

Bhawani Singh Vs. State and ors.

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Court : Rajasthan

Decided On : Jul-23-2002

Reported in : RLW2003(3)Raj1755; 2002(5)WLN269

Judge : Rajesh Balia and; K.K. Acharya, JJ.

Acts : Rajasthan (Regulation of Appointments to Public Services and Rationalisation of Staff) Act, 1999 - Sections 2, 9, 11 and 19; [Industrial Disputes Act, 1947](#) - Sections 25; [Constitution of India](#) - Articles 14, 16, 21, 39, 41, 42 and 254(2)

Appeal No. : D.B. Civil Writ Petition No. 3271 of 2001 and 17 Ors. Petitions

Appellant : Bhawani Singh

Respondent : State and ors.

Advocate for Def. : R.P. Dave,; Kusum Rao and; S.R. Sharma, Advs.

Advocate for Pet/Ap. : Sagar Mal Mehta, Adv. General, assisted by; Sandeep Bhandawat, Adv.;

Judgement :

Balia, J.

1. The common issue raised in all these cases is the constitutional validity of the Rajasthan Regulation of Appointments to Public Services Rationalisation of Staff Act, 1999 (hereinafter called Act of 1999). Various provisions of the Act more particularly Sections 2(v), 9, 11 and 19 of the Act are being assailed as ultra vires. Consequent relief has been asked in each petition, as we shall notice later on, to quash the directions issued and order passed in pursuance thereof under the provisions of Act of 1999.

Brief View of Impugned Provisions

2. As per its preamble, the Rajasthan State Legislature enacted the Rajasthan (Regulation of Appointments to Public Services and Rationalisation of Staff) Act, 1999 (hereinafter called, 'the Act of 1999') to regulate appointments in the public service and prohibit irregular appointments in offices and establishments under the control of the State Government, local authorities, public corporations and Universities etc.

3. In brief, the scheme of the Act is that all services in any office established under the State Government, local authorities, a Govt. company or undertaking wholly owned or controlled by the State Govt., a body established under any law made by the legislature of the State whether incorporated or not, including a University and any other body established by the State Government or a society registered under any law relating to the registration of societies for the time being in force and receiving funds from the State Government either fully or partly for its maintenance, or any educational institution whether registered or not but receiving aid from the State Government have been treated as 'Public Service' for the purposes of the Act of 1999, Providing this enlarged definition of 'public service' under Section 2(v), the Act defined 'Daily Wage employee' under Section 2(ii) and considered all appointments other than of those who are selected and appointed on a sanctioned post in accordance with the relevant rules on a regular basis to be 'daily wage employees' for the purposes of the Act.

4. With these premise, under Section 4(1) the Act prohibits appointment of any person in any public service to any post, in any class, category or grade as 'a daily wage employee'. However, it made an exception under Sub-section (2) of Section

4 by making a provision that no urgent temporary appointment shall be made in any public service to any post, in any class, category or grade except with the prior permission of the competent authority and such appointments shall have to be consistent with such conditions as may be imposed by such competent authority. The competent authority was authorised to lay down the conditions under which alone any urgent temporary appointments could be made.

5. Under Section 5, creation of any post in any office or establishment relating to public service was made subject to the previous sanction of the competent authority and appointments made on a post created without the previous sanction of the competent authority was declared to be invalid under Section 5(2) of the Act. Such appointments were subjected to the restrictions/prohibitions contained in Sections 8, 9 & 15 of the Act of 1999.

6. Section 8 inter-alia provides that the Treasury Officer/Sub Treasury Officer or Accounts Officer or any other officer or authority who is charged with the responsibility of passing the salary bill shall not pass such first bill of any person appointed to public service in violation of Section 7 or Section 4(2) of the Act of 1999,

7. As noticed above, Sub-section (2) of Section 4 ordains that urgent temporary appointment in any public service henceforth shall be made only with the prior permission of the competent authority and subject to conditions imposed by him. Section 7 is captioned as 'Regulation of recruitment'. Recruitments have been categorised into three classes.

8. Thus, providing for creation of new posts subject to the sanction of competent authority and urgent temporary appointments also having been made subject to the previous sanction of the competent authority and classifying the permissible recruitments, imposed the sanction against the appointments made in contravention of Sections 4 & 7 as well as prohibiting regularisation of the employees defined as Daily Wage Employees in a public service as defined under Section 2(ii) and (v) of the Act under Section 9. The Act also envisaged termination of employees defined as Daily Wage employees.

9. Section 10 named a large number of Authorities, authorising them to issue direction in terms of the provisions of the Act to their respective subordinates and non-compliance to that direction was made an actionable misconduct.

10. The Act also made a provision for abatement of the existing claims for regular appointment of all daily wage employees and persons appointed on an urgent temporary basis and closed all remedial avenues to persons aggrieved with such orders.

11. It will be apposite to reproduce relevant provisions of the Act hereunder;-

Section 2 (ii) 'daily wage employee' means any person who is employed in any public service on the basis of payment of daily wages and includes a person employed, on the basis of nominal muster roll or consolidated pay either on full time or part time or piece rate basis, or as a workcharged employees, and also includes any other similar category of employees, by whatever designation called, other than, those who are selected and appointed on a sanctioned post in accordance with the relevant rules on a regular basis.

2(v) 'Public service' means services in any office or establishment

(a) the State Government;

(b) a local authority;

(c) a Government Company or undertaking wholly owned or control led by the State Government;

(d) a body established under any law made by the Legislature of the State whether incorporated or not, including a University; and

(e) any other body established by the State Government or a society registered under any law relating to the registration of societies for the time being in force and receiving funds form the State Government either fully or partly for its maintenance, or any educational institution whether registered or not but receiving aid from the State Government.

Explanation - For the purpose of this clause engagement of persons on muster rolls in respect of works for reliefs against natural calamities shall not be deemed to be public service.

4. Prohibition of daily wage appointments and regulation of temporary appointments.(1) The appointment of any person in any public service to any post, in any class, category or grade as a daily wage employee shall be prohibited.

(2) No urgent temporary appointment shall be made in any public service to any post, in any class, category or grade without the prior permission of the competent authority and such appointments shall also be consistent with such conditions as may be imposed by the competent authority.

5. Prohibition of creation of Posts.-(1) No post shall be created in any office or establishment relating to a public service without the previous sanction of the competent authority.

(2) Any appointment made to any post created in violation of Sub-section (1) shall be invalid and the provisions of Sections 8, 9 and 15 shall mutatis mutandis apply to such appointments.

6. Prohibition of revision of pay, allowances, perquisites, honorarium, compensatory allowances etc.- No revision of pay, allowances, perquisites, honorarium, compensatory allowances etc. in respect of any employee or elected or nominated member, chairperson or any office bearer etc. of the establishments or offices mentioned under Section 3 of this Act, shall be made without the approval of competent authority.

7. Regulation of recruitment- No recruitment or appointment other than those referred to in Sub-section (2) of Section 4, in any public service to any post in any class, category or grade shall be made.

(a) from the panel of candidates selected and recommended for appointment by the Rajasthan Public Service Commission where the post is within the purview of the said Commission; or

(b) from a panel prepared by a Selection Committee constituted for the purpose in accordance with the relevant rules or orders issued in that behalf; or

(c) where recruitment or appointment otherwise than in accordance with Clauses (a) and (b) is permissible, from the candidates having the requisite qualifications and in accordance with the relevant rules and/or orders.

Explanation. - For the removal of doubts it is hereby declared that nothing in this section shall apply to compassionate appointments made in favour of son/daughter/spouse of any person employed in public service who dies in harness in accordance with the relevant rules and/or orders issued from time to time.

8. Bills not to be passed. - The Treasury Officer/Sub Treasury Officer of Accounts Officer or any other officer of authority who is charged with the responsibility of passing the salary bill shall not pass such first bill of any person appointed to public service unless a certificate issued by the Appointing Authority to the effect that appointment has been made in accordance with the provisions of Section 7 or Sub-section. (2) of Section 4 is attached to the salary bill of the appointee concerned.

9. Bar to regularisation of services. - No person who is a daily wage employee and no person who is appointed on an urgent temporary basis and is continuing as such at the commencement of this Act shall have or shall be deemed ever to have a right to claim for regularisation of services on any ground whatsoever and the services of such person shall be liable to be terminated at any time with due notice:

Provided that in the case of workmen falling within the scope of sec, 25-F of the [Industrial Disputes Act, 1947](#) (Central Act No. 14 of 1947) retrenchment compensation as may be payable under the said Act shall be paid in case of termination of services by way of retrenchment:

Provided further that nothing in this section shall apply to the workmen governed by Chapter V-B of the [Industrial Disputes Act, 1947](#) (Central Act No. 14 of 1947).

Explanation. - For the removal of doubts it is hereby declared that the termination of services under this section shall not be deemed to be dismissal or removal from service but shall only amount to retrenchment or termination simpliciter, not amounting to any punishment.

10. Power to give directions-For the purpose of enforcing the provisions of this Act, it shall be competent for the State Government, the Director of Treasuries and Accounts, the Director of Inspection, the Director of Local Fund Audit Department, the concerned Chief Account Officer, Financial Advisor/Senior Accounts Officer etc. or Head of the Department of the government of local authority to issue such directions as may be deemed fit to their subordinates and the subordinates shall comply with such directions and where any subordinate functionary is guilty of non-compliance with such directions, it shall be deemed that such functionary is guilty of misconduct and shall be liable to be proceeded against under the disciplinary rules applicable to them.

11. Abatement of claims. - Notwithstanding anything contained in any judgment, decree or order of any civil court, Tribunal or other authority, the claims for regular appointment of all daily wage employees and persons appointed on any urgent temporary basis, shall stand abated and

(a) no suit or other proceedings shall be instituted or maintained in any civil court, Tribunal or other authority by the daily wage or temporary appointees against the State Government or any other employer of public services specified under Sub-clauses (b) to (e) of Clause (v) of Section 2 for regularisation of the services;

no civil court shall enforce any decree or order directing the regularisation of the services of such persons; and

(c) all suits or other proceedings pending in any civil court or Tribunal claiming the regularisation of services shall abate.

12. With these substantive provisions, ancillary provisions were also made befalling the consequences on persons or authorities acting in contravention of the provisions of the act in the matter of giving appointments in violation of Section 4 &

7 of the Actor regularisation of services, and not terminating the services of daily wage employees or urgent temporary basis in terms of Section 9 by way of making it punishable offence as well as the subject matter of departmental action as a case of misconduct. The provisions of Sections 14, 15, 16 and 17 deal with such consequences with which we are not presently concerned. However, relevant for the purposes is to notice Section 19, which gives an overriding effect to the provisions of the Act over all other laws, judgments, decrees or orders of any court for the time being in force, reads as under:-

Section. 19 Act to override other laws. - The provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force or in any rule, regulation, by law, standing order made or resolution passed by any local authority, Government Company/Undertaking, other body or society specified under Sub-clauses (b) to (e) of Clause (v) of Section 2, or in any judgment, decree or order of any court, Tribunal or other authority.

Contentions .

(A) By the petitioners.

13. We may now notice the contentions raised by the learned counsel for the petitioners.

14. The first contention raised by the learned counsel for the petitioners in this regard is that the provisions of the Act are arbitrary, unjust and in violation of Articles 14, 16 and 21 read with Articles 39, 41 and 42 of the Constitution.

15. It has been contended that by giving all pervasive meaning to 'daily wage employees' by including all ad hoc, urgent temporary employees and workcharge employees who have been appointed in accordance with the rule but have not been appointed on an sanctioned post on the regular basis as well as such regent temporary or casual appointment which are illegal and void ab-initio as one class and put them all beyond the place of consideration for regular appointment by way of regularisation in any circumstances and also beyond remedial measures has made the law placing unequals at same level resulting in irrational discrimination.

So also consequential termination results in depriving the incumbents of their livelihood, makes law arbitrary and unreasonable violating Articles 14, 16 and 21 of the Constitution. Such law is also indirection of State's obligation to make laws in consonance with provisions of Constitution giving protection to rights of equality and life, and to give effect to directive principles of State Policy. The provisions of Part IV are not enforceable and no mandamus can be sought to enforce such provisions. But a law made in derogation of and contrary to directive principles of State Policy, must be held to be arbitrary and unreasonable to result in violation of fundamental rights guaranteed under Articles 14, 16 and 21 of the Constitution, where such directive principles have been held to be reflected in rights guaranteed under Part III of the Constitution.

16. It was urged that regularisation in all circumstances is not a constitutional anathema but there is well defined arena where under a continuous officiation by a person as an ad hoc temporary or casual employee results into coming into existence a wholly arbitrary and unreasonable condition which results in violation of Articles 14, 16 and 21 of the Constitution. There is a constitutional mandate to protect the citizens from being subjected to such arbitrary and unreasonable treatments at the hands of the State or instrumentalities of the State and to resort to positive action for redeeming such circumstances. Not only that there have been directions from the Supreme Court to frame appropriate schemes or regularisation of such employees but in fact the State Govt. did not certain laws laying down terms and conditions under which only regularisation on services of a person who has continued for a fairly long time and under which the persons already working for a long period have acquired rights to be considered and regularised by appointing on existing posts. The impugned provisions of the Act have resulted in taking away such rights not only the present right to make such claim by making a declaration that no regular appointment can be made but by further ordaining abatement of all such claims and by prohibiting recourse to all such remedial measures to law to ventilate such claims and prohibiting enforcement of any judgment, decrees or awarded, wherein such claims have been accepted after trial. Such a piece of legislation is wholly arbitrary, unreasonable and violates Articles 14, 16 and 21 of the [Constitution of India](#) as it results in denial of continued employment and results in deprivation of the

livelihood of such employee arbitrarily and without authority of valid law.

17. In this connection, it was urged that a benefit that the accrued under the existing rules governing the sendee conditions cannot be taken away by amendment or making a law with retrospective effect. No statutory, rule or administrative order can whittle down any right which has become crystallized and no law or rule can be framed which affects or impair such vested right.

18. Secondly, it has been contended that the impugned provisions impinge upon the occupied field By the Central legislation viz., [Industrial Disputes Act, 1947](#), which has been enacted by the Parliament on the subjects falling under item Nos. 23 and 24 of the concurrent List-III of Seventh Schedule of the Constitution reserving the legislative powers in the matters of trade Union, Industrial and Labour Disputes under item 22, social security and social insurance, employment and unemployment under item No. 23 and welfare of labour including conditions of work, provident funds, employer's liability, workmen's compensation, invalidity and old age pensions and maternity benefits under item No. 24 of the concurrent list. As the impugned provision of the State Act are incompatible with and repugnant to the central legislation, the law made by the State legislature cannot operate unless such law was reserved for and received the president's assent before its promulgation. The same having not been done, the provisions fall within the province of Article 254 of the Constitution and cannot operate so far as they are inconsistent with the provisions contained in central Act relating to industrial disputes and other collateral enactments for the welfare of the labour providing social security and social insurance governing the terms of employment and unemployment in industrial establishments.

19. It has further been contended that in view of the clear declaration of law by the Supreme Court in Bangalore Water Supply & Sewerage Board v. A. Rajappa and Ors. (1), reaffirmed in General Manager Telecom v. A. Srinivasa Rao and Ors. (2), various departments in the State engaged in the welfare activities and to the extent they are not engaged in discharge of sovereign functions of the State fall within the definition of 'industry', the employment as members of the various departments of the State invite applicability and operation of the [Industrial](#)

[Disputes Act, 1947](#) and like measures of labour welfare laws enacted by the Parliament. In view of that, taking away the right of workmen engaged in the public departments as members of the public services as defined in the Act of 1999 including denial of right to status in the service even after long and continuous engagement thereunder as casual, temporary or ad hoc and further denial to approach the remedial forum provided under the various enactments particularly under the Industrial Disputes act is directly in conflict with and repugnant with the provisions made under the [Industrial Disputes Act, 1947](#).

20. It has been contended that not giving status of regular and permanent appointment while the work exists and the person being so appointed is discharging his functions continuously has been declared by Industrial Disputes Act, a Central Legislation, to be an act of unfair labour practice. Attention was invited to Entry 10 of the Fifth Schedule appended to Industrial Disputes Act made by Parliament. According to Section 2 (ra) of the Act, to employ the workmen as Badli, casual or temporary and to continue them such for years with the object of depriving them of status and privileges of the permanent workmen is an unfair labour practice. This provision is one of the manifestations of the principle enunciated by the Supreme Court in connection with continued long officiation by persons on ad hoc, temporary or casual employment results in violation of Article 14, 16 and 21 of the Constitution and termination of such employees without considering their cases for regularisation an act of arbitrariness and unreasonableness demanding positive State action,

21. Section 25-T of the Industrial Disputes Act imposes a prohibition to adopt unfair labour practice and practising of unfair labour practice has been made an offence punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or both under Section 25-U, This prohibition correspondingly confers a right on temporary employee firstly that he is not subjected to any unfair labour practice and secondly if a workman is subjected to such unfair labour practice to seek remedy by having recourse to industrial dispute settlement by raising such dispute and resolving through mechanism provided under the Act of 1947. Similarly, Chapters V-A and V-B of the Act of 1947 provide safeguards against illegal retrenchment by the employers.

While Chapter V-A deals with smaller establishments, Chapter V-B lays down more stringent conditions against lay-off, retrenchment/lock-outs in the case of establishments which have not less than 100 workmen on an average per working day have been employed during the preceding 12 months and it is not of a seasonal character. All Govt. activities except engagement in discharge of its sovereign functions, have been held to be 'industry' within the meaning of [Industrial Disputes Act, 1947](#) and the employees of such department or establishments, who fall within the definition of workmen, become subject of the provisions of [Industrial Disputes Act, 1947](#). In the matter of their employment and unemployment and security of service and terms of conditions of employment the Act of 1947 confer rights, security of tenure and protection against exploitation arising from hire and fire policy both in the matter of substantive provisions as well as for seeking remedies against illegal terminations and relief against practising unfair labour practice.

22. An illegal retrenchment means a termination which is not in accordance with the provisions of Industrial Disputes Act regulating retrenchment whether under Chapter V-A or Chapter V-B. The provisions relating to retrenchment and remedies against terminations, arising out of unfair labour practice or in contravention of the provisions of Industrial Disputes Act are governed by the provisions of [Industrial Disputes Act, 1947](#) which has been enacted in respect of subject matters enlisted in concurrent list III of VII Schedule of the Constitution and is occupied field. As the Act of 1999 has not been reserved for assent of the President but it makes provisions in respect of field occupied by Central Legislation, viz. industrial Disputes Act 1947, more particularly Sections 9, 11 and 19 of the Act of 1999, and which are repugnant to the provisions made in said enactment, the same cannot operate in view of clear provisions of Article 254 of the Constitution.

