it was not necessary to establish actual malice in every claim for misfeasance in public office. The Court approved the decision in Bourgoin SA v. Ministry of Agriculture Fisheries and Food. (1985) 3 AELR 585, where it was held by Mann, J., that the Minister who had banned import of French Turkeys to protect British Turkey farmers was liable and proof of actualmalice, ill, will or specific intent to injure was not essential in tort. An appointment made for extraneous reasons does not require any proof of malice. The appointing authority was liable in tort. The Court has bounden duty to come up heavily against such actions. A public authority guilty of it commits tort of misfeasance. The tort of misfeasance in public office includes malicious abuse of power, deliberate maladministration, and other unlawful acts causing injury. 'Misfeasance in public office was explained by Smith, J., in the Supreme Court of Victoria in Farrington v. Thomson, (1959) VR 286, as purporting to exercise a power which they knew they did not possess. In Asoka Kumar David v. M.A.M.M. Abdul Cader, (1963) 3 AELR 579, it was held that the tort of misfeasance will also be committed even in the absence of malice if the public officer knew both that what he was doing was invalid and that it will injure the plaintiff, in R. v. Secretary of State for the Home Dept. ex p. Ruddock, (1987) 2

AELR 518, Taylor, J., held that three ingredients were necessary with regard to tort of misfeasance in public office :

'The three ingredients of that tort were said in that case to be : (1) that a public officer knew he had no power to do that which he did ; (2) that he knew that his act would injure the plaintiff ; (3) that in fact he did so.'

24. The law on misfeasance was explained in a recent decision given by the English Court. Its ratio in Three Rivers District Council and others v. Bank of England, (1996) 3 AELR 558, was summarised by the Apex Court in Common Cause (supra) at page 278 thus :

'..... that the tort of 'misfeasance in public office' was concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer and the purpose of the tort was to provide compensation for those who suffered loss as a result of improper abuse of power.....'

25. Since the entire law on misfeasance was exhaustivelyreviewed by Clark, J., in Three Rivers District Council (supra) at page 632, which is helpful in deciding the controversy in this petition, the six principles laid down in the decision are extracted below :

(1) The tort of misfeasance in public office is concerned with a deliberated and dishonest abuse of the powers given to a public officer. It is not to be equated with torts based on an intention to injure, as suggested by the majority in Northern Territory v. Mengel, (1995) 69 ALJR 527, it has some similarities to them.

(2) Malice, in the sense of an intention to injure the plaintiff or a person in a class of which the plaintiff is a member, and knowledge by the officer both that he has no power to do an act complained of and that the act would probably injure the plaintiff or a person in a class of which the plaintiff is a member are alternative, not cumulative, ingredients of the tort. To act with such knowledge is to act in a sufficient sense maliciously : See Mengel 69 ALJR 527 at 554 per Dene, J.

(3) For the purpose of the requirement that the officer knows that he has no power to do the act complained of, it is sufficient that the act was unlawful or, in

circumstances in which he believes or suspects that the act is beyond his powers, that he does not ascertain whether or not that is so or fails to take steps as would be taken by an honest and reasonable man to ascertain the true position.

(4) For the purpose of the requirement that the officer knows that his act will probably injure the plaintiff or a person in a class of which the plaintiff is a member it is sufficient if the officer has actual knowledge that his act will probably damage the plaintiff or such a person or, in circumstances in which he believes or suspects that his act will probably damage the plaintiff or such a person, if he does not ascertain whether that isso or not or if he fails to make such inquiries as a honest and reasonable man would make as to the probability of such damage.

(5) If the states of mind in (3) and (4) do not amount to actual knowledge, they amount to recklessness which is sufficient to support liability under the second limb of the tort.

(6) Where a plaintiff establishes (i) that the defendant intended to injure the plaintiff or a person in a class of which the plaintiff is a member (limb one) or that the defendant knew that he had no power to do what he did and that the plaintiff or a person in a class of which the plaintiff is a member would probably suffer loss or damage (limb two) and (ii) that the plaintiff has suffered loss as a result, the plaintiff has a sufficient right or interest to maintain an action for misfeasance in public office at common law. The plaintiff must of course also show that the defendant was a public officer or entity and his loss was caused by the wrongful act.