23. Ancillary to the aforesaid argument, it was contended that in defining 'public services' by including services other than 'State public services', the State legislature has transgressed its limit under Entry 41 of the List II of VII Schedule, Entry 41 of List II of VII Schedule reads 'State Public Services and State Public Service Commission'. Services enumerated in Sub-clause (b) to (e) of Section 2(v)

defining 'public service' are ultra vires, as they make law for services other than State Public Services. It amounts to invidious invasion on independence of autonomous bodies having independent juristic personality by inclusion of employment under local authorities, universities, any body established under any law enacted by State legislature and wholly owned Govt. companies. By making the field of its operation to employment under private person like societies registered under law relating to registration of societies and non-Govt. education institutions whether registered or not which are receiving financial aid to any extent from State; an inroad has been made in the field of private employment. This violates Article 19(i)(g) of the Constitution of such persons.

24. It was urged by Mr. Mridul that the Subject reserved for State legislature to make laws is the 'State Public Services' and not the 'services under any organisation receiving aid from the State'. Learned counsel contends that 'State Public Service' has definite connotation under service jurisprudence and howsoever wide the Entry 41 may be construed, it cannot include within its purview the services which are not under the State but are under other organisations which may though constitute an instrumentality of State and therefore, a State within the meaning of Article 12 for the purpose of enforcement of fundamental rights under Part III of the Constitution, but under Entry 41 the concise phrase is 'State Public Services.' The subject matter of 'State Public Services' cannot be extended to mean services under the State as well as under the instrumentalities of the State for the purpose of conferring power on the State Legislature to regulate service conditions of the services other than State Government services. Attention was also invited in that connection to Entry 70 of the Union List which enlists a similar subject for legislation by Parliament viz. 'Union Public Service, All India Services and Union Public Service Commission', for the purpose of making out a case that the expression 'State' used in Entry 41 cannot be given an extended meaning of the State as has been given in the context of Article 12. Specific legislative field has been carved out for the purpose of making laws relating to services under the Union as well as services under the State by the respective legislatures for the purpose of regulating respective services under them. The expression 'State Public Service' and 'Union Public Service' have been used to denote services under the state or under the Union, as

the case may be and does not extend to services under any other organisation having independent existence.

25. The extended meaning assigned to 'Public Services' to be regulated by Act of 1999, according to the learned counsel, denudes the other autonomous organisations of their autonomy. In this connection, it was also contended that the local authorities have been separately dealt with by the Constitution for the purpose of protecting their autonomy and by this device the State Legislature has tried to cut at the roots of autonomy of the institutions like universities, municipalities and panchayat institutions by colourable exercise of its legislative authority.

Reply by Advocate General

26. In response, learned Advocate General pointed out that the Act of 199 is an enactment in the field exclusively preserved for State legislature under Entry 41 of List II of VII Schedule. Therefore, question of legislative incompetence or entrenching upon occupied field does not arise. While it was not seriously disputed that Sections 9, 11 and 19 of the Act of 1999 to some extent trench upon the matters dealt with by Industrial Act, but the same is only minimal and incidental. Such minimal incidental encroachment over occupied field does not invalidate the statute. In such circumstances, doctrine of pith and substance comes into play to save the Act from becoming invalid by ignoring incidental encroachment.

27. He urged that entries in respective list only provide respective field or subject, which can be encompassed in a legislation made by a legislature having authority to make law in respect thereof. Such entries have to be given widest possible meaning; and authority to make laws in respect of any subject matter includes authority to enact in respect of all matters which are ancillary and incidental to main subject. He, therefore, contends that authority to enact law in respect of 'State Public Services' includes within its ambit law to provides prohibition of certain method of recruitment and also to provide for consequences of recruitment made in breach of such prohibition. Non-regularisation and consequential termination of 'daily wage employee' is a matter ancillary and incidental to law on the subject of State Public Service. So also providing penalties or consequence to

be fall on officers, who act in violation of statutory provisions, is within legislative competence of the State Legislature.

28. With this premise, learned Advocate General Contended that when a law is made by any legislature in respect of field reserved for it, no question arises of legislative incompetence and repugnance. While legislating on exclusive field, in making incidental ancillary provisions even if there is some transgression to another field, it will not render such entrenchment invalid, if in pith and substance law is within the exclusive legislative competence of such legislature.

29. He, thus, while conceding that there is some encroachment in field occupied by Industrial Disputes Act 1947, urged that the impugned provisions cannot be invalidated or be rendered inoperative.

30. It was urged that Act of 1999 in making provisions for ensuring that no irregular appointments de hors the rules are made, that no back door entries takes place in public services in violation of Article 16, does not violate any constitutional limits. State legislature is fully competent to make laws for regulating services and employment within the State under any State organisation or establishments in respect of which it is otherwise competent to make laws. Such power to legislate in respect of Municipalities or other local authorities registration of societies and about education vest with State legislature. All these fields are subject matter of different entries in List II of Seventh Schedule. Which makings laws for such institutions the State legislature has implicit power to legislate on all ancillary and incidental matters, which include making appropriate provisions for regulating employment under these institutions. He therefore contends that even if Act of 1999 does not deal exclusively with subject matter under entry 41 of the State List, no provision is beyond the specified legislative field of subjects enumerated in List II.

31. Mr. Sagar Mal Mehta lastly submitted that the Act of 1999 shall not affect regularisation of services of ad hoc temporary or casual or daily rated employees which has been made prior to 7.5.99, the date with effect from which the Act came into force. Likewise, it was submitted by Mr. Mehta that decrees and awards passed by different courts prior to 7.5.99 shall also not be affected. Section 9 of

the Act of 1999 applies only in cases of such employees who are continuing as daily wage employees on the date of commencement of the Act and. not to those who have ceased to be daily wage employees in terms of Section 2 (ii) of the Act prior to 7.5.99. He did not dispute that regularisation of daily rated employees as defined in the Act is not possible in any circumstance after 7.5.99. However, he submitted that since by a competent piece of legislation right to regularisation has been abrogated and all claims thereto have been declared to stand abated, therefore, question of keeping the remedies alive for claiming regular appointment through regularisation also does not arise. Section 11 is merely a consequence of Section 9, it therefore, does not fall within the province of a law which is repugnant to the existing central enactment, namely the Industrial Disputes Act.

32. In this connection, it was urged by learned Advocate General that so far as retrenchment is concerned, under Section 9 itself compliance with the provisions of Industrial Disputes Act for bringing out termination by way of retrenchment have been saved in both cases where Section 25-F applies as well as cases govern by Chapter V-B. He drew attention of the Court to second proviso to Section 9 pointing out that Section 9 does not apply at all to workmen governed by Chapter V-B of the [Industrial Disputes Act, 1947](#). For establishments governed by Chapter V-A also retrenchment has been made subject to compensation as may be payable under the Industrial Disputes Act of 1947 under Section 25-F thereof. With the aforesaid submissions, the learned Advocate General prayed for dismissal of the writ petitions.

I. Whether Consideration for Regularisation is a facet of Fundamental Right Guaranteed under Article 14, 16 and 21 of the Constitution and a subject matter governed by [Industrial Disputes Act, 1947](#)?

(a) Concept of Regularisation as evolved by Courts in the Constitutional Schemes:

33. As would appear from the rival contentions noticed above and the substantive provisions made in the Act of 1999, the principal controversy hovers around the prohibition made in Section 9 of regularisation of 'daily wage employees' as defined under Section 2 (ii) of the Act by giving them regular appointment in any circumstance after the commencement of the Act and by abating under Section 11

all claims to regular appointment of all such 'daily wage employees' including of those whose claims have been adjudicated in their favour and prohibiting access to remedial forums whether to ordinary civil courts or through the Industrial Tribunal/Labour Courts established under the Industrial Disputes Act or other enactments, in connection with claim to regular appointment by regularisation to any public service resulting in termination of services under directions issued by various authority named under Section 10 of the Act. This would be necessary to inquiry into principle behind regularisation in the first instance. It is inherent in the question that such a issue arises only in a case of person who has not been regularly appointed to permanent post but who has been appointed on temporary of ad hoc basis or contract basis either against the existing cadre post as may be required in the exigencies of service or outside cadre post and such appointments are irregular appointments. Apparently, there cannot be an inherent vested right for regular appointment or regularisation at the inception of such irregular appointment and therefore in the ordinary circumstance terminating such ad hoc temporary or casual employment as early as possible or on cession of need for which such appointment have been resorted to is a normal consequence. It is also true, the principle of regularisation of irregular service by giving regular appointment more often then not does not arise from any statutory mandate. In other words, it is not a right or a claim which emanate from any enactment or comes into existence as such at the time of appointment. Consideration for regularisation of irregular or temporary service arise only at a subsequent stage when such appointment has continued for long and indefinitely, The Principle has been evolved by the Courts as sentinel qui vi to protect constitutional goals and guarantees though fair governance by noticing the inequalities and arbitrariness seeping into continued appointment on temporary, ad hoc or casual basis for prolonged period.

34. It may be noticed here that in view of definition given under the Act of 1999 the term 'daily wage employees' take within its ambit all forms of temporary, ad hoc, casual or contract employment or any other employment which is not by way of appointment on a sanctioned post after regular selection in accordance with the relevant rules on regular basis whether such appointment has been under the Rules and in accordance with the Rules providing for urgent temporary

appointments or de hors the rules under executive instructions to meet the emergent situations demanding immediate action by making urgent temporary appointment or illegal appointments contrary to rules. The principal foundation for regularising the services of such employees was directly derived from the directives in Part IV of the Constitution under Articles 39, 41 or 42. Mandate of Constitution under Articles 14 & 16 cutting at the roots of arbitrariness and unreasonableness in every sphere of State action, Article 21 ensuring right to life which includes right to livelihood and dignified living read with. In cases where such irregular appointment has been allowed to continue indefinitely and the services of such employee is not discharged or reverted as soon as the purpose of such irregular appointment is over, right to work and the security of tenure is constitutional goal under Articles 39, 41 & 42 read in the light of preamble. In such circumstances on considering that livelihood is a part of fundamental right to life, and denying a person of his livelihood in circumstances which can be termed as arbitrary and unreasonable brought about by State and that principle of regularising and absorbing irregular appointees was evolved to fulfil the objective of maximisation of production. In this connection it would be appropriate to refer to some of the decided cases of the Supreme Court.

35. In *Dhirendra Chamoli and Anr. v. State of U.P.* (3), when the matter came up before the Court by way of writ petition on behalf of the petitioners who were casual workers on daily wage basis for number of years discharging functions of Class IV employees at Nehru Yuvak Kendras for equality in the matter of emoluments given to [he regular employees, the Court held on finding that the persons engaged by the Nehru Yuvak Kendras performed the same duties as is performed by Class IV employees appointed regularly to sanctioned post, denial of equality in wages on the plea of accepting job with the knowledge of disparity in the conditions, held.

'the fact that these employees accepted employment with full knowledge that they will be paid only daily wages and they will not get the same salary and conditions of service as other Class IV employees, cannot provide an escape to the Central Government to avoid the mandate of equality enshrined in Article 14 of the Constitution.'

The Court further said:

'it is not desirable that any management and particularly the Central 'Govt. should continue to employ persons on casual basis in organisations which have been in existence for over 12 years.'

36. The Court expressed hope that posts will be sanctioned by the Central Government in the different Nehru Yuvak Kendras so that such persons who have been employed as casuals for such long periods can be regularised.

37. The ratio was followed in Surendra Singh's case reported in same Volume at page 639 by another Bench of the Supreme Court.

38. The matter received more detailed consideration in yet another case of Daily Rated Casual Labour v. Union of India (4), This case arose out of claim made by the casual employees in Post & Telegraph Department of Union of India at various places. While deprecating the classification of employees into regularly recruited employees and casual employees for the purpose of paying less than the minimum pay payable to employees in the corresponding regular cadres particularly in the lowest rungs on the department and further classifying such casual employees into three classes for the purpose of making different levels of payment of wages as violative of Article 14 & 16 of the Constitution, the Court said:-

' India is a socialist republic. It implies the existence of certain important obligations which the State has to discharge. The right to work, the right to free choice of employment, the right to just and favourable conditions of work to just and favourable remuneration ensuring a decent living for himself and his family, and the right to security of work are some of the rights which have to be ensured by appropriate legislative and executive measures..... It is again for this reason that managements and the governmental agencies in particular should not allow workers to remain as casual labourers or temporary employees for an unreasonable long period of time. Where is any jurisdiction to keep persons as casual labourers for years as is being done in the Post and Telegraphs Department? Is it for paying them lower wages? It cannot be so because there is

so much of development to be carried out in the communications department that you need more workers Let us remember the slogan ; 'Produce or Perish'. It is not an empty slogan. We fail to produce more at our own peril. It is against this background that we say that non-regularisation of temporary employees or casual labour for a long period is not a wise policy. We, therefore, direct the respondents to prepare a scheme on a rational basis for absorbing as far as possible the casual labourers who have been continuously working for more than one year in the Posts and telegraphs Department.'

39. This positive mandate was issued by the apex Court to regularise the services of casual workers on rational basis to give effect to Constitutional mandate.

40. In Jacob M. Puthuparambil v. Kerala Water Authority (5), the question arose in connection with the employees serving under the Kerala Water Authority. They were employed through employment exchanges between 1st April, 1984 and 4th August, 1986. The petitions were filed apprehending termination of their services as their appointments were on temporary basis. The High Court dismissed the petitions which led to appeals before apex Court. Some petitions were also filed before the Supreme Court directly under Art, 32. The Court referred to Rule 9 which permitted to fill immediate vacancy in emergency temporarily otherwise than in accordance with law. Notwithstanding the rule required that such temporary employment should not continue for period exceeding three months i.e. 180 days and the person so temporarily appointed should be replaced as soon as possible by a member of the service or an approved candidate qualified to hold the post under the said rules but their urgent temporary appointments continued for longer period. The Court referred to Part III of Constitution and said:

'The Constitution guarantees 'equality', abhors discrimination, prohibits and penalises forced labour in any form whatsoever and extends protection against exploitation of labour including child labour. After extending these guarantees, amongst others, the Constitution makers proceeded to chart out the course for the governance of the country in Part IV of the Constitution entitled 'Directive Principles of State Policy'. These principles reflect the hopes and aspirations of the people. Although the provisions of this part are not enforceable by any court, the

principles laid down therein are nevertheless fundamental in the governance of the country and the State is under an obligation to apply them in making laws. The principles laid down therein, therefore, define the objectives and goals which the State must endeavour to achieve over a period of time. Therefore whenever the State is required to make laws it must do so consistently with these principles with a view to securing social and economic freedom so essential for the establishment of an egalitarian society. This part, therefore, mandates that the state shall strive to promote the welfare of the people by minimising the inequalities and by making effective provision for securing the right to work as also to public assistance in cases of unemployment, albeit within the limits of its economic capacities. Thus the Preamble promises socio-economic justice, the fundamental rights confer certain justiciable socio-economic rights and the Directive Principles fix the socio-economic goals which the State must strive to attain. These three together constitute the core and conscience of the Constitution.'

41. The Court then referred to earlier decisions of the Supreme Court in P.K. Narayani v. State of Kerala (6), and the Dally rated Casual Labour employed under P & T Deptt. through Bhartiya Dak Tar Mazdoor Manch v. Union of India (7), and directed the regularisation of the four categories of employees.

42. In State of Haryana v. Piara Singh (8), the problem arising from irregular appointment and long continued ad hoc temporary employment received more wholesome attention.

43. While emphasising that the normal rule is that regular recruitment should be through prescribed agency but countenanced that the exigencies may call some times for an ad hoc/temporary employees by a regularly selected employee as early as possible and that ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee but he must be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

44. However, the Court also noticed equities arising from continued temporary employment for a fairly long spell and said:

'If for any reason, an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and qualified according to rules and his service recorded is satisfactory and his appointment does not run counter to the reservation policy of the State.

The proper course would be that each State prepares a scheme, if one is not already in vogue, for regularisation of such employees consistent with its reservation policy and if a scheme is already framed, the same may be made consistent with our observations herein so as to reduce avoidable litigation in this behalf.

45. More importantly, the Court observed in relation to workmen coming under the umbrella of Industrial Disputes act and other welfare legislations by noting the status of workcharged employees and said:

'So far as work-charged employees and casual labour are concerned, the effort must be to regularise them as far as possible and as early as possible subject to their fulfilling the qualifications, if any, prescribed for the post and. subject also to availability of work. If a casual labourer is continued for a fairly long spell - say two or three years - a resumption may arise that there is regular need for his services. In such a situation, it becomes obligatory for the concerned authority to examine the feasibility of his regularisation. While doing so, the authorities ought to adopt a positive approach coupled with an empathy for the person. As has been repeatedly stressed by this Court, security of tenure is necessary for an employee to give his best to the job. These are but a few observations which we thought it necessary to make, impelled by the facts of this case, and the spate of litigation by such employees. They are not exhaustive nor can they be understood as immutable. Each Government or authority has to devise its own criteria or principles for regularisation having regard to all the relevant circumstances, but while doing so, it should bear in mind the observations made herein.'

46. In this connection, it is relevant to notice that the Court quoted with approval the importance of safeguarding the benefits conferred on a workman governed by Industrial Disputes Act independent of other provisions as laid down by the Supreme Court on earlier occasion in *Jaswant Singh v. Union of India* (9).

47. In Jaswant Singh's case, which arose in connection with the claims raised by labour employed at the Beas Project on work charge basis, the Court said:

'The work-charged employees are engaged on a temporary basis as their appointments are made for the execution of a specific work. From the very nature of their employment, their service automatically come to an end on the completion of the works for the sale purpose for which they are employed. They do not get any relief under the Payment of Gratuity Act nor do they receive any retrenchment benefits or any benefits under the Employees' State Insurance Schemes.'

48. Relying on this statement, the Court in Piara Singh's case made aforesaid observations noticed by us relating the work-charged employees requiring their regularisation if the work had continued for two or three years.

49. Thus, the Court in the two cases made it clear that it is obligation of the State of consider for regularisation of those temporary employees who are governed by Industrial Disputes Act and entitled to benefits under said Act.

50. Again in the case of K.S. Mahalingegowda v. Secy to govt., Deptt. of Vocational Education (10), the Apex Court while rejected the claim of party between the vocational teachers and non- vocational teachers, keeping in view the fact that the scheme of employing Part Time Vocational Teachers operating since 1977-78 directed the State Govt. to have a fresh look on the scheme and if it is to be kept as a permanent feature then it should be appropriately revised. The Court advised to maintain a list of part time lecturers of the basis of continuous length of service and to make periodic regularisation out of the such List.

51. While holding in principle that employee whose entry in service is illegal being in total disregard of recruitment rules or being not on existing vacancy, has no case for regularisation, distinction was pointed out by the Supreme Court between the cases requiring regularisation and the cases in which regularisation of services cannot be considered in Ashwani Kumar v. State of Bihar (11), the Court said:

'In this connection it is pertinent to note that question of regularisation in any service including any Government service may arise in two contingencies Vacancies which are of a long duration appointments are made on ad hoc basis or daily wage basis by a competent authority and are continued from time to time and incumbents have continued to be employed any artificial breaks, and their services are otherwise required by the institution which employs them, a time may come in the service career of such employees when such an employee must be made against an available sanctioned vacancy by following the rules and regularisation may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. A need may then arise in the light of the exigency of administrative requirement for waiving such irregularity in the initial the irregular initial appointment may be made available to the concerned initial entry must not be found to be of all the established rules and in any case back door entries for filling up such vacancies have got to be strictly avoided. However, there would never arise any occasion for regularising the appointment of an employee whose initial entry itself is tainted and is in total breach of the requisite procedure of recruitment and especially when there is no vacancy on which such an initial entry of the candidate could ever be effected. tainted from the very beginning and no entrant would ever survive for recruiting this latter class of cases.'

52. With settling the above principle making distinction between case where regularisation of long service is required to be considered and cases in which it is not permissible, the Court found as a fact that about 6000 persons were initiated in public employment by corrupt methods by one Mullick and such illegal employment was sought to be shielded by making an order of regularisation. Such order of regularisation were quashed.

53. In *Arun Kumar Rout v. State of Bihar* (12), the Court while holding that there is no inherent right to claim regularisation as a matter of course but in the circumstances where initial appointment was though irregular but the incumbents did not lack in requisite qualification and had served department satisfactorily even

without getting any salary for a long time, directed to fill in 50% of sanctioned posts from amongst appellants on the basis of their inter se merits by regularisation.

54. In *H.D. Singh v. Reserve Bank of India* (13), the issue arose in the context of a circular issued by the Reserve Bank of India according to which Tikka Mazdoors (persons helping Examiners of coins/notes) were not to be engaged continuously but offered work on rotation basis by characterising them as mazdoors/Badli workers. The Court found the practice adopted by the Reserve Bank of India in offering rotational appointments so as to see that workmen did not get the protection of the beneficial legislation amounted to unfair labour practice and expressed its anguish in adopting hyper-technical pleas by the employer in trying to stifle the efforts of the employees in their legitimate claims seeking benefits under the Industrial Law. The Court said:

'We thought it necessary to refer to the factual details in the case only to show our concern at the manner in which the employer, in this case the Reserve Bank of India, who should set a model for other employers being a prestigious institution, behaved towards its employees We will not be far from truth if we say that the Bank has deliberately indulged in unhealthy labour practice by rotating employees like the appellant to deny them benefits under the Industrial Law. It has disturbed us to find that the appellant was denied job because he has become better qualified. It has been our sad experience to find employers trying to stifle the efforts of employees in their legitimate claims seeking benefits under the Industrial Law by tiring them out in adjudication proceedings raising technical and hyper-technical pleas, industrial adjudication in bona fide claims have been dragged on by employers for years together on such pleas. It would always be desirable for employers squarely on merits and get them adjudicated quickly. This would help industrial peace. It is too late in the day for this Court to alert the employers that their attempt should be to evolve a contented labour. We do not forget at the same time the fact that it is necessary for the labour also to reciprocate to prevent industrial unrest. In this case for example the Bank should have treated the appellant as a regular hand in List II. Instead, the Bank has, by adopting dubious methods, invited from us, remarks which would have normally avoided. While allowing the appeal the court not only directed

reinstatement but also directed the Bank to enlist the appellant as a regular employee.

55. In *Prem Chand v. State of H.P.* (14), the Division Bench of the Himachal Pradesh High Court had an occasion to deal with the case, the facts of which were akin to the case at hand. In the said case, the petitioners were employed as daily rated workmen in the Himachal Pradesh Forest Printing Press at Kalaghat. According to the petitioners their employment was being subjected to fictional or artificial breaks after every period of ninety days. The contention raised before the Court was firstly that the respondents are indulging in an unfair labour practice and are acting arbitrarily and unjustly by employing them as daily rated workmen for such a length of time by administering casual breaks with the object of depriving them of the status and privileges of regular workmen and secondly that they are being treated unfairly and unjustly in the matter of their emoluments and conditions of service as compared to the holders of regular posts of the corresponding categories and that thereby the principle of 'equal pay for equal work' is being violated. The workmen were employed for a period of 7 to 10 years.

56. The Court found by relying on the decision of the Supreme Court in *State of Assam v. Kanak Chandra Dutta* (15), that the employment to a post under the State means to an existing post under the administrative control of the State which may be regulated by the conditions of service prescribed under the Rules but every employment is not an employment with posts. An appointment of casual labour was held not to be an appointment to a post governed by rules of Regular Recruitment and so far as the adjudication or control of disputes and complaints with respect to their recruitment as such, termination, remuneration, the benefits to which they are entitled to etc. are matters which cannot be said to be triable exclusively by the State Administrative Tribunal created for adjudication of disputes relating to service matters of concerned holders of the civil post.

57. The ratio of this decision further points out that rights of such daily rated workmen or casual employees who have not been employed to any existing vacancies but for discharge of duties for its employer otherwise than under service rules form a class by itself; their rights, duties and claims etc. are strictly not

governed by service rules governing the establishment inasmuch as admittedly in such cases their appointment is not under the service rules but for meeting the exigencies of the requirement of the employer do hors the rules. In such circumstances, where comes into existence the relationship of employer-employee and they become amenable to laws like Industrial Disputes Act or other beneficial legislations. The amplitude of operations of such laws concerning determination of their inter se disputes and demands and satisfaction cannot be curtailed with reference to service rules meant for regular employment to existing posts. By very nature of things of such employment de hors the rules, the exigencies of the employer results in bringing into existence a situation not envisaged under rule and issues arising out of such situation has to be dealt with as such. The court speaking through Chief Justice P.D. Desai observed in 1988 LIC 1094 that the respondents owe a duty to themselves and to their employees like the petitioners to review the case in al earnestness and to accept such of their demands as are legitimate and well founded. It would be gracious on their part so to do for, in the ultimate analysis, the court is not powerless and would grant just relief admissible to the employees in accordance with law.

58. The dispute related to fictional and artificial breaks administered in continuity of service, party of emoluments with the workers discharging similar duties. The Court had observed:

'The court places on record its sense of regret that the petitioners are being employed on daily-wage basis without their services being regularised for such length of time. The fact that the Press is not a temporary establishment and that the employment has continued for so long is indicative that there is need for additional permanent posts. It is not at all desirable that any management and, more particularly, the State Government should continue to employ persons on casual basis under such fact-situation. It would be legitimate to hope that in conformity with the modern concept of justice and fair play and with its avowed commitment to the constitutional mandate of socio economic justice, the State Government will take appropriate action in the direction of regularising the services of the petitioners and also of all those daily rated workmen who have been in continuous employment for more that six months.'

59. In a very recent judgment, Gujarat Agriculture University v. Labhu Bechar (16), the Supreme Court again had occasion to consider the issue about the concept of prolonged temporary casual appointment and the obligation of the State or instrumentality of the State towards such employees for regularisation. The appellants before the Supreme Court was Gujarat Agricultural University, which is fully aided by the State of Gujarat and is engaged in educational activities in agriculture and allied sciences and humanity and is also prosecuting research in agriculture and other allied sciences. It engaged daily rated workers for its various activities. Those workers were paid as per the minimum wages fixed by the State Govt. from time to time. Such persons were engaged due to the exigencies of work without considering the relevant factors about their educational qualification, age limit and other relevant requirements for the purpose of regular appointment under the recruitment rules. Those daily rated workers employed at different agricultural research centres at different places with different projects and were unskilled, semi-skilled, skilled and field labourers of different categories. Since the University is grant-in-aid institution fully funded by the State Government, it requires prior sanction by the State Government for appointment of its employees. In fact, all the posts sanctioned by the State Government were filled by the University as per recruitment rules. But in the case of daily wage workers who were plumbers, carpenters, sweepers, pump operators, helpers and masons etc., no posts were sanctioned for them and hence they were working on daily rate basis, thus, their appointment were on irregular basis and not in accordance with the recruitment rules. In the aforesaid scenario, the appellant Gujarat agricultural University had contested the claims of its workmen for regularisation and permanent status. A Single Judge of the Gujarat High Court relying on decision of the Supreme Court in Daily rated casual labour employed under P & T Deptt. through Bhartiya Dak Tar Mazdoor Manch v. Union of India (supra), in the case of Gujarat Agricultural University v. Rathod Labour Bechar (supra), had directed the Gujarat Agricultural University to submit scheme for conferring regularisation and also directed that such a scheme of giving permanent status could not be confined to the workmen before the Court as large number of such workers were involved, disputes about which were pending in various labour Courts, and nothing the suggestion that it would be fair and just instead of making multiple schemes for

such purpose separately in each case directed to frame a comprehensive scheme for the purpose of considering all pending litigations. Appeal against that order was dismissed by a Division Bench and further appeal before the Supreme Court during the course of which appellant Gujarat Agricultural University against the direction of framing a scheme of regularisation for its workmen in a phased manner after and objections were raised thereto as to the fairness of the scheme on behalf of the workmen was issued. It is in the aforesaid circumstances that right to claim regularisation was questioned by the University. The Court observed:

'It is also well settled, if work is taken by the employer continuously from daily wage workers for a long number of years without considering their regularisation for its financial gain as against employees legitimate claim, has been held by this Court repeatedly as an unfair labour practice.

60. Therefore, the Court denouncing the new culture of taking work from daily wage worker or ad hoc appointee for a long time either for financial gain or for controlling workers more effectively with sword of Damocles hanging over their heads or continue with favoured one in the cases of ad hoc employee whistling complaint and raise legitimate claims, said:

'If the work is of such nature, which has to be taken continuously and in any case when this pattern becomes apparent, when they continue to work for year after year, only option to the employer is to regularise them In such situation a legal obligation is cast on an employer if there be vacant post to fill it up with such workers in accordance with rules if any and where necessary by relaxing the qualifications, where long experience could be equitable with such qualifications. If no post exists then duty is cast to assess the quantum of such work and create such equivalent post for their absorption.'

61. The Court buttressed this conclusion by referring to Daily rated casual labour employed under P & T Deptt. though *Bhartiya Dak Tar Mazdoor Manch v. Union of India* (supra), *State of Haryana v. Piara Singh* (supra), *Surender Singh v. Engineer-in-Chief, CPWD* (supra) *Mool Raj Upadhyaya v. State of Himachal Pradesh* (17), *Dharwad Distt. PWD Literate daily wages employees Association v. State of Karnataka* (18), *Bhagwati Prasad v. Delhi State Mineral Development*

Corporation (19) and large number of other cases also.

62. The aforesaid case emphasizes in no uncertain term the unfairness imbedded in continued employment of daily wage employees of all kinds and creed and corresponding constitutional obligation on the part of the employer be it a State or agency or instrumentality of the State to absorb such daily wages employees of longer standing either on existing posts or if required by creating such equivalent posts corresponding to the existence of law. All this require an adjudicating forum also.

63. The importance of adjudication of dispute like this by Tribunals under Industrial Disputes Act was emphasized by justice Gajendragadkar while speaking for the Court in J.K. Cotton Spinning and Weaving Mills Ltd. v. Labour Appellate Tribunal (20):

'The *raison d'être* of a labour Tribunal is to be found in the desire of State to provide a forum which may be unhindered by legalistic considerations, attempt to secure harmonious relations between the employer and the employee with ultimate object of securing an efficient working of industry by resolving disputes through medium of arbitration and adjudication. It therefore endeavours to restore the competing claims of employers and employees by finding a solution which is just and fair to both parties.'

64. It can also be perceived that though regularisation as such cannot be claimed as a matter of right in all circumstances but in given circumstances where non-regularisation results in arbitrariness and results in failure of substantial justice denuding the incumbent of his livelihood and also of right to secure justice by remedial forums as are hitherto available to him is an act of arbitrariness, unreasonableness and unfairness in all circumstances. By prohibiting of making regular appointment of such incumbents who have been initially appointed irregularly but within the province of the competence of appointing authority and have continued for long discharging duties required by the employers to be performed in discharge of their official duties and which makes out a case for regulating their services by regularisation in terms of law laid down by the Supreme Court for giving effect to the guarantees of the Constitution, results in

negation of the constitutional guarantee by the impugned State act, such an enactment must necessarily be deemed to be violative of Part III of the Constitution particularly Articles 14, 16 and 21.

65. From the aforesaid discussion, it is apparent that the Supreme Court has viewed continuance of employment on temporary, casual and ad hoc basis to be an act of arbitrariness violative of Articles 14, 16 and 21 of the Constitution read in light of Directive Principles of State Policy enshrined in Articles 39, 41 & 42 of the Constitution. The test of reasonableness in State action pervades the constitutional scheme particularly with reference to Articles 14 & 21 which confines its positive manifestation and expression in the lofty ideal of social and economic justice which inspires and animates the Directive Principles and that Article 14 strikes at arbitrariness in State action.

66. Mr. Mehta relied on decision in Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi and Ors. (21), to suggest that regularisation of long serving employees as casual or temporary is inherently de hors the rules and cannot be regularised. It was a case in which the claim of regularisation by the persons employed under Jawahar Rojgar Yojna. The question about regularisation arose when the claim of regularisation was made by the persons employed under Jawahar Rojgar Yojna against Delhi Administration after the scheme was discontinued. The court finding that the Delhi Administration at no stage engaged any of the present petitioners for work. It was District Rural Development Agency which was implementing the machinery of the Jawahar Rojgar Yojna had given the present petitioners work on the person needy. The said Yojna cannot have by its very nature any sanctioned posts or workers. Even when the DRDA was implementing the Yojna they were being funded by the Central Government directly for the purpose of giving employment under the said Yojna. The Court found that the scheme under which the petitioners were given employment had been evolved to provide income for those who are below the poverty line and particularly during the periods when they are without any source of livelihood and therefore, without any income what sever. The schemes were further meant for the rural poor for the object of the schemes was to start tackling the problem of poverty from that end. The object was not to provide the right to work as such

even to the rural poor much less to the unemployed in general. In these circumstances the Court held that reliance on the decisions of this Court where regularisation has been directed is misplaced and misconceived in the case before it inasmuch as it has been contended by the workmen that those who have completed 240 days or more days in a year referring to the requirement of continuance service of one year under the Industrial Disputes Act, their claim for regularisation of employment under the Yojna on general principles of regularisation which the court had evolved to deal with inequitable situation arising out of irregularity and ad hoc appointments continuing for unduly long period in a given circumstances because that would result equally in other unreasonable and inequitable situation envisaged in the order. Therefore, the Court said that the employee has no right to claim of regularisation on completion of 240 days or more days in a year at Jawahar Rojgar Yojna, which was not a project meant for providing employment.

67. Learned counsel for the respondent had also placed reliance on decision of the Supreme Court in *Indian Express Newspapers (P) Ltd. v. Union of India* (22), *Union of India v. Bishamber Dutt* (23), *E. Ramakrishnan v. State of Kerala* (24), *P. Ravindran v. Union Territory of Pondicherry* (25), *R.S. Ajara v. State of Gujarat* (26), to make a submission that no regularisation is permissible by giving regular appointments made de hors the rules as that would amount to back-door entries in violation of Article 16.

68. Having considered the precedents cited by learned counsel for the respondent, we are of the opinion that in none of the cases cited by the learned Advocate General, the vast catena of decision to which we have made reference that too by way of illustration, have neither been noticed nor referred to in those judgments and decision appears to have been given in special facts and circumstances of each case.

69. Moreover, we have noticed the distinction has been drawn by the Supreme Court itself in the cases where regularisation of temporary, ad hoc or daily wageemployee is required to be considered by the employer for their absorption by regularisation before it is compelled to terminate services and the cases in

which regularisation is not permissible in *Ashwani Kumar v. State of Bihar* (supra) and *State of Haryana v. Piara Singh* (supra). Where the rules permit for giving urgent temporary appointment and the person has been appointed by the competent authority and it is found that the concerned incumbents have continued to be employed for long period of time with or without artificial break and the services are otherwise required by the institution which employed them or the cases in which initial entry of the employee is against an available vacancy or the appointment is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure of such recruitment, fall in the category where consideration for regularisation is an obligation. But where the initial appointment is found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment, regularisation is not permissible. Such questions required to be determined in each case depending on facts of the initial recruitment and the rules under which such appointments are made. For such an enquiry it is essential that person having been denied regularisation and faces termination of services or continued employment on inequitable conditions of service, has a right to raise his grievance before appropriate forum and the same is adjudicated by it. Denial of such remedy in all circumstances itself spell unreasonableness. There is no absolute anathema to regularisation declared by any decision of the Supreme Court. On the other hand, where the initial recruitment does not suffer from any such blatant illegality as has been spoken by the Supreme Court in *Ashwani Kumar's* case, the Court has consistently considered it to be the obligation of the State who is under an obligation to act reasonably and free from arbitrariness and unfairness in all its affairs to consider their cases of regularisation with sympathy for the incumbents and the positive attitude as the mandate of Articles 14 & 21 read in the light of Directive Principles of State Policy under Articles 39, 41 & 42 of the Constitution envisaging social security, security of employment and a right to work with fundamental right to dignified living and not to be deprived of his livelihood arbitrarily.

(b) The inter-relation between Public Employment and law relating to industrial dispute with particular reference to retrenchment and unfair trade practice.

70. In this connection, it would be apposite to refer to decision of the Supreme Court in *W.B.S.E.B, v. Desh Bandhu Ghosh* (27), deprecating the 'hire & fire' policy adopted by the State or instrumentalities of the State. The Court declaring the provision in West Bengal Electricity Board Regulation authorising the Board to terminate the services of its employees by serving three months notice to be ultra vires, held that on the fact of it, the regulation is totally arbitrary and confers on the Board a power which is capable of vicious discrimination. It is a naked 'here and fire' rule, the time for banishing which altogether from employer-employee Relationship is fast approaching. It only parallel is to be found in the Henry VIII class so familiar to administrative lawyers.