26. There is thus no doubt that the ingredient or misfeasance in public law has been fully established. The petitioner and like him thousands were appointed illegally, deliberately and knowingly. This was done due to political pressure or for other reasons. It was malice in law. The officers knew that such appointments could not be upheld in law. The damage and loss to the appointees shall be presumed to have been known to the authorities.

27. The question still is whether this Court in exercise of its jurisdiction under Article 226 can hold the appointing authority liable for their illegal actions and

compensate the aggrieved employee and direct action against such officers. The Courts under the Constitution have been authorised to issue not only the prerogative writs provided therein but also to pass any order or direction to enforce any of the fundamental rights and for any other purpose. The power of HighCourt is not only to grant relief for the enforcement of fundamental rights but for enforcement of duties by public bodies. Every executive or administrative action of the State or statutory or public bodies is open to the judicial scrutiny and the High Court, in exercise of its powers of judicial review under the Constitution, cannot only quash the executive action or decision which is contrary to law or is vlolative of fundamental rights guaranteed under the Constitution, but can take such actions which it considers necessary for upholding the rule of law. In Smt. Nilapali Behera (supra), the Court held that public officer guilty of violating fundamental rights was liable in public law to compensate the injured person. The Court further held that the Court under Articles 32 and 226 can exercise power as the remedy is available in public law based on strict liability for contravention of fundamental rights. The respondents in appointing petitioner or likes to him either under political pressure or for extraneous reasons committed breach of fundamental right of the citizen of this country giving rise to liability as explained by English courts and the Apex Court. The action of the respondents has injured the petitioner who was not only exploited by appointing him on lesser wages but his services have been terminated as well. J.S. Verma, J.. in his judgment dispelled the doubt raised in Rudal Sah v. State of Bihar, AIR 1983 SC 1086, if compensation could be awarded while exercising jurisdiction under Article 32 by observing :

'We respectfully concur with the view that the Court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enables the award of monetary compensation in appropriate cases, where that is the only mode of redress available.'

In the same decision Dr. A. S. Anand. J., now the Chief Justice of India, held as under :

'The purpose of public law is not only to civilise public power but also to assure the citizen that they, live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the Court moulds the relief by granting 'compensation' in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen..... This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 or 226 of the Constitution to the victim or the heir or the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed..... It is a sound policy to punish the wrongdoer and it is in the spirit that the Courts have moulded the relief by granting compensation to the victims in exercise of their writ jurisdiction. In doing so the Courts take into account not only the interest of the applicant and the respondent but also the interests of the public as a whole with a view to ensure that public bodies or officials do not act unlawfully and do perform their public duties property particularly where the fundamental right of a citizen under Article 21 is concerned. Law is in the process of development and the process necessitates developing separate public law procedures as also public law principles.'

28. In Common Cause (supra) Saghtr Ahmad, J., while discussing the scope of Article 226 of the Constitution observed.

'Thus, the High Court has jurisdiction not only to grant relieffor the enforcement of Fundamental Rights but for 'any other purpose' which would include the enforcement of public duties by public bodies.'

In the same judgment the Court after considering the Indian and English law observed that there was not much of difference between the powers of the Courts exercised under Articles 32 or 226 with those exercise in England for judicial review. It was held :

'Public law remedies are available in both the countries and the Courts can award damages against public authorities to compensate for the loss or injury caused to the plaintiff/petitioner, provided the case involves, in this country, the violation of fundamental rights by the Government or other public authorities or that their action was wholly arbitrary or oppressive in violation of Article 14 or in breach of statutory duties and is not purely a private matter directed against a private individual.'

The law is thus clear that the High Court while exercising its extraordinary jurisdiction under Article 226 is not only empowered but constitutionally obliged to protect the citizens of this country against infringement of their right guaranteed by Part III of the Constitution. And compensate them if they are found to have been exploited or victimised by public authorities, in flagrant disregard of law or abuse of power.