71. In *Central Inland Water Transport Corporation Ltd. v. Brojo Nath* (2B), the Court said:

'..... State actions, including actions of the instrumentalities and agencies of the state, must not only be in conformity with the Fundamental Rights guaranteed by Part III but must also be in accordance with the Directive Principles of State Policy prescribed by Part IV. Clause (a) of Article 39 provides that the State shall, in particular, provide that the State shall, in particular, direct its policy towards 'securing that the citizens, men and women, equally have the right to adequate means of livelihood.' Article 41 requires the State, within the limits of its economic capacity and development to 'make effective provisions for securing the right to work'. An adequate means of livelihood cannot be secured to the citizens by taking away without any reason the means of livelihood. The mode of making 'effective provision for securing the right to work' cannot be by giving employment to a person and then without any reason throwing him out of employment. The action of an instrumentality or agency of the State, if it frames a service rule such as Clause (a) of Rule 9 of a rule analogous thereto would, therefore, not only be violative of Article 19 but would also be contrary to the Directive Principles of State Policy contained in Clause (a) of Article 39 and in Article 41.'

72. Consequently, the impugned provisions were held to be invalid by the Court.

73. In *Workmen v. Meenakshi Mills Ltd.* (29), the question had arisen before the Court as to the validity of Section 25-N of the Industrial Disputes Act imposing

restriction on employers of large establishments to retrench its workmen without permission of the appropriate Govt. the Court upheld the provisions as having been enacted to effectuate the mandate contained in the Directive Principles enshrined in Articles 38, 39(a), 41 & 43. The Court said:

'The object underlying the enactment of Section 25-N by introducing prior scrutiny of the reasons for retrenchment is to prevent avoidable hardship to the employees resulting from retrenchment by protecting existing employment and to check the growth of unemployment which would otherwise be the consequence of retrenchment in industrial establishments employing large number of workmen. It is also intended to maintain higher tempo of production and productivity by preserving industrial peace and harmony. In that sense, Section 25-N seeks to give effect to the mandate contained in the Directive Principles of the Constitution viz. Articles 38, 39(a), 41 and 43. The restrictions imposed by Section 25-N on the right of the employer to retrench the workmen must, therefore, be regarded as having been imposed in the interests of general public.'

74. Thus, the object of enacting industrial law particularly, the provision under Chapters V-A & V-B were directly referable to State's obligation of making laws to give effect to the mandate contained in Directive Principles of the Constitution namely Article 39(a), 41 & 43 of the Constitution in protecting the existing employment and to check the growth of unemployment.

75. It cannot now also be disputed and doubted that all departments of the State which are not engaged in discharge of sovereign functions of the State concerning employment thereunder is a industry within the meaning of Section 2(j) of the Industrial Disputes Act and all employees conforming to the norms of workmen within the meaning of the Act are entitled to the benefits emanating from the said enactment which has been enacted by the Parliament in respect of the field covered by entries 22, 23 or 24 of the concurrent List III of the Schedule VII of the Constitution which provides for trade unions, industrial and labour disputes (entry 22), social security and social insurance (entry 23) employment and unemployment, welfare of labour including conditions of work, provident funds,

employers' liability, workmen's compensation, invalidity and old age pension and maternity benefits (entry 24).

76. Reference in this connection may be made to Bangalore Water Supply and Sewerage Board v. A. Rajappa (supra). A Constitution Bench of 7 Judges ruled:

'Industry' as defined in Section 2(j) has a wide import. Where there is (i) systematic activity, (ii) organised by co-operation between employer and employee (the direct and substantial element is chimerical), (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g. making, on a large scale, prasada of food), prima facie, there is an 'industry' in that enterprise. Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector. The true functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.'

With these premises, the Court said:

'The consequences are (i) professions, (ii) clubs, (iii) educational institutions, co-operatives, (iv) research institutes, (v) charitable projects and (vi) other kindred adventures, if they fulfil the triple tests listed above, cannot be exempted from the scope of Section 2(j).'

77. Thus, casting a wide net of the term 'industry' for the purposes of Industrial Disputes Act, the Court excluded only the sovereign functions directly understood from the definition of 'industry' and operation from the provisions of Industrial Disputes Act,

78. The discordant note struck in Bombay Telephone Canteen Employees' Association v. Union of India (30), and Sub-Divisional Inspector of Post v. Theyyam Joseph (31), however was not approved by Supreme Court in General manager, Telecom v. A. Srinivasa Rao (supra), wherein the Court held:

'A two-Judge Bench of this Court in Theyyam Joseph case held that the functions sovereign functions of the State and it is, therefore, not an 'industry' within the

definition of Section 2(j) of the [Industrial Disputes Act, 1947](#). Incidentally, this decision was rendered without any reference to the seven- Judge Bench decision in Bangalore Water supply. In a later two-Judge Bench decision in Bombay Telephone Canteen Employees' Assn. case this decision was followed for taking the view that the Telephone Nigam is not an 'industry'. Reliance was placed in Theyyam Joseph case for that view. However, in Bombay Telephone Canteen Employees' Assn. case (i.e. the latter decision), we find a reference to the Bangalore Water Supply case. After referring to the decision in Bangalore Water Supply it was observed that if the doctrine enunciated in Bangalore Water Supply is strictly applied, the consequence is 'catastrophic'. With respect, we are unable to subscribe to this view for the obvious reason that it is in direct conflict with the seven-Judge Bench decision in Bangalore Water Supply case by which we are bound. It is needless to add that it is not permissible for us, or for that matter any Bench of lesser strength, to take a view contrary to that in Bangalore Water Supply or to bypass that decision so long as it holds the field. Moreover, that decision was rendered long back - nearly two decades earlier and we find no reason to think otherwise. Judicial discipline requires us to follow the decision in Bangalore Water Supply case. We must, therefore, and that the decision in Theyyam Joseph and Bombay Telephone Canteen Employees' Assn. cannot be treated as laying down the correct law. This being the only point for decision in this appeal, it must fail.'

79. On a reference by a two Judges Bench to a larger Bench for considering the question of making a reference to larger Bench of Supreme Court of making a reference to larger Bench of Supreme Court to reconsider the decision in Bangalore Water Supply's case, the Court said in Coir Board Ernakulam Kerala State and Anr. v. Indira Devai P.S. and Ors.(32):

'The. judgment delivered by seven learned Judge of this Court in Bangalore Water Supply case does not, in our opinion, require anyreconsideration on a reference being made by a two- Judge Bench of this Court, which is bound by the judgment of the larger Bench.'

80. We have seen above that the Apex Court has categorically held in Piara Singh's case that the employees who are governed by the Industrial Disputes Act

and who have continued in service for 2 of 3 years, a presumption arise that there is a regular need for their service and in such situation it becomes obligatory for the concerned authority to examine feasibility of regularisation of such workmen and in considering such question of regularisation the authority ought to adopt a positive approach.

(c) State of law by the Supreme Court about right to life under Article 21 and wide expanse of Articles 14 and 16 to shield the governed against any arbitrariness, unreasonableness and unfairness in all spheres of its activities.

81. In this connection, following observations from the Supreme Court in *Bandhua Mukti Morcha v. Union of India* (33), also invite our attention.

'It is the fundamental right of every one in this country, assured under the interpretation given to Article 21 by this Court in *Francis Mullin's case* (AIR 1980 SC 849) to live with human dignity free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive principles of State Policy and particularly Clauses (e) and (f) of Article 39 and Articles 41 and 42.'

The Court went on to say after observing that the Directive Principles of State Policy contained in Clauses (e) and (f) of Article 39, Article 41 are not enforceable in a Court of law, it may not be possible to compel the State through judicial process to make law 'But where legislation is already enacted by the State providing those requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 256 which provides that, the executive power of every state shall be so exercised as to ensure shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State. The State is under a constitutional obligation to see that there is no violation of the fundamental right of any person, particularly when the belongs to the weaker sections of the community and is unable to wage a legal battle against a strong and powerful opponent who is

exploiting him. The Central government is therefore bound to ensure observance of various social welfare and labour laws enacted by parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the Directive Principles of State Policy.'

82. With these premise the Court held that State of Haryana cannot be permitted to deny benefits of various social welfare and labour laws enacted with a view to enabling them to live a life of human dignity. The State must therefore ensure that the employers observe various social welfare and labour laws enacted for the benefit of the workmen. This is a constitutional obligation which can be enforced against the Central Government and the State by a writ petition under Article 32 of the Constitution.'

83. Thus the implementation of law to give effect to Directive Principles of State Policy are also enshrined in Articles 39, 41 & 42 as has been placed on such high pedestal to be enforceable as fundamental Rights by invoking Article 39 of the Constitution.

84. Likewise, in *Union of India v. Hindustan Development Corporation* (34), on the interplay of Articles 14, 19 and 21 of Part III of the Constitution and Directive Principles of the State Policy, the Court said:

'now coming to the test of reasonableness which pervades the constitutional scheme, the Court in several cases particularly with reference to Articles 14, 19 and 21 has considered this concept of reasonableness and had held that the same finds its positive manifestation and expression in the lofty ideal of social and economic justice which inspires and animates the Directive Principles and that Article 14 strikes at arbitrariness in State action.'

85. Reference was made by the Court in this connection to the cases of *E.P. Royappa v. State of Tamil Nadu* (35), *Menka Gandhi v. Union of India* (36) and *Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir* (37).

86. It may be noticed that prior to decision in Royappa's case, the test of reasonableness in Article 14 was confined to examine case of discrimination on

the touchstone of reasonableness of classification having a rationale nexus to the object sought to be achieved by such classification. But in Royappa's case, the Apex Court opined the most potent and positivist dimension of the spirit and soul of Article 14 cutting at the roots of arbitrariness, unreasonableness and unfairness in every sphere of State action.

87. After posing the question: 'Now what is the content and reach of this great equalising principle', the Court.

'It is a founding faith, to use the words of Bose, J., 'a way to life', and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affect any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality.'

Coming to the temporary and hoc appointments, the Court said:-

'It is also necessary to point out that ambit and reach of Articles 14 & 16 are not limit to cases where public servant affected has a right to a post. Even if a public servant is in an officiating position, he can complain of violation of Articles 14 and 16 if he has been arbitrarily or unfairly treated or subjected to mala fide exercise of power by the State machine, it is, therefore, no answer to the charge of infringement of Articles Hand 16 to say that the petitioner had no right to the post of Chief Secretary but was merely officiating in that post.'

88. The view was reiterated by the Court in Meneka Gandhi's case and Ajay Hasiya's case. In Meneka Gandhi's case the Court said:

'No attempt should be made to truncate its also embracing scope and meaning, for to do so would be to violate its magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. Equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic which the other to the whim and caprice of an absolute monarch. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omni-presence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14 to must be right and just and fair and not arbitrary, fanciful or oppressive.'

89. The principle was reiterated in Ajay Hasiya's case (38).

90. On the aforesaid premise, the requirements of the State to consider regularisation as a positivist, in its manifestation of fundamental right under Articles 14, 16 & 21 of the Constitution as animated in Directive Principles of State Policy and law enacted by Parliament on the subjects enumerated in the Concurrent list entries No. 21, 21 & 24 in the form of Industrial Disputes act, and the provisions made thereunder and the right to remedy against indefinite continuance in the service without the permanent status and regular employment resulting in unfair labour practice is a part of Fundamental right.

91. To sum up the principle deduced from long chain of decided cases it can be said to be well settled:

(i) In the matter of Government service normal rule is regular recruitment through prescribed agency, the recruitment of ad hoc or temporary hands is an exceptional leeway permitted due to exigencies of administration. In such facts situation endeavour will also be to replace such temporary employee by regular selected employees.

(ii) that law does not favour ad hoc or temporary employment continuing for long spells, as it breeds unhealthy and unreasonable service environment endangering industrial peace perilously affecting dignity and quality of life of those whose security of work is under constant threat.

(iii) Article 14 of the Constitution is embodiment of rule against arbitrariness and unreasonableness in the State action in all spheres of its activities. Article 21 of the Constitution which guarantees protection against deprivation of life and personal liberty includes within it right to dignified livelihood. Article 39(d) spells out the directive principles of the State policy towards securing equal pay for equal work for both woman and man and Article 42 stipulates the Directive Principles of the State policy in securing just and humane conditions of work.

(iv) equal pay for equal work and security of employment by regularising casual employees of long duration within a reasonable period have been unanimously accepted as Constitutional goal to our policy. To this end, thrust has been that the management particularly Govt. agencies should not allow workers to remain as casual labourers or temporary employees for unreasonably long period of time.

(v) mere continuation for some period on ad hoc by itself does not give a right to permanency but where for any reason ad hoc or temporary employees are continued for fairly long spell they have a right to claim regularisation and the authorities are under obligation to consider their case for regularisation in a fair manner.

(vi) regularisation can not be resorted to by governmental agencies as mode of fresh recruitment to permit back door entries to frustrate the mandate of Article 16 by making a straight jacket measure of service for regularising the appointment made do hors the rules, unmindful of the circumstances under which the appointment had been made.

(vii) the first condition for laying claim for regularisation is availability of work on reasonably permanent basis. Mere continuance for some time of a casual or ad hoc employee does not give right to presume about need for continued employment but continuation of causal or ad hoc employee for a long duration of

several years a presumption for need for regular permanent employment may be justified.

(viii) Apart from the right to reasonable treatment by State agencies and security of job emanating from Constitutional provisions, Industrial Disputes Act is legislative measure giving effect to directive principles of State Policy in the field of ensuring equal pay for equal work and ensuring security of job with just and humane conditions by providing prohibition against practising of unfair labour practice both by employers and employees and defining the term unfair labour practice to include practice of engaging workman for long spells characterising them badli, casual, temporary, ad hoc with the object of denying them status of permanency and benefits and privileges attached thereto.

(ix) A claim by workers, continuing for long spell as casual or temporary under an employer governed by Industrial Disputes Act, to permanency is a demand which can be achieved through collective bargaining or a claim giving rise to industrial dispute which can be enforced through adjudication under the provisions of the I.D. Act.

(x) Adjudication of claim for permanent status as an industrial dispute which has been made subject matter of reference to the Industrial tribunal is governed by the principles emanating from the provisions of Industrial Disputes Act which by necessary implication involves determination of question whether continued casual or temporary employment is a bonafide administrative exigency simplicitor or amounts to unfair labour practice on the part of the employer, inasmuch as claim to permanency under Industrial Disputes Act directly emanates from prohibition against unfair labour practice adopted by the employer.

(xi) In situation emerging from long spell of ad hoc or temporary or casual employment of daily rated workmen, courts have consistently resorted to issued directions for framing a scheme for regularisation of such workmen on a just and fair basis to the employer or have also issued directions for regularising the petitioners before it as the circumstances of the case may warrant but ordinarily in the first instance an opportunity is being given to be employer himself to frame a scheme in a fair and just manner of absorbing such casual workmen on

permanent basis whether in one go or in a phased manner and has considered objections thereto, if any, before according its approval to such scheme.

(xii) In considering the question of granting relief as to conferring status of permanency and emoluments and privileges attached thereto, primary consideration is existence of permanent nature of work for such casual employees to be utilised against it and the extent of absorption on regular and permanent basis depends upon the extent of regular work available against which temporary employees can be regularly employed. Regularisation or permanency is not to be resorted in case where the establishment by itself is of temporary nature; where the employment is not with the object of offering employment but for ameliorating financial condition of weaker sections of the society like employment under Jawahar Yojana or where employment has been secured or offered by committing illegalities, irregularities or fraud as in the case of Ashwani Kumar (supra) where the appointments were found to have been given to six thousand persons out of all proportion to the existing requirement of the project for about 800 persons only, by the Director of the project Mr. Malik by committing illegalities, irregularities and fraud as per the investigation report. In which case the appointments against rules were held to be nullity and void ad initio.

II Consideration of Contention regarding Repugnancy and entrenchment on occupied field.

(a) Doctrine of pith and substance and occupied field.

92. The principal question is integrally connected with the question whether the impugned provisions of the enactments amount to legislation by the State legislature on a field occupied by Parliament in respect of subjects governed by entries 22 to 24 of the Concurrent List III of the VII Schedule of the constitution?

93. In considering this question, the principles for construing the legislation in respect of entries of legislative fields find place in provisions emanating from Chapter I of Part XI comprised in Articles 245 to 255 of the Constitution.

94. Article 245 lays down the territorial operational limits of law made by Parliament and State legislatures respectively. While the laws made by the Parliament may be for the whole of India or for any part of the territory of India, the operation of legislation made by State legislature is confined to any part or whole of the State concerned.

95. Article 246 ordains that Parliament has exclusive powers to make laws with respect to the matters enumerated in list I of the VII Schedule referred to as the Union List. Power to legislate on residuary subject matter encompassing subjects not specifically covered by any of the three Lists vests in Parliament by virtue of Article 248. Likewise, the State legislature has exclusive powers to make laws in the State concerned or any part thereof in respect of any of the matters enumerated in List II of the Seventh Schedule referred to as State List. Like power vests in the Parliament for making laws for that part of the territory of India which is not part of any State but is a Union Territory.

96. The Parliament and the State legislature of any State both have concurrent power to legislate in respect of any of the matters enumerated in List III in the Seventh Schedule referred to as the concurrent List. Articles 249 and 250 deal with special circumstances in which Parliament can exercise its power to legislate in respect of any subject matter enumerated in the State List also. We are presently not concerned with such powers. However, relevant to notice for present purpose is that if in respect of subject matters enumerated in List II if Parliament makes law in exercise of authority derived from the provisions of Articles 249, 250, 252 or 253 in respect of any of the subjects enumerated in List II, it would not restrict the State legislature to make law which under the Constitution it has power to enact in respect of said subject matter but if any provision of law made by State legislature is repugnant to law made by Parliament and Settlement Committee, the law made by the Parliament shall prevail and to the extent of repugnancy until continuance of the law made by the Parliament, State law shall remain inoperative. Article 251 is a manifestation of Article 254. Articles 246 and 254 read as under:-

Article 246(I) Notwithstanding anything in Clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in list

I in the Seventh Schedule.

(2) Notwithstanding anything in Clause (3), Parliament, and, subject to Clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule.

(3) Subject to Clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in list II in the Seventh Schedule.

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

Article 254(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the Provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to the matters, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State;

Provided that nothing in this Clause shall prevent Parliament from enacting at any time any law with respect to the same matter including law adding to, amending, varying or repealing the law so made by the Legislature of the State.

97. The above provision plainly speaking keeps respective legislative authority within its exclusive field supreme, and any provision made by entrenching outside

its field of exclusive territory by Parliament of the state, as the case may be, is without authority and void, inoperative. However, where both the legislatures - Central as well as State, has power to make laws then the law made by Parliament will prevail and if both the legislatures enact on the same subject matter, any provision made by State Legislature which is repugnant to the provisions of an earlier law made by Parliament or any existing law then the law made by State legislature can prevail only if it has been reserved for consideration of the President and has received his assent. Otherwise, the law made by State legislature will not be operative to the extent it is repugnant to the law made by Parliament on any subject of Concurrent List or law made by Parliament in exercise of its authority under Articles 249, 252 and 253.

98. Concerning this inter-relation of State legislature and the Parliament, principle was stated by Federal Court in *Subramanyan Muttuswami* (39).

99. While interpreting the like provision under Govt. of India Act 1935 as in Article 254, in *Subramanyan v. Muttuswami* (supra), the Court enunciating the principle of exclusivity of entries, falling in Lists I, II & III from others, said:

'In its fullest scope, Section 100 would then mean that if it happens that there is any subject in List II which also falls in List I or List III, it must be taken as cut out from List II. On this strict interpretation there would be no question of any real overlapping at all. If a subject falls exclusively in List II and no other list, then the power of the Provincial Legislatures is supreme. But if it does also fall within List, then it must be deemed as if it is not included in List II at all. Similarly, if it also falls in List III, it must be deemed to have been excluded from List II. The dominant position of the Central Legislature with regard to matters in List I and List III is thus established. But the rigour of the literal interpretation is relaxed by the use of the words 'with respect to' which as already pointed out only signify 'pith and substance,' and do not forbid a mere incidental encroachment. But, even if such an incidental encroachment may be ordinarily permissible, the field may not be clear. There may be competency and yet repugnancy also. The question is how to prevent a clash if the trespass is on a field already occupied by a Central Legislation.'

The answer was given in negative.

100. One thing may be borne in mind clearly that entries in the respective lists of the Seventh Schedule do not confer power to legislate. Power to legislate is derived from the distribution of the legislative powers under Article 246. Entries in the legislation are respective fields of legislation to find field demarcation. Such entries are to receive widest construction unless their import is cut down by competing the legislative field assigned to respective legislations, the power of any legislation under the Constitution is subject to the provisions of the Constitution that is the paramount law, e.g. law made by any legislature cannot be in derogation of any provision of Part III of the Constitution. No law can affect basic feature of Constitution or that no legislation can be made in violation of Article 301 of the Constitution. The matter mentioned in any entry covers all over ancillary or subsidiary matters which can reasonably be said to be comprehended in it. But one limitation is there that by artificially expanding the meaning of the special legislation, it cannot confer upon itself power to legislate on subject matter in respect of which it is not authorised to make law. Reference in this connection may be made to *State of Madras v. Cannon Dunkerley* (40). It was a case in which legislature of State of Madras had enacted Madras General Sales Tax Act by giving an extended meaning to expression 'sale' which did not accord with definition of 'sale' given in the Sale of Goods Act, a Central enactment, to bring use of goods in a execution contract within the term 'sale' given in the Sale of Goods Act, a Central enactment, to bring use of goods in a execution contract within the term 'sale' and levy tax thereon. The Court held that that the legislation of Madras could not arrogate upon itself power to levy tax on transactions which are not 'sales' within the meaning of the Central Act by giving an extended meaning to term 'sale'. Ordinarily, when wide construction of an entry leads to a conflict or overlapping with another entry in the same or different list, the rule of harmonious construction is applied in the first instance so as to reconcile the conflict and to give effect to all of them.

101. The first question in such instances arises before one can proceed to consider were it is not possible to harmoniously construe seemingly incompatible provisions so as to keep them both alive or there is repugnancy which cannot be

resolved.

102. The question whether the legislature has kept itself within the territory assigned to it or has encroached upon a forbidden field is determined by finding out the true nature and character or pith and substance of the legislation which may be different from its consequential effects. If in the pith and substance of the legislation is covered by an entry in respect of which the legislature has power to enact exclusively, any incidental encroachment in the rival field which is not substantial is to be disregarded if the encroached field is not occupied. Such repugnancy may rise by entrenching upon field exclusively reserved for other legislation. In respect of matters given in State List, if the Parliament has made law, the law made by the Parliament may be repugnant of the State Law. Vice Versa, if the made by the State entrenches upon field enumerated in the Union List and is not covered by any entry in the List enumerated for itself, the law made by the State will be repugnant to the law made by the Parliament.

103. In these circumstances, if law made by State legislature can be construed in pith and substance in respect of a matter enumerated in List II, and has made incidental encroachment on some matter in List I, such an incidental encroachment will be valid provided the field on which encroachment is made, is not covered but if the field is already occupied by competent legislature, to the extent of repugnancy, such incidental encroachments will also be void,

104. This also explains the difference between doctrine of repugnancy and doctrine of occupancy. An encroachment on the other field which is occupied by existing legislation cannot be saved by the doctrine of pith and substance. But if the legislation which in pith and substance is within its competence but there is incidental encroachment in the rival field which is not occupied, law shall not be declared invalid for that reason.

105. The doctrine of pith and substance was summarized by the Supreme Court in *Delhi Cloth & Gen. Mills. Co. Ltd. v. Union of India* (41), in para 33.

'When a law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it, what has to be ascertained is the true character of the

legislation. To do that one must have regard to the enactment as a whole to its objects and to the scope and effect of its provisions. To resolve the controversy if it becomes necessary to ascertain to which entry in the three lists, the legislation is referable, the Court has evolved the doctrine of pith and substance. If in pith and substance the legislation falls within one entry or the other but some portion of the subject-matter of the legislation incidentally trenches upon and might enter a field under another list, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence.'

106. The doctrine which the Courts have evolved with regard to occupied field is that if the encroachment is merely incidental then there is no difficulty so long as trespass is upon an enacted field. Where while enacting on the field reserved for the legislature concerned it trenches upon incidentally beyond which is occupied by a legislature by another competent legislature to the extent of such entrenchment howsoever may be limited or incidental may be, it is void and inoperative.

107. In 1907, in *Grant Trunk Railway of Canada v. Attorney-General of Canada* (42), Lord Dunsedin said:

'First, that there can be domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field was clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.'

108. The principle was reiterated by Lord Tomlin in *Attorney General for Canada v. Attorney General for, British Columbia* (43).

109. The principle was followed by Sulaiman, J. in *Subramanyan v. Muttuswami* (supra), who stated in his separate opinion:

'We cannot import the doctrine of incidental encroachment in favour of the provinces, and refuse to import the doctrine of unoccupied field which is in favour of the Centre. The two must go hand in hand. To allow Provincial Legislatures to encroach upon the exclusive Federal field, even though in an indirect way, when

there is a Central legislation already occupying the field, would be to give the former a free hand in nullifying Central Acts relating to matters in Federal List. Such a carte blanche could hardly have been contemplated. The scheme of Section 100 of the Act is to exclude completely from the authority of the Provincial Legislature the power to legislate with respect to subjects in List I. If in consequence of certain difficulties that Provincial Legislatures would experience by a rigid enforcement of such an exclusion we must in interpreting the words 'with respect to' import the Canadian doctrine of permissibility of incidental encroachment, we must then at the same time import the other allied doctrine also that such an encroachment is permissible only when the field is actually unoccupied. It is only in this way that actual clash between the centre and provinces can be avoided.'

110. A Constitution Bench of the Supreme Court in *State of J&K; v. M.S. Farooqi* (44), approved the opinion of Sulaiman, J.

111. Doctrine of repugnancy was cited by Fazal Ali J. In *I.T.C. Ltd. v. State of Karnataka* (45):

'The doctrine of occupied field has a great place in the interpretation as to whether or not a particular legislature is competent to legislate on a particular entry. This means that when the field is completely occupied by List I, as in this case, then the State legislature is wholly incompetent to legislate and no encroachment or A encroachment, minimal or otherwise, by a State legislature is permitted. In other words, where the field is not wholly occupied, than a mere minimal encroachment would not affect the validity of the State legislation.'

112. The cardinal principles justifying the competency of the respective Legislatures with respect to entries concerned, was summarized by Fazal Ali, J. In *I.T.C. Ltd. v. State of Karnataka* (supra):

'(1) Entries in each of the Lists must be given the most liberal and widest possible interpretation and no attempt should be made to narrow or whittle down the scope of the entries.'

(2) The application of the doctrine of pith and substance really means that where a legislation falls entirely within the scope of an entry within the competence of a State legislature then this doctrine will apply and the Act will not be struck down.

(3) The consideration of encroachment or entrenchment of one List in another and the extent thereof is also well established. If the entrenchment is minimal and does not affect the dominant part of some other entry, which is not within the competence of the State Legislature, the Act may be upheld as constitutionally valid.

(4) The nature and character of the scope of the entries having regard to the touch stone of the provisions of Articles 245 and 246.

(5) The doctrine of occupied field has a great place in the interpretation as to whether or not a particular legislature is competent to legislate on a particular entry. This means that when the field is completely occupied by List I, as in this case, then the State legislature is wholly incompetent to legislate and no entrenchment or A encroachment, minimal or otherwise, by a State legislature is permitted. In other words, where the field is not wholly occupied, than amere minimal encroachment would not affect the validity of the State legislation.'

113. Coming to these conclusion, the Court made reference and approved the observations made in *S.P. Mittal v. Union of India* and *Delhi General Mills Co. Ltd. v. Union of India* (supra).

114. Yet another principle which emerges that question of repugnancy arises where two enactments occupy the same field on which the respective legislatures are competent to make laws. In the absence of existing of two enactments, the question that really falls for determination is whether the law made by the concerned legislature is within the field over which it has authority to make law. If this question is answered in affirmative, a further question may arise that while making law in respect of such subject incidentally, it has transgressed or entrenched upon the field over which it has no authority to make law. In the later event, if the entrenchment is not substantial and is not occupied by legislation made by legislation competent to make law, made in that subject by invoking the

doctrine of pith and substance, such incidental entrenchment does not become invalid on unoccupied field but if the entrenchment is on the field which is occupied by a competent legislation, then such entrenchment cannot stand. However, where in respect of any subject matter in Concurrent List where both the legislators - Central as well as State, are entitled to enact laws and they do enact laws as occupying the field, the question of repugnancy in real sense arises for determination. In such event, there being repugnancy between the two laws made by competent legislatures which cannot be harmonised, law made by State Legislature must give way to law made by Parliament which in the context is a superior legislation, unless the laws made by State legislature is reserved for consideration of the President and received his assent as per Article 254(2) of the Constitution.

(b) Consideration of contention on subject matter and object of the impugned Act.

115. We have already noticed the scheme of the Act in brief. It reveals that it purports to make provisions in two fields. Firstly, to restrict appointment of any person in public services as a 'daily wage employee' under Section 4(1) by generally prohibiting such appointment altogether. But permitting urgent temporary appointments with prior sanction of competent Authority and under Sub-section(2) if any urgent temporary appointment is to be made to any post in any class, category or grade, it ought to be made with the prior permission of competent authority. Under Section 5, the Act also imposes a prohibition on creation of any post in any office of establishment relating to a public service without the previous sanction of the competent authority and secondly it declares that any appointment on a post which has been created in violation of Sub-section (1) of Section 5 to be invalid and consequentially, the appointment made on such post, which in law does not effect, shall be governed by the provisions of Sections 8, 9 & 15.

116. Section 8 is a prohibition directed against Treasury Officer or a Sub-Treasury Officer or Accounts Officer or any other officer or authority who is charged with the responsibility of passing the salary bill from passing the first bill of a person who has been appointed to a public service unless a certificate is issued by the appointing authority to the effect that the appointment has been made in

accordance with the provisions of Section 7 of the Act or if it is an urgent temporary appointment by the sanction of the competent authority under the conditions attached to such appointment by the competent authority as envisaged under Section 4.

117. It may here, be apposite to notice that in fact these provisions do not provide for any procedure for recruitment nor indicate any new provision in the field in substance than what is already prevailing. No law envisages giving appointment to any public service contrary to rules in irregular manner whether such appointment is on a sanctioned post on regular basis or an appointment offered to meet the exigencies of service on urgent temporary basis, whether against sanctioned post under the service or on excadre posts; or otherwise to meet any urgent need on temporary and ad hoc basis. It may be noticed that all service rules which provide for recruitment and appointment to any service in addition to regular appointment do envisage power to appoint on urgent temporary basis in the contingencies envisaged in the rules where appointment by regular section against existing vacancies cannot be immediately possible. Therefore, Section 4 making such appointment subject to prior approval by the competent authority does not deviate from the existing rules of ordinarily giving appointment on a vacant post on regular basis but wherever it is required the appointing authority is vested with power to make appointment on ad hoc, urgent temporary basis also. Under Section 7 of the Act of 1999 appointment on regular basis against existing vacancies have been declared to be made in accordance with Existing Rules in the field or where there are no Rules, in accordance with executive instructions issued from time to time. Existing Rules envisage circumstances in which urgent temporary appointments can be made as exception to general Rules while generally prohibiting making of urgent temporary appointments, Section 4 too leave door open for urgent temporary appointments. It is now made subject to prior sanction from the competent authority and to be consistent with the conditions as may be imposed by such competent authority. Though the Act itself does not provide any guideline in that regard but the same has been left solely on the discretion of competent authority, who can be any person of varying rank: under Section 10. Therefore, declaration of making appointments in accordance with the rules cannot be the principal object of the Act.

118. So also in all services rules, the creation of posts invariably rest with the State Government and creation of posts is not left with any authority lower than the State itself.

119. Illustratively, some of the rules which are also relevant for examining other issues on merit may also be noticed.

(i) Recruitments as Class IV Servant were governed by the Rajasthan Class IV Services (Recruitment & Other Service Conditions) Rules, 1963 framed under Article 309. In Rule 4 of the said Rules, it was provided that staffing pattern will be as ordained in column 2 of the Schedule and Sub-rule (2) required that in every grade the number of posts will be as may be determined by the State. The State was authorised to create posts permanently or temporarily from time to time. Thus, providing for regular appointment for the posts as determined by the State Govt. and providing for such recruitment on temporary basis, Rule 18 of the Rules envisaged circumstances in which the appointing authority was authorised to appoint any such person on urgent temporary, basis who is eligible for direct recruitment.

(ii) The Rules of 1963 for recruitment to Class IV Services in various departments of the State has since been replaced by Rules of 1999. So far as aforesaid provisions are concerned, no change has been made. In Rule 4 of New Rules, it is provided that such posts be included in the service as may be provided in column 2 of the Schedule and Sub-rule (2) provided that in every grade the number of posts must be as much as may be determined by the Govt. and the Govt. may in the exigency of service may create a post, permanently or temporarily or abolish a post without giving rise to any claim for compensation. It also provided that the State Government may keep any post vacant or in abeyance. Rules of 1999, which have come in force with close proximity of date on which the impugned provisions of Act of 1999 were enacted, also envisages under Rule 29 the situations in which urgent temporary appointment can be made.

(iii) In the Rajasthan Subordinate Offices Ministerial Staff Rules, 1957 it was provided in Rule that the strength of staff shall be as may be determined by the Govt. from time to time. Under Rule 7, recruitment of staff after the

commencement of the Rules was made subject to the procedure laid therein and detailed provision were made prescribing qualification and eligibility criterion for the posts mentioned in the Rules. Under this Rules also Sub-rule (3) of Rule 26 further envisaged the contingencies in which urgent temporary appointments could be made. It envisaged that such urgent temporary appointments could be made either by direct recruitment or promotion and vacancies could be filled by the State Government or authority competent to fill the vacancies as the case may be by appointing in officiating capacity an officer eligible to the post. Some other provisions were also made providing further conditions or restrictions for appointment on urgent temporary appointment to different posts.

(iv) Rajasthan Accounts Services Rules, 1954 (Rule 6 and 30). (v) Raj. Subordinate Accounts Services Rules, 1963 (Rule 4 & 30). (vi) Rajasthan Administrative Service Rules, 1954 (Rule 6 and 31). (vii) Rajasthan Co-operative Service Rules, 1954 (Rule 6 and 27).

(viii) Rajasthan Subordinate Co-operative Service (Class I) Rules, 1955 (Rule 6 and 30).

(ix) Rajasthan Subordinate Co-operative Service (Class II) Rules, 1955 (Rule 6 and 26). etc.

120. Apart from Rules framed by State in exercise of its power under Article 309 for recruitment and appointment under the State services, the authority to create new posts or abolish existing posts in local bodies have been reserved with State Government only.

121. Under Sections 78, 79, 80, 82, 83 and 99 of Panchayati Raj Act and Rajasthan Rural Development and Panchayati Raj State and Subordinate Service Rules, 1998, it is only the State Government which has power to fill the strength of posts under the various Panchayati Raj Institutions. So also only State Government is authorised to create new posts and abolish existing posts. Rules also envisage urgent temporary appointment under Rule 31 of Rules of 1998.

122. Similarly, under the Rajasthan Municipal Act, 1959, Chapter 13 deals with services under Municipalities in Rajasthan. Section 302 enjoins upon the State Government to constitute a State Municipal Service. In pursuance of the Rajasthan Municipal Service Rules, 1963, Rajasthan Municipal (Subordinate and Ministerial Service) Rules, 1963 and Rajasthan Municipalities (Class IV Service) Rules, 1964 have been framed by State as delegated legislation. Under parent Act, staff strength has to be fixed under direction of State Govt. while cadre strength in the case of State Service is fixed by State Govt. itself, such strength in respect of subordinate and ministerial service and Class IV services is fixed by respective Municipalities with the prior approval of State Govt.

123. Thus, there already exists complete control of State on creation of posts whether in the case of services directly under it or it concerned services under local authorities or other body or institution which are constituted by law made by State legislature in exercise of its legislative authority in respect of subject for which it is competent to make law. So also Rules do provide for urgent temporary appointments in contingencies envisaged thereunder.

124. The purpose is not to detail the gamut of urgent temporary appointments under the various rules but is to notice that creation and abolition of posts whether it relates to Class IV Service or Subordinate Services or State Services of Class I are already within the exclusive preserve of the State Government in these circumstances, assuming that the Govt. is competent to make laws in respect of services defined as public services under the act and is not confined to State Public Service, one thing clearly does not stand to reason where the rules governing different services provide for creation of posts by the highest executive authority of the State namely the State Government itself, why creation of such posts has been made subject to approval by the competent authority created under the statute which obviously shall be an authority subordinate to the State Government and not above the State Government Section 5, in terms, makes a situation where the authority to create any posts permanently or temporarily under the various Rules has been made subject to approval by a competent authority under the provisions of the Act of 1999, and appointment to any posts, though created by State Government but not with the approval of Competent Authority

has been declared invalid. The provision has an overriding effect by virtue of Section 19.