29. What remains to be decided is whether petitioner is entitled to reinstatement or compensation only. For this, it is necessary to mention that the employees whose services were terminated in pursuance of the letter issued by the Government on 12.2.1999 were divided in three groups. I have already held that those employees who were appointed against posts which were not sanctioned or were not eligible could not be equated with those who were eligible and were appointed against regular post. It is, therefore, necessary to clarify that thoseemployees who fell in the first two groups could not be reinstated but if they were appointed as clerks on fixed salary and they worked as such, then they shall be entitled to the difference in the salary paid to them from the date of appointment till the date of termination irrespective of voluntary acceptance of lesser amount as it was violative of Article 23. But the employees of the last group in which the petitioner falls have to be treated differently. Their services could be terminated in terms of the appointment letter only. As is clear from the appointment letter, the petitioner was appointed in absence of regular selection because the work was suffering and it was necessary to appoint him so that the work may be carried on smoothly. Further, the order did not mention that his services could be terminated with one month's notice. On the contrary, he was appointed till the regular selection was held. Therefore, the order terminating the petitioner's service was against the terms of his appointment and it

cannot be upheld. The petitioner is entitled to continue till the regular selection is made.

30. I have held that the petitioner was exploited and his right under Article 23 were violated, therefore, he is entitled to be compensated. In the circumstances, interest of justice, in my opinion, would be served if the petitioner is paid the difference between the amount paid to him and which was payable to a clerk from the date of appointment till the date of termination.

31. Since the appointing authorities made appointments according to the counter-affidavit against the regulations and under political pressure or for other reasons deliberately, intentionally and knowingly and they exploited the petitioner under Article 23 of the Constitution, therefore, they are liable to be proceeded with both departmentally and by initiating criminal proceedings against them. It is necessary if the rule of law has to prevail.

32. Another off-shoot of the irregular appointment was that theexpenditure on salary went much beyond the prescribed limit under the Adhiniyam. In paragraph 7 of the counter-affidavit filed as Annexure-1, it is stated that the expenditure on salary could not exceed under Section 19 beyond 10% of the total receipts but between 1995-96 to 1998-99 it rose 14% to 21%. The irregular appointments admittedly, were made against regulations and under political pressure or for other reasons. It would not be unreasonable to assume that such appointments benefited the persons making these appointments personally. And it increased the financial burden on the Mandi Samitis and Mandi Parishad as the expenditure on salary went beyond the limit fixed by the Adhiniyam. Therefore, the Mandi Samitis and Mandi Parishad are entitled to recover this amount from such officers.

33. For the reasons stated above, this petition succeeds and is allowed. The order dated 11.6.1999 passed by respondent No. 3 Annexure-4 to the writ petition is quashed with following directions :

(1) The petitioner shall be reinstated and shall be permitted to continue as clerk till regular selections are held.

(2) The respondents shall hold regular selection for the vacancies within six months from today. The petitioner shall be permitted to participate in it. If he has become overage, he shall be granted age-relaxation.

(3) The petitioner was appointed by the Additional Director on the recommendation of the Deputy Director. He worked as a clerk from the date of his appointment till the date of his termination. He was paid Rs. 1,400 per month only. He shall be paid the difference in the emoluments paid and the salary payable to a clerk within three months from today.

(4) The appropriate authority under the Uttar PradeshKrishi Utpadan MandiAdhiniyam, 1964. U. P.Agriculture Produce MarketsBoard (Officers and StaffPunishment) Regulations,1984 and the U. P. AgricultureProduce Market Committees(Centralised) ServiceRegulations, 1984 or the StateGovernment, as the case maybe, shall initiate actionagainst both therecommending andappointing authoritydepartmentally and byinitiating criminalproceedings.

(5) It would be open to the respondents to recover the amount spent on salary in excess of 10% from the appointing authorities and if recommending authorities are involved, then proportionately from both.

(6) A copy of this judgment shall be sent by the office within a week to the Chief Secretary. State of Uttar Pradesh to ensure that the directions are complied.

34. The petitioner shall be entitled to his costs.