125. The competent authority has been defined in Clause (1) of Section 2 to mean an officer or officer specified by the State Government by notification to exercise the powers and perform the functions of a competent authority under the Act and different authorities may be specified for different purposes with respect to different districts, different departments or different institutions. By enacting Section 10, legislature itself has designated class of certain officers who can act as Competent Authority which ranges from highest to lowest rank of officer. Thus, it clearly means that State Government is the appointing authority for the competent officer and the competent officer is an authority subordinate to the state.

126. Moreover, while giving a very wide definition of 'daily wage employee', as noticed at the beginning of the discussion, Section 7 provides for regulation of recruitment. Clause (a) and Clause (b) of Section 7 reiterates the law, as has been well established and echoed by the decisions of the Courts in number of decisions which are legion, that recruitment or appointment to any post must be made by selections in accordance with the rules, and to such candidates whose names find place in the panel of selected candidates selected and recommended for appointment by the body envisaged under the Rules to make such recommendation, whether by Public Service commission where any post is within its purview or by selection committee as the case may be. Section 7 only restates the principle in its mandate to adhere to various Service Rules for the time being in force in the matter of giving appointment on regular basis. Clause 9c) of Section 7 also reflects this position that where recruitment or appointment otherwise than in accordance with Clause (a) and (b) is permissible, same may be made from amongst the candidates having requisite qualification and in accordance with the relevant rules and/or orders. The appointments made on compassionate grounds in favour of son, daughter or spouse of any person dying while in service is to be made in accordance with the relevant rules and/or orders issued from time to time in this behalf have also been saved.

127. Section 7 read as a whole in substance only declares adherence to existing Rules or guidelines for recruitment to posts otherwise than in the nature of urgent temporary appointments. Section 7 by itself does not lay down any new rule or principle for giving appointments by regular recruitment otherwise than under the existing Rules, or orders issued by concerned Authority and governing recruitment to all public services if framed for the purpose, or in the absence of rules, by executive instructions by the concerned authority. Thus, the entire gamut of Sections 3, 4, 5 & 7 is to give declaration as to existing law about the appointment to the regular posts to be made in accordance with the rules or orders governing such recruitment, on posts creation of which is exclusively government's field, except to the extent that urgent temporary appointments, which are also permissible under various rules, have been made subject to the prior permission of the competent authority and on conditions determined by him.

128. The appointments made in contravention of the rules are otherwise not held to be valid appointments nor law has countenanced such appointments. As an ancillary to this declaration that the appointments to be made in accordance with the relevant rules on the regular basis, to keep a further check on the compliance of provisions, Section 6 & 8 have been made. While Section 6 indicates that revision of pay, allowances, perquisites, honorarium, compensatory allowances etc. in respect any employee or elected' or nominated member, chairperson or any office bearer etc. of the establishment or offices mentioned under Section 3 shall not be made without approval of the competent authority, Section 9 says that payment of first bill of any person appointed to any post in public service shall not be passed unless the appointing authority issues a certificate that appointment has been made in accordance with the provisions of Section 4(2) if it is an appointment of urgent temporary nature and if on regular basis in accordance with the Rules governing such appointment.

129. Declaration in conformity with existing law with minor changes not affecting substratum of existing law, which is already in force either by way of rules framed under proviso to Article 309, which itself is a parent legislation, or by making ancillary and incidental provision as to regulate recruitment at different levels under local authorities or other bodies established by govt. in exercise of its

executive authority or under any law enacted by State within its own legislative field, does not give rise to question of transgressing one's own legislative field or question of repugnancy to any other law so long as it regulates the terms and conditions under which recruitment can be made and providing for consequences of non- adherence to such provisions.

130. However, the question do arise for consideration where such law does not envisage any substantive provision relating to recruitment or appointment, but merely ordains prohibition of making appointment contrary to existing Rules, which is inherent in provisions of all the rules that no appointment can be made in contravention of Rules, and makes certain other provisions substantively altering the substantive law in force in other field as to true scope or object of such enactment and in pith and substance to which subject matter such enactment relates to? Apparently, the answer must point to latter.

131. Pausing here for a while, it may be noticed that as per decisions of the Supreme Court in Jaswant Singh's case in Piara Singh's case, referred to above the employment under the workcharged establishment is by very nature of thing is temporary appointment. Such appointments cannot be said to be per-se illegal or irregular. Such appointment may be as such valid and lawful as regular appointment against a permanent post. It has also been noticed by the Court that the appointment under the workcharged establishment, apart from the declaration of law in Bangalore Water Supply's case, are the employee who are governed by the provisions of Industrial Disputes Act, which is a labour welfare legislation. In State of Rajasthan separate Rules viz., Workcharged Employee's Service Rules 1964 govern employment on work charge establishment under various Govt. departments. Such Rules also provide for conferring semi-permanent and permanent status on completion of minimum period of service on the workcharge establishment. The Rules also provide for making regular appointments on regular establishments of eligible persons under other Rules.

132. Under the provisions of the Act of 1999 all the persons appointed on urgent temporary basis, which is permissible under the Rules or in the administrative exigencies to tide over temporary needs, or for the purpose of doing odd jobs

under various departments including maintenance works, the persons engaged as workcharged employees on daily rate under separate Code, on a fixed remuneration or even in payscales, have all been categorised as 'daily wage employees' for the purposes of this Act, appointment of which was not earlier prohibited nor there is any strict prohibition under the act of 1999 also except to the extent that such appointment may be made subject to the prior approval of the competent authority. Any urgent temporary, ad hoc or casual appointment does not become illegal by itself nor does there is any warrant to assume under the Act of 1999 that all appointments made on urgent temporary basis prior to commencement of the Act of 1999 were not in accordance with various rules or illegal. In fact when respective Service Rules governing recruitment and conditions of service under various services, some of which we have referred to above, envisage urgent temporary appointments and appointments on the workcharged establishments, which too are governed by separate Rules, are in the very nature of things temporary, urgent temporary appointments made in such services governed by rules, prima facie raise a presumption that any initial appointment made by the authority competent to make such appointment is lawful. In other words, it is very well envisaged under existing law that a lawful appointment on urgent temporary basis can be made. So also a lawful appointment on urgent temporary basis is permissible under the act of 1999. It merely declares that an urgent temporary appointment made contrary to provisions of Act, which obviously refers to future appointments to be void. By such declaration neither existing temporary employment becomes void, nor future appointments on urgent temporary basis will become void per-se. Each case of dispute will entail an enquiry into the question whether appointment of a 'daily wage employee' (other than a person appointed on regular post) is lawful, irregular or illegal? Before the appointment can be declared invalid or void.

133. The second part of Act deals with subject of regularisation. Section 9 prohibits regularisation of all 'daily wage employee's existing as on the commencement of the act on whatever ground and ordains consequent termination. Section 11 declares abatement of all claims to regularisation and also forfeits right to all remedies by way of seeking adjudication of such claims. The process pending proceedings have been declared to be abated. Significantly

adjudicated claims were made non-executable. No positive statutory law for regularisation otherwise exists except perhaps under workcharge code or directions issued by authorities from time to time, which needed repeal, or law declared by Supreme Court, which was desired to be set at naught.

134. We have noticed above a chain of decisions of the Supreme Court spelling out ratio that when a person who was appointed on temporary ad hoc basis as casual or ad hoc or on contract basis and is not discharged or reverted as soon as the purpose of such appointment completed but is allowed to continue indefinitely, it gives rise to occasion for removing inequalities arising therefrom the demanding a positive action on the part of the State for absorbing such irregular appointees. This obligation of the State and corresponding right in the incumbent is founded on the necessity of security of tenure which is secured by Part IV of the Constitution ,and the need for maximisation of production. The obligation to act affirmatively was recognised in cases where initial appointment was in accordance with rules for giving such urgent temporary appointments or where such appointment was within the power of the appointing authority but there has been some non-compliance with the procedure or manner in making the appointment which makes the appointment irregular but which does not go to the root of the appointment so as to render the appointment void ab-initio. Root of such obligation was traced to constitutional scheme on conjoint reading of Pt.III and Pt.IV of the Constitution.

135. So also a clear distinction has been drawn with employee governed by I.D. Act 1947, and who are subject to benefits flowing from said Act and have a claim to regularisation under the scheme of a law made by Parliament. In such cases, indefinite continuance is the service and thereafter termination of the services without considering the case for regularisation with attending circumstance amounts to arbitrary and unreasonable treatment of such incumbent by the State requiring remedial measures.

136. In fact principle of obligation employers falling within the preview of expression 'State' under Article 12 has been propounded by Apex Court in matters arising in various shades raising claim to regularisation of casual, daily rated and temporary services of long duration by invoking plea of equal protection of law

guaranteed under Article 14, against exploitation and right to livelihood and dignified human existence as an essential element of right to life under Article 21. In most cases remedy was sought under Article 32 of the Constitution enforcing fundamental rights which itself is a fundamental right; and the court ruled in Bandhua Mukti Morcha case that petition under Article 32 in that regard was maintainable.

137. As such law has not ever sanctified as such actions of temporary appointments or irregular appointments or illegal appointments, at the same time, law has never favoured policy of hire and fire and engagement of services under conditions which results in practising 'unfair labour practice'.

138. In People's Union of Democratic Rights v. U.O.I. (46) and Bandhua Mukti Morcha case (47) the Apex Court has emphasized that labour welfare legislations have been enacted in furtherance of directive principles of State Policy envisaged under Article 39(1)(b), 41 and 42 to make life of workman a life of human dignity which is a Constitutional guarantee under Article 21. Though provisions of Pt. IV are not enforceable, but it becomes Constitutional obligation to give effect to welfare laws made to give effect to such policy. In such circumstances, when Parliament makes law in that direction and State legislature retraces its step to carry out obligation under such laws, the same cannot but be ultra vires the Constitution.

139. [Industrial Disputes Act, 1947](#) was law enacted by the Parliament as a labour welfare legislation in respect of entries made in Article 22, 23 and 24 of the concurrent List to give effect to Directive Principles of State Policy. It enacted in unequivocal terms that engagement of workman as Badli or casual or temporary for long duration by any employer amounts to an 'Unfair Labour Practice'. Where an employee satisfies his status as a workman under Section 2(s) of the Act of 1947 working at an establishment considered as industry under Section 2(j) of the Industrial Disputes act and the continued existence of work and need to employ workmen to discharge such work, it gives rise to claim to permanent status. If such claim to permanent status and regularisation is refused, the disputes are referred to Labour Court or Industrial Tribunal under said Act by appropriate Govt. as a

remedy against practising of Unfair Labour Practice or such claims were raised before High Court or Supreme Court by invoking extra-ordinary jurisdiction on the anvil of violation of fundamental rights and failure on the part of employer to discharge constitutional obligation to remedy unjust and inequitable conditions resulting in inequalities arising out of State action demanding a positive action to remove such inequality arising out of State action.

140. Sections 9 and 11 of the Act of 1999 make a complete departure from existing law by making a total prohibition against considering regularisation of existing daily rate employees and abates all claim to regularisation existing or adjudicated irrespective of nature of such 'daily rate employment' and existing continued requirement to make appointments to discharge such works. That affects a major change.

141. A faint suggestion was made that there is no complete denial of claim to regularisation, nor a closure of remedy against foreclosure of claim to regularisation founded on ground of reasonableness. To remove arbitrariness and to seek protection against unfair labour practice under Section 12 of the Act of 1999, it was urged that a person aggrieved of any refusal to regularisation and consequent termination may approach 'review committee' under Section 12, which has power of civil courts under Section 13.

142. To understand the validity of this argument it will be necessary to notice the provisions. Subject matters of review by the review committee envisaged under Clause (a) and (b) of Sub-section (1) of Section 12 are-

12. Review Committees.--(1) After the date of commencement of this Act, the State Government may constitute a Review Committee with an officer not below the rank of a Secretary to the Government as the Chairperson and such number of members of such rank as it may deem fit to review,-

(a) the existing staff pattern in any office or establishment employing persons belonging to any public service keeping in view the workload of such office or establishment; and

(b) the pay scales, allowances, exgratia payments, bonus, pension, gratuity and other terminal benefits and perquisites applicable to the post belonging to any establishment keeping in view the qualifications and job requirements of each such post.

143. After dwelling upon aforesaid material, the Review Committee is required to submit its report along with its recommendations to State Government. On such recommendation, the State Government can take action by framing Rules in that behalf. It is for the State Government to accept or not accept any recommendation.

144. In discharging its function of making a report and recommendation for the purpose of collecting necessary material, the Review Committee has been conferred power of civil court only in respect of summary and enforcing attendance of witnesses, and examining them on oath as well as requiring discovery and production of documents, requisition of public records and issuing commission of examining witness and document. No power of civil court as an adjudicator is conferred on Review Committee.

145. A perusal of aforesaid provision nowhere sustains the contention, Section 12 only provides for setting up of a review committee for recommending the staffing pattern in various offices or establishments, employment under which is considered as 'Public Service'. It also provides for recommending any scales, allowances, ex-gratia payments, bonus, pension, gratuity and other terminal benefits and perquisites applicable to any post under public service. For the purpose of discharging aforesaid duty, it has been conferred with power to examine witnesses and securing documents, as are available to civil court in the matter of summoning and examining witnesses in person on affidavit or by commission as well as for requisition and production of relevant documents.

146. The Section 12 and 13 nowhere empowers the Committee to entertain any grievance in respect of subject matter of claims which have been declared to have abated under Section 11 and with the destruction of right to claim under Section 9 and 11, remedy too has been extinguished as a necessary consequence. Both the principles are facets of same coin. Where there is a right, there is a remedy; or

where there is no right, there is no remedy. Section 12 and 13 has not revived what have been extinguished vide Sections 9 and 11.

147. We find that in a recent Supreme Court decision the State has sought to defeat the claim to regularisation by inviting attention to Act of 1999. Supreme Court while commending the object of the Act in an effort to block large scale induction of employees as daily wage or workcharged and continuing them for a long duration, directed the State Government to consider the case of appellant for regularisation bearing in mind the entire past record of appellant. The appellant, an engineer, was engaged as a daily wage Junior Engineer at a stipulated rate of Rs. 25/- per day since Jan. 1986 and was not successful in getting a decision from the Govt. or the Court despite Resolution of Panchayati Samiti recommending his case for regularisation in 1988. The validity of the provisions of act of 1999 was not the subject matter of appeal as the Act has come into existence only during the pendency of appeal and was placed before the court as defence during he course of hearing. In these circumstances, the Court by noticing Section 11 (c) of the Act, refrained itself from issuing any directions, but still left the matter to be considered by State Government. Reference is to order passed in *Maluram v. State of Rajasthan* (Civil Appeal No. 5087/98, decided on 21.2.2001). The decision is a pointer to its effect on closing the remedial measures to denial of any just claim to a workman/employee. This is reflected in the statement down below:-

'The Act is undoubtedly prospective in nature but under Section 9 thereof there is a bar to regularisation of services and Section 11(c) of the Act provides that all pending proceedings shall abate. It is because of this embargo it would not be appropriate for this Court to issue any direction to the formal order of regularisation notwithstanding the fact that appellant has been drawing the privileges of regular Govt.servant by the acts of Competent Authority and has been drawing the regular scale of pay even.'

148. Thus, notwithstanding finding the case to be one which making an order of regularisation was considered to be an formality, because of the statutory provision, the Court stayed its hands off and left the matter to be decided by State Government.

149. However, commendation of an Act as an effort to check the mass scale induction of daily wage employees cannot be read as pronouncing upon the validity of Act, which was not subject matter of appeal at all. It cannot be considered a precedent pronouncing upon the validity of law. Moreover, the commendation is only of the first part of enactment, referred to above by us, prohibiting urgent temporary employment except in accordance with the provisions of act. There is no such commendation for the second part dealing with subject of regularisation. In fact, the dismay of Court is being unable to pass an order of regularisation in a case which was not found by all corners to be justified because of the statutory prohibition, yet commended the case for regularisation to State Government.

150. Therefore, it will be reasonable to hold that in pith and substance dominant object of Act of 1999 is to give a full stop to claim to regularisation and remedies to be pursued in that regard. The Act does not make law exclusively in the field of 'State Public Service' but is amalgam of legislation in the field governed by multiple entries of VII Schedule. In so far as relates to recruitment, appointment and prescribing terms of appointment under various public bodies, reference may be made Entries 5, 32 and 41 of the II List.

151. However, regularisation of service of temporary employees designated as 'daily wage employees' under the Act of 1999, is not a term and condition of service, which could be a subject incidental or ancillary to making law for recruitment to 'State Public Service' or 'Public Service'. Regularisation is a concept which is directly related to redeeming the inequalities and arbitrariness in the employment arising because of the action of employer in persuing with long continuance of service on temporary basis without regular appointment against regular post. Such a condition results to hanging of democles sword of losing a job and livelihood and resultant unemployment. Methodology of regularisation in service is a principle evolved by Court in consonance with principles of equity, good conscious or fairness, soul of Article 14, to remove arbitrariness in all spheres of State action. Provisions of Industrial Disputes Act aim at securing permanent status to workman who are suffering from Unfair Trade Practice at the hands of employers by providing security of job and relief by redeeming inherent

unreasonableness and arbitrariness in practicing Unfair Labour Practice. Making law for regulating retrenchment of a workman of any establishment who has worked with fair amount of continuity under same employer is a measure in the field of providing security of job with some solace of social security.

152. The subject of industrial dispute; security of work, employment and unemployment and labour welfare are all legislative fields enumerated in Concurrent List vide entry 22, 23 and 24 of the VII Schedule. The Industrial Disputes Act envisaging remedy against unfair labour practice spelt in service of long duration of casual or temporary employment is an enactment made by Parliament to give effect to directive principles of State Policy contained in Articles 39, 41 & 42 and is a subject matter enumerated in Entries 22, 23 and 24 of the List III of the VIII Schedule of the Constitution.

CONCLUSION

(I) Whether impugned provisions infringe Pt. III of the Constitution?

153. It is in that scenario, Sections 9, 11 and 19 when closely looked, in terms prohibit the regularisation of all existing urgent temporary employee without distinction between such temporary appointments which are lawfully permissible under the rules or does not suffer from irregularity which may make it void ab-initio and has been made by a competent authority on the one hand and the appointments which are void because of inherent lack of competence at the time of making appointment, or which have been made de hors the rules and are not curable at any subsequent stage on the other. Both have been kept at par. This makes prima facie a case that by ordaining under Section 9 that such persons who are continuing as 'daily wage employees' as on the date of commencement of the Act, shall have no right to be regularised on any ground whatsoever and their services will be liable to be terminated, unequals have been treated equally.

154. Very pertinent here to notice is that while the employees falling under Chapter V-B of the Industrial Disputes Act have been saved from the operation of Section 9 altogether, the employees falling in the like circumstances but employed in establishments which are not governed by Chapter V-B of the Industrial

Disputes Act and are governed by Chapter V-A, have only been made subject to the provisions of Section 9 of the Act of 1999 which conveys prohibition against regularisation on any ground whatever, apparently, in the aforesaid situation, the principal area of operation of the Act, from the scheme appears to be, to prohibit regularisation of such employees by way of giving them regular appointment under any of the departments of the Govt. or under any of the services which are described as 'public services' for the purposes of the Act only in respect of employees who have been employed in comparatively smaller establishments.

155. In making this prohibition, a classification has been made by dividing the workmen under Section 2(s) of the Industrial Disputes Act in two categories viz. the workmen who are governed by Chapter V-B of the Industrial Disputes Act who have been kept out of operation of Section 9 and the workmen who may be governed by the Industrial Disputes Act and Chapter V-A but not by Chapter V- B. For the persons governed by Chapter V-B of the industrial Disputes Act, 1947, Section 9 have not at all been made applicable. That is to say in any of the organisations where on an average not less than 1000 workmen are employed on a average per working day. Second proviso of Section 9 reads that 'nothing in this Section shall apply to the workmen governed by Chapter V-B of the Act of 1947.' Therefore, the prohibition against regularisation of services wherever it is so permissible, remains unaffected in any organisation where more than 100 workmen are employed on an average per working day but for workmen situate in a like situation where they have been continued for long on a casual, ad hoc or temporary basis and regularisation of their services have been held by the Supreme Court to be a constitutional obligation of the employer and the clear distinction which has been drawn between the claim of regularisation of a workman who is governed by Industrial Disputes Act, have only been subjected to rigor of Section 9. If the object of the Act of 1999 be to stop the mass scale induction of urgent temporary employment whether under the rules or de hors the rules and its regularisation later on because of the long continuance of service, there is no discernible rational nexus between classifying the workman employed in larger establishment to exclude them from the rigor of Section 9 and subjecting only the workmen of a smaller establishment to the rigor of Section 9 by subjecting them to compete prohibition of regularisation of services of 'daily wage employee'

in terms of Section 2(ii) of the Act and object sought to be achieved.

156. It is true that the Constitution does not obligate a State to frame a law in furtherance of any directive principle of State Policy under Chapter IV but at the same time in a situation where denial of regularisation and consequent termination of service of a long standing temporary employee, particularly in cases where existence of work cannot be doubted, and urgent temporary employment cannot be branded as hors the Rules or void ab-initio, has been held to result in violation of fundamental rights under Article 14, 16 and 21 of the Constitution read in the animation of Article 39, 41 and 42 of the Constitution and correspondingly casting an obligation demanding of the State to act positively by making them permanent and regularising their services. When a large number of such persons are involved the apex Court has time and again put the State under an obligation to frame a fair and reasonable scheme for absorption of such personnel in a phased manner and has not countenanced mass terminations.

157. There is yet another aspect of the matter. On the one hand in furtherance of directive principles of State Policy Parliament has made a law in respect of labour welfare by enacting Industrial Disputes act which forbids long continuance of workman on temporary status, without conferring upon such employee status of permanent employee and laying down retrenchment policy which in the first instance lays down manner of affecting valid retrenchment by providing conditions under Section 25-F and 25-G to keep a check on exploitation of labour by hire and fire policy. It also confers under Section 25-H a right on a retrenched workman to be offered employment prior to offering such work to any new entrant. This ensures future employment of retrenched workman, and effectively checks the employers trait to remove workman with oblique motive to get rid of any employee for the purpose of offering same job to someone also. These provisions of Central Act have an overriding effect.

158. The State legislature has enacted the impugned Act purposely for not giving effect to such claims by workman retrenched under Section 9 and 16.

159. Notwithstanding provision of Part IV of the Constitution are not enforceable by seeking a mandamus to any legislation to make laws in accordance with it,

where a law has in fact been enacted by Parliament in furtherance of directive principles of State Policy and is in operation, its stultification by State legislature by making law for not giving effect to provisions of such law enacted by Parliament, shall make such law unreasonable and violative of Pt. III of the Constitution; particularly of Articles 14 & 21 of the Constitution.

160. We have noticed that the Supreme Court in a recent judgment in Gujarat Agricultural University case (supra) has stated it as settled law that where work is taken from workmen year after year, only option is to regularise them and emphasised that the State is under an obligation to create posts in a phased manner to absorb such personnel where such posts do not exist currently. In this scenario, when on the one hand the law of the land declared by the Supreme Court makes it a constitutional obligation to remove inequalities arising from long continuance of service by taking positive steps in that direction, the legislative enactment for denuding the concerned authorities falling with the expression 'State' under Article 12 from acting in consonance with such constitutional obligation is clearly in violation of constitutional scheme and the law even if held to be within the legislative competence of the State and not entrenching upon the occupied field by the central legislation, must be held to be ultra vires the Constitution.

161. It was contended by the learned Advocate General that in such circumstance instead of declaring the law to be invalid it should be read down to make the law applicable only to such cases where regularisation is not permissible.

162. Ordinarily, it would have been possible to construe Section 9 to be confined to the prohibition of regularisation to cases where no constitutional obligation arise on the part of the State to absorb such personnel by framing an appropriate scheme in a phased manner but this would entail necessarily an adjudication of the validity of the claim to regularisation by enquiring into question whether the claim is one in which regularisation is not permissible in law or where it is obligatory in law? By enacting Section 11, such an adjudication has also been prohibited. Therefore, Section 9 cannot be severed from Section 11. Reading the scheme of Section 9, 11 and 19 as integrated, it is not possible to read down

Section 9 by confining its operation only to such illegal appointments de hors the rules which are not permissible to be regularised under law.

163. The distinction, as we have noticed, exists between the case where regularisation is a part of constitutional remedy and also remedy under the Industrial Disputes act, wherever it is applicable on the one hand, and the appointments which are not liable to be regularised on the other, as has been noticed above in *Ashwani Kumar v. State of Bihar* (supra).

164. Apparently, Section 9 suffers from three vices. Firstly, by putting the lawful appointment on urgent temporary basis under the rules and the appointments which though have been lawfully made by the competent authority but there is some infraction of procedure on the one hand which are not illegal and the recruitment as 'daily wage employees' which are not by a competent authority and which are de hors the rules in a way that make the appointment illegal and void ab initio on the same pedestal when in respect of which different constitutional obligations arise unequals have been treated equals. Law is well settled that Article 14 is breached not only when equals are treated as unequals but also when unequals are treated as equals and there is no rational nexus to object sought to be achieved with such classification.

165. It was stated by Supreme Court Constitution Bench which considering the expanse of equality concept under Article 134 in *St. Stephen's College v. University of Delhi* (48):

'The equality means the relative equality namely the principle to treat equality what are equal and unequally what are unequal. To treat unequals differently according to their inequality is not only permitted but required.

166. In *Secy. Finance Department v. West Bengal Registration Service Association* (49), the Court applied the principle that treating unequals as equals will be violative of Article 14 in reversing judgment of High Court issuing a mandamus to grant pay parity to those who were not equals,

167. Secondly, by classifying the employees to be governed by the provisions of Section 9 in different classes and by excluding therefrom the persons governed by Chapter V-B of the [Industrial Disputes Act, 1947](#) but subjecting a workman governed by Chapter V-A of the Industrial Disputes Act, only on the basis of the size of the establishment has no rational nexus with the object sought to be achieved by the impugned Act.

168. Lastly the law has been made to denude the State or other class of employers, which is State under Article 12, from authority to act affirmatively in accordance with its constitutional obligation, and mandates them to act in breach of directive principles of State Policy enshrined in Article 39, 41 & 42 which have been read into Article 14, 16 & 21 for making regularisation in appropriate cases as a constitutional obligation. Any law which denudes the State of its authority to act affirmatively to remove inequalities and arbitrariness wherever found to exist cannot but be an unreasonable, arbitrary and unfair legislative action resulting in violation of fundamental rights guaranteed under Article 14 of the Constitution. As the fall out of the impugned provision is mass scale deprivation of livelihood, it also results in breach of fundamental rights under Article 21 of the affected incumbents.

169. Therefore, to save it from being ultra vires the constitution, the only plausible way is to confine its applicability to daily wage employees who have not been appointed by the competent authority or have been appointed de hors the rules which are void ab-initio and are not liable to be regularised at any stage. But in that event also the violation of Article 14 arising from the irrational classification of industrial workmen governed by Chapter V-A and V-B in the matter of regularisation and consequent, termination would still survive and it is not possible to read down the provision without substantially re-writing the provisions of Section 9. Such a course is not permissible for the Court, because in such event the exercise by the Court will pass from the realm of interpretation to the realm of legislation.

170. One ancillary aspect is that while leaving it to State Govt. to nominate an officer to act as Competent Officer for different areas, departments and institutions or for different purpose, who need not necessarily an officer of high ranking, but

may be of lowest, rank, no guideline appear from the Act, about the circumstances and conditions under which urgent temporary appointment can be permitted by the Competent Officer, it has been left to sole discretion of the Competent Officer, who can exercise his discretion in the matter unfettered. As all the provisions of the Act of 1999 have been given overriding effect over all other laws under Section 19. Section 4 and 19 read together leave different Competent officers free to exercise their power to permit and lay conditions for any urgent temporary appointment irrespective of any Rules like Workcharged employees Rules 1964, which deals with temporary appointments only or other provisions in various Rules governing such urgent temporary appointments thereunder.

171. Various Rules provide for the contingencies in which urgent temporary appointments can be made under the rules. Such appointments obviously cannot be said to be per se illegal or irregular. While permitting the urgent temporary appointments by the Act of 1999, no guidelines have been provided under which, circumstances or contingencies urgent temporary appointments can be made or permitted to be made by the competent authority nor any procedure has been laid for urgent temporary appointment in various services which has been left to be governed by discretion of Competent Officer. Thus, contingencies under which lawfully an urgent temporary appointment can be made has been subjected to unfettered discretion of Competent Officer.

172. Simultaneously, under Section 10 legislature has conferred power on large number of State functionaries ranging from State govt. to Director of Treasures and Accounts, the Director of Inspection, the Director of Local Funds Audit Department, to concerned Chief Accounts Officer, Financial Advisor/to Sr. Accounts Officer etc. or Head of the Deptts. of Govt. and local authority to issue direction to their respective subordinates such directions as they deem fit for the purpose of enforcement of provisions of the Act which not only binds their subordinates but declares noncompliance of such direction to be a misconduct for which concerned subordinate may be subjected to departmental enquiry and he may be visited with punishment.

173. There cannot be any dispute about binding subordinates to carry out the instructions and directions of superior officers in discharge of their functions and treat noncompliance of such direction as an act of insubordination, which do amount to misconduct.

174. But no guideline appear from the provisions of Act read as a whole of the nature of direction that may be issued nor any guideline is discernible which obligates to have any uniformity and correlation between directions issued by one authority and other. Power has been conferred on vast majority of in hierarchy of officer ranging from highest to lowest in the concerned department to his subordinates. The use of expression 'etc.' in statute, it refers to treat the enumeration of list as illustrative and to include all officers of like rank and nature by applying the principles of *eiusdem generis*, or it makes the provision too vague and unguided to draw the line. If the expression 'etc.' is to be treated as 'superfluous', to save the provision from the vice of vagueness, it only betrays the 'draughtsman' blunder.

175. Be that as it may, in the absence of any guideline to have coherence and correlation amongst directions that may be issued in the same field by varying authority, makes the provisions suffer from the vice of excessive delegation of authority conferring unbridled and uncanalised power to issue directions of varying nature inviting potent confusion and consequent genuine apprehension of meeting different treatment to like persons in like situation dependent on the concerned authority exercising power within the State for same purpose.

Such provisions suffer from the vice of excessive delegation of authority.

(ii) Whether impugned provisions suffer from repugnancy?

176. The termination of temporary employees as such would have to take place in accordance with law relating to termination and non-regularisation may furnish a case for termination but the methodology of termination does not depend on the question of regularisation. Method of termination of any employee has to be in accordance with law e.g. the general conditions for the Rajasthan State employees under Rajasthan Service Rules under Rule 23-A envisages inter-alia

that a service of a temporary Govt. servant who has been in continuous Govt. service for more than three years and who satisfied the suitability in respect of age and qualification prescribed for post and has been appointed in consultation with Rajasthan Public Service commission wherever such post is within purview of the Commission, shall be liable to be terminated by notice of three months given in writing provided that services of such Govt. employee may be terminated forthwith and on such termination Govt. servant shall be entitled to a sum equivalent to his pay for the period of notice. In other case, the duration of notice required for termination is one month.

177. In the case of any Government servant or an employee defined as a member of the 'public service' under the Act of 1999 who is governed by the provisions of the [Industrial Disputes Act, 1947](#), whether serving at an establishment governed under Chapter V-A or Chapter V-B, the provisions relating to retrenchment under the Central Act have an overriding effect over any other law, except to the extent such other law or contract provides more beneficial terms, in view of Section 25-J of the [Industrial Disputes Act, 1947](#) which apply to retrenchment under chapter V-A and Chapter V-B with equal force. Section 25-J. reads as under:-

'25-J. Effect of laws inconsistent with this Chapter.-(1) The provisions of the Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law including standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946).

Provided that where under the provisions of any other Act or rules, orders or notification issued thereunder or under any standing orders or under any award, contract of service or otherwise, a workman is entitled to benefits in respect of any matter which are more favorable to him than those to which he would be entitled under this Act, the workman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he receives benefits in respect of other matters under this Act.

(2) For the removal of doubts, it is hereby declared that nothing contained in this Chapter shall be deemed to affect the provisions of any other law for the time being in force in any State in so far as that law provides for the settlement of

industrial disputes, but the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of this Chapter.

178. Significantly, Sub-section (2) makes it unequivocally clear that so far as law relates to lay off and retrenchment the field is exhaustively occupied by Act of 1947 and while saving laws made by State providing for settlement of Industrial Disputes, has kept the subject of lay off and retrenchment outside the preview of State Legislature.

179. Therefore, person who is a workmen within the meaning of Section 2(s) of the Act of 1947 by virtue of his being employed in an industry or at an establishment in terms of decision of the Supreme Court in Bangalore Water Supply case and Central Inland Water Course case, the termination by way of retrenchment must conform to the Chapter V-A or Chapter V-B as the case may be. Compliance of these provisions is not subject to the question of taking decision of regularisation. Even while holding that person is not entitled to regularisation, the termination may still be invalid for the reason of non-compliance of these provisions.

180. In this connection, it may be noticed that according to Section 9 of the Act of 1999 services of daily wage employees' can be terminated merely by giving due notice and no more. Provisions of Section 9 have an overriding effect in view of provision contained in Section 19. At the same time termination under Section 9 is a retrenchment within the meaning of Industrial Disputes Act. Necessary corollary is that a valid retrenchment must conform to the provisions of the Industrial Disputes Act whether under Chapter V-A or V-B in view of Section 25-J of Industrial Disputes Act, unless State enacts a law contrary to said provision with the assent of the President. The Act of 1999 was admittedly not reserved for approval of President so as to receive his assent.

181. Repugnancy between central enactment and the Act of 1999, a State enactment, is visibly apparent. Section 25-J of the Industrial Disputes Act, 1957 gives an overriding effect to provisions relating to retrenchment contained in Chapter V-A and V-B of I.D. Act. Such provisions include firstly notice of minimum period, or emoluments of the notice period to be paid at the time of retrenchment,

and also payment of retrenchment compensation as conditions precedent for valid retrenchment under Section 25-F, as well as disclosure of reason for such retrenchment in case retrenchment is of a workman in continuous service of one year or more; Secondly, adherence to rule of last come first go, a manifestation of Article 14 is required under Section 25-G. In case after retrenchment takes place, the employer wants to employ any person for the same or similar work, he is bound to offer re-employment to such retrenched workman before employing any new hand under Section 25-H. In this regard only difference in cases governed by Chapter V-B is that under Section 25-N employer has to take a prior approval from appropriate Govt. for effecting a valid retrenchment. On receipt of such approval, payment of retrenchment compensation as pre-condition is envisaged under Section 25-N(g) and requirements of Section 25-G and 25-H are applicable with equal force in such cases also by virtue of Section 25-S, which makes provisions of Section 25-B, 25-D, 25-FF, 25-G, 25-H and 25-J of Chapter V-A applicable to industrial establishments governed by Chapter V-B also.

182. We have noticed above that the field of law governing retrenchment is already governed by an existing law made by Parliament which is in respect of subject matter governed by entries under concurrent List of VII Schedule which has an overriding effect.

183. The conditions for valid retrenchment envisaged under Industrial Disputes Act are cumulative and conditions precedents and not conditions subsequent. That is borne out from the heading of Section 25-F which reads 'Conditions Precedent to retrenchment of workmen' and the negative expression in which the provision have been construed by apex Court in *State of Bombay v. Hospital Mazdoor Sabha* (50) and *Bombay Union of journalists v. State of Bombay* (51). The retrenchment being a matter relating to employment and non-employment and by virtue of Section 2-A of the Industrial Disputes Act an individual termination is also an industrial dispute. Such conditions precedent for valid retrenchment falling within the purview of I.D. Act, which is a central legislation, cannot by a subsequent State legislation be altered or made conditions subsequent unless such legislation is reserved for the assent of the President and has received his approval.

184. Under Section 11 of the Act of 1999 the claim to regularisation of services in all circumstances, even if made prior to commencement of the Act under the provisions of law including such claims which have been adjudicated by competent forum in favour of the incumbent even before commencement of the Act but have not been implemented have been declared to have abated and the remedy to seek regularisation of service of whatever type has not only been prohibited in future but existing decrees, awards and judgment have also been nullified by declaring that same shall not be executed. This is notwithstanding the fact that Section 9 only prohibits regularisation in future of daily wage employees who are continuing as such at the time of commencement of the Act; and does not affect the regularisation already made, by express provision no retrospective operation has been given to Section 9 of the Act. Thus, effect of Section 11 is not only to debar any employee from raising a claim to regularisation after the commencement of Act but clearly to nullify the judicial pronouncements without removing the premise on which judgment is founded. Nullification of finality of judgment simplicitor is not within the domain of legislation.

185. Section 19 of the Act of 1999 has given this legislation an overriding effect over any other law in that regard. We have already noticed that the provisions of Section 14 to 18 merely provide consequences of non-compliance to befall on the officers of the State who give appointment contrary to the rules and who made regularisation contrary to law made under the Act as a punishable offence and has defined misconduct in respect of which departmental proceedings can be undertaken and the officer can be punished.

186. Thus, on the one hand, part of Act (Sections 4 to 8) principally declares the existing position of law about requirement of regular recruitment and also permits urgent temporary appointments which to are permissible under existing provision but makes such urgent temporary appointments subject to prior sanction of the competent authority appointed by the State, and subjects creation of new posts subject to competent Authority sanctioning the same when under all existing law such power vest in State Govt. only. On the other hand, the provisions of Section 9 & 11 ordains prohibition of regularisation of daily wage employees as defined in the Act in all circumstances and forfeits recourse to any remedy to such persons

whether under the ordinary civil law of the country, or under the special enactments like Industrial Disputes Act to protest against such refusal to regularisation. It not only abates the claim to regularisation, which are prohibited prospectively, but nullifies existing judgments and decrees accepting the claims of employees raised and decided prior to commencement of the Act of 1999.

187. In this scenario, we have no doubt in our mind, applying the principle of pith and substance that the principal object of the Act is to extinguish the obligation of State of regularisation in the field where such affirmative action has been held to be a constitutional goal and a constitutional obligation of State as an employer and as State is wedded to act reasonably and fairly without arbitrariness in all spheres of its activities, to deny the incumbent a fundamental right to raise grievance about such State action and lay claim to regularisation by establishing facts and circumstances which makes it obligatory upon State to act positively with an affirmative actin for adjudication of such claim by the forums prescribed under law. Consequence is termination of service which results in unemployment and deprivation of livelihood; perpetuating unreasonableness and arbitrariness in State action under the shelter of legislative action. Such law must be held to be unreasonable and arbitrary violating Article 14 of the Constitution.

188. No doubt exclusion of extra-ordinary remedies available under Constitution cannot be read into any provision as right to seek remedy by way of judicial review of any State action under Article 14 or 32 is basic feature of Constitution and by any law such right cannot be taken away, yet, where inherent in claim is enquiry into facts, denuding the citizens right to approach Courts or forums meant to hold such enquiry, when extra-ordinary jurisdiction is ordinarily not invoked to enquiry into question of facts, makes such provision unreasonable, arbitrary and unfair impinging on equality clause of Article 14.

189. Ancillary to the question of extinguishing right to seek remedial adjudication and nullifying the existing decrees and awards, attention is drawn to Entry 11A of Concurrent List, which reads as under:

11A 'Administration of justice; constitution of and organisation of all courts, except the Supreme Court and High Courts.

190. Subject 'Administration of Justice' is transrafted Entry 32 of former List II to List III with effect from 3.1.77 vide the Constitution 42nd Amendment Act 1976), undoubtedly in respect of subject covered by this entry Parliament as well as State both have concurrent power to legislate: However, where Labour Court or Industrial Tribunals are to be constituted under Section 7 or 7A, the Industrial Disputes Act as the case may be, by Appropriate Govt., as defined under Section 2(a) for the act of 1947. Thus, for the purpose of adjudication of industrial dispute in relation to which Appropriate Government is State Government, the Labour Court or Industrial Tribunal may be constituted by the State Government in exercise of its power under the Central Act. It has power to establish or abolish as many as labour Courts of Industrial Tribunals as it may deem fit within the State, but jurisdiction exercisable by such Labour Court or Industrial Tribunal flows from Section 7 and 7A of the Industrial Disputes Act 1947 and is not the subject matter to which power of State reaches, except in accordance with law made by state Legislature in terms of Article 254 after securing approval from the President. Section 7 of the Industrial Disputes Act provides that Labour Court shall exercise jurisdiction over such matters as are prescribed in Schedule 11 appended with the Act. Likewise, under Section 7A the Tribunal is vested with jurisdiction to deal with matters described in Schedule III of the Act. Schedule II further envisages all residuary matters which are governed by the Act and not mentioned in Schedule III are to be adjudicated by Labour Court.

191. Disputes as to retrenchment, including examination of validity and justifiability of reason which has led to retrenchment as well as to secure relief against unfair labour practice are to be adjudicated by Labour Court/Industrial Tribunal in terms of [Industrial Disputes Act, 1947](#).

192. While constituting the requisite number of Labour Court or Industrial Tribunal has been left to Appropriate Govt., jurisdiction of any such Labour Court or Industrial Tribunal has been ordained by Central Act itself and was not left to State Govt. State Govt. cannot truncate such jurisdiction to adjudicate upon dispute arising in respect of matters dealt with by Act of 1947, nor can it abrogate the binding nature and implementation of award made under Industrial Disputes Act without amending the legislation in the manner known to law that is to say as

provided under the Constitution. Any amendment in Schedule of the Act or nullify the effect of awards which are binding under Section 18 and 33C of the Industrial Disputes Act is repugnant to provisions of Industrial Disputes Act. Such law can operate only if that law resulting in such amendment has been reserved for consideration of the President of India and received his assent.

193. It is further relevant to notice that while power to add entries in first schedule to [Industrial Disputes Act, 1947](#) has been conferred on appropriate Govt., power to add, alter or amend second and Third Schedule has been exclusively conferred on Central Govt. under Section 40 of the Act of 1947. State Govt. has no power under the Act of 1947 to make any alteration or modification in Schedules II & III of the [Industrial Disputes Act, 1947](#).

194. Thus the law denuding the authority of Labour Court and Industrial Tribunal which legitimately arise out of matter dealt with under it and nullifying the awards and adjudication under said Act under Section 11 which have an overriding effect by dint of Section 19 over the provisions of any other law is apparently a law repugnant to an existing law enacted by Parliament and which completely occupies the field. Any provision of such law made by State Govt., which has not been reserved for the consideration of President and has not received his assent, cannot operate.

195. We have already noticed that while making law in respect of a subjectmatter falling in State List the State legislature has necessary power to make provisions incidental minimal encroachment takes place on the field not reserved for it, it cannot be invalid for that reason alone but where such entrenchment is on occupied field whether of the exclusive jurisdiction of another legislation or in respect of a subjectmatter governed by Concurrent List, in the case of such repugnancy where one cannot be obeyed without disobeying other, legislation made by the superior legislation viz. Parliament, prevails.

196. The subject matter of valid retrenchment is exhaustively occupied by the [Industrial Disputes Act, 1947](#) which is further clear from non-obstante Section 25-J of the act of 1947. Therefore, to the extent the provisions of Section 9 makes distinction between industrial workmen governed by Chapter V-B and V-A and

makes retrenchment of workmen governed by Chapter V-A subject to conditions subsequent and by not 'making other provisions of Chapter applicable thereto, and giving the provisions of Act of 1999 an overriding effect overall other laws under Section 19 of the Act of 1999 making it impossible to obey 25-H of [Industrial Disputes Act, 1947](#), Central legislation, backed with an overriding effect by dint of Section 25J without disobeying Act of 1999. The provisions clearly entrench upon the field occupied by the central legislation, which too has been given overriding effect, and is apparently repugnant to the provisions of Industrial Disputes act contained in Chapter V-A of the said Act.

197. It also takes out the continuance of the employee's for long as casual, Badli or temporary or an hoc by whatever name called, while work to be discharged exists and there is disparity in the conditions of service between such temporary employees resulting in a situation where inference can be drawn that such long continuance is to derive financial benefit by the employer and makes it an unfair labour practice as defined under the Act of 1947 Not only that, by enacting Section 11 prohibiting of raising claim against such unfair labour practice and denying remedies by adjudication of such industrial disputes before the Labour Court or Industrial disputes before the Labour Court or Industrial Tribunal which is established under the central legislation, are the provisions repugnant to the Act of Parliament which has been enacted in respect of subject matters falling in Concurrent List and on such field occupied by the Central Legislation any law made by State legislature for not giving effect to such provisions or bringing about termination by retrenchment without adhering to such provisions and also denying an opportunity to raise a claim against unfair labour practice arising from long continuance in service of temporary status by denuding the Courts or tribunals established by or under a Central Legislation of its authority to adjudicate such disputes are the provisions of the Act of 1999 contained in Section.... with Section 19. These provisions are repugnant to central legislation and cannot be obeyed without disobeying provisions of I.D. Act, 1947. Therefore in view of Article 254, the provisions made by State legislature in that regard cannot operate because State legislation has not been reserved for consideration of the President and has not received his assent.

198. Be that as it may, since we have come to the conclusion that the provisions of Sections 9 & 11 are ultra vires the provisions of constitution being in violation of Articles 14, 16 & 21 of the Constitution, even if the impugned provisions are held to be within legislative competence of State legislature and is not entrenching upon occupied field of Central legislation and not repugnant to law made by Parliament, result would not have been different.

(iii) Conclusions about validity of Section 2(V) of the Act of 1999.

It has been contended by the learned counsel for the petitioners that State Public Service is confined to civil services under the State i.e. to say wherever there is a direct relationship of employer-employee with the State and no other services can fall within its ambit. It is on this anvil Clause (b), (c), (d), and (e) are stated to be beyond legislative competence of the State. Countering the question of challenge to State legislature's competence to define 'public service' for the purpose of the Act of 1999, the contention of the learned Advocate General is that the Act of 1999 is enacted in respect of subject covered by Entry 41 of the Second List that is to say in respect of 'State Public Service and State Public Commission', and therefore wherever the involvement of State is there and the question of recruiting personnel under any institution having financial assistance from State can be construed as a public service in respect of which the State has power to legislate.

199. In this connection, we notice that the Supreme Court had occasion to consider this aspect of the matter in the contest of services under the Panchayats in *Mathurdas v. S.D. Munshaw* (52). The contention raised before the Supreme Court was that the service under the Panchayat or the Panchayat Service is not a State service in respect of which State could legislate. The Court said:

'Entry 41 List II of the Seventh Schedule refers to State Public Services suggesting that there can be more than one State Public Service under the State. The panchayat Service is constituted by the Panchayat Act and the State Government is empowered to make orders and rules regarding its organisation and management. It is true that in Section 203 it is stated that the Panchayat Service shall be distinct from the State Service. Having regard to broad features of the Panchayat Service, the said declaration appears to have been made only to

distinguish the Panchayat Service attached to the several departments which are under the direct control of the State Government. Merely because the panchayats are declared to be body corporate, it cannot be said that any of the persons working under them cannot be considered as members of a civil service under a State. The Panchayats Act derive their authority from the statute and are under the control of the State Govt. They form part of the local self-Govt. organisation which the State Govt. is under an obligation to foster under Article 40 of the Constitution.'

200. For the aforesaid reasons, the Apex Court held the Panchayat service constituted under the Panchayats Act is a civil service of the State of Gujarat. Thus, principle is clearly deducible that the subject in respect of which State is competent to make law and any body which is constituted or incorporated under such organisations are considered for the purpose of Entry 41 to be civil services of the State in respect of which State has necessary legislative power to make law.

201. Viewed in that light, we find that under State List of the VII schedule Entry 5 speaks of local government that is to say the constitution and powers of municipal corporations, improvement trusts, district boards, mineral settlement committees and other local authorities for the purpose of local self Govt. or village administration. Therefore, making provision for any service constituted under a 'local authority' as defined under Section 2(iv) of the Act, falls within the ambit of subject matter in respect of which law can be enacted by the State Government. Entry 5 itself authorises to make laws in respect of a local authority about its constitution and administration of the local authority, which extends to making laws regarding all incidental and ancillary matters and that would include making law regarding constitution and regulating such services under that authority. We have noticed above in this regard relevant provisions of Rajasthan Municipalities Act, 1959 and Rules framed thereunder as well as Rajasthan Panchayati Raj Act and Rules framed thereunder which are legislations in respect of subject matter for which State legislature is competent to make law.

202. On the same principle, a body established under any law made by the State legislature whether incorporated or not including a university, would be included in the definition of public service for the purposes of the Act where the State has

necessary authority to establish such other body or university by enacting a law. Legislative competence carries with it necessary authority to legislate on incidental and ancillary matter for the governance of such body under law and that include a power to constitute and regulate the services under such university or institution, or other body by making law in that respect. The provisions can be made within the Act under which such body/institution has been established or law may be made independent of it. The legislative competence to enact in respect of a field does not mean that such authority has to be exercised exhaustively by enacting one single Act. It can be manifested in different Acts. It is also relevant to notice that one enactment need not necessarily fall within one entry of any of the list in the Schedule VII. One enactment can cover the field of more than one Entries, provided the legislative authority has competence to make law in respect of such multiple subjects enumerated in different entries.

203. So also inclusion of body described in Clause (d) of Sub-clause (v) of Section 2 also cannot be said to be beyond the legislative competence of the State by including in public service for the purpose of Act of 1999, which as noticed by us is for two-fold purpose of which prohibition of regular... on of daily wage employees is principal object.

204. For the same reason no exception can be taken to include a Govt. Company or undertaking wholly owned or controlled by the State or any other body established by the State Govt. within the meaning of public service for the purposes of the Act as they are the limbs of the State Govt. itself and it is regulation and administration also is a part of the State's executive authority.

205. However, same thing cannot be said in relation to inclusion of body which is not established by law or made by legislature or is not a body established by the State Govt. and not a local authority but the private organisation though in the matter of transacting their business or activities they may be regulated by regulatory laws. The inclusion of any society registered under law relating to registration of societies for the time being in force and receiving financial assistance from the State wholly or in part or the non-Governmental Education Institute whether registered or not any receiving aid from the State Govt. within the

domain of Public Service and to arrogate to itself the basic managerial function in the matter of employment and non-employment under it. It can regulate and put conditions for grant of financial aid to any institution. It can prescribe norms under which grant-in-aid or financial assistance can be rendered but that does not authorise the State Govt. to take control of the management and administration of such institution as a whole. If a society registered under any law relating to registration of society needs financial assistance of the State Govt., it can approach the State Govt. for such financial assistance by fulfilling conditions but such conditions cannot relate to arrogating the management and control of the institution by the State so as to take its independence in the matter of determining the desired number of persons or to decide upon the continuance or termination of service, except to extent regulating employer-employee relations as an employees welfare measure. Providing for minimum standards of qualification for all teachers to be appointed in any school or educational institutions for the purpose of imparting education may be referable to subject of Education under Entry 25 in Concurrent List as it concerns the quality of education but providing for minimum qualification requisite for the recruitment with that object cannot extend to taking control over recruitments and requirement of teachers and other staffs at the institution, whether it is an educational institution or other institution seeking financial aid from the State. Literally meaning, it would amount to that registered society doing a business or engaged in any other activity but receiving financial assistance from the State for carrying its trade activities may have to surrender its independence in the matter of its staffing pattern and employing persons to the extent of its necessity, whether temporarily or permanently. Mere having assistance wholly or partly cannot put the services under a private establishment be it a registered society or an educational institution which is not established by the State Government, as a public service.

206. Accordingly, we have no hesitation in coming to the conclusion that to the extent a society registered under any law relating to registration of society for the time being in force which is not a body established by the State Govt. or constituted under any law or non-governmental educational institution receiving grant in aid to any extent whether registered or not has been brought within the definition of 'public service' is arbitrary and unreasonable and also beyond the

legislative competence of the State whether under State List or Concurrent List and is therefore ultra vires.

207. Accordingly, we hold, any law which mandates State or its instrumentalities to act or not to act in a manner so that arbitrary and unfair circumstance affecting any person does not arise accords with scheme of Constitution. For the same reason, if any law absolves State and its instrumentalities not to act to remove arbitrary and unfair circumstances arising out of its own acts or omissions and also deprives the person suffering from such inequalities to have recourse to available remedies must be held to be ultra vires as negation of Constitutional obligation.

208. For the reasons aforesaid:

(i) Sections 9 & 11 read in light of Section 19 of the Act of 1999 are declared ultra vires the Constitution being violative of Articles 14, 16 and 21 read with Articles 39, 41 and 42 of the Constitution.

(ii) The said provisions are otherwise inoperative for the reason of their apparent repugnancy with I.D. Act 1947, which is a law made by Parliament in respect of subject matters enumerated in entries 22, 23 and 24 of Concurrent List, and field is exhaustively occupied by existing law and the State Legislation has not been reserved for consideration of the President and has not received his assent as required under Article 254(2) of the Constitution.

(iii) The following part of Clause (e) of Section 2(v) is also declared ultra vires.

'a society registered under any law relating to the registration of societies for the time being in force and receiving funds from the State Government either fully or partly for its maintenance, or any educational institution whether registered or not but receiving aid from the State Government.' (iv) As a consequence of declaration of Section 9 to be ultra vires, any direction or order issued solely on the basis of and with reference to Section 9 for non-regularisation or consequential termination of services cannot be sustained,

(v) Any order refusing claim to regularisation and consequent termination as well as any claim to regularisation can be made subject to remedial forums for

adjudication as may be available under law. Section 11 being held ultra vires such claims cannot be refused to be adjudicated by the concerned forum by invoking Section 11.

(vi) Likewise the claims to regularisation, which have already been adjudicated and become final, there shall be no impediment in execution and implementation of such order, decree or award in accordance with law.

(vii) Rest of the provisions of the Act, cannot be said to suffer from any such infirmity. Remaining provisions neither transgress the filed in respect of which State legislature is competent to make law nor can be said to repugnant to any law made by Central Act in respect of subject matter for which Parliament is competent to make law.

(viii) However, the aforesaid declaration would not mean that mere continuance for long period confers an indefeasible right in favour of the incumbent for regularisation in all circumstances. It must depend on facts of each case, Regularisation of any employee is obligation of employer only where such long continuance as temporary employee is considered to be resulting in unfair labour practice or is a case of arbitrary, unreasonable action on the part of the employer in public service by not conferring regular appointment to a person which is otherwise, found to be lawfully made or where incumbent has been appointed by the competent authority but there is some procedural flaw not affecting validity of appointment:

209. With aforesaid conclusions, we direct that all the cases referred to above may now be fisted for orders for considering on merits the respective orders under challenge and reliefs claimed by the petitioners for making appropriate orders.