
(2001) 10 BOM CK 0075
In the Bombay High Court
Case No : Writ Petition No. 125 of 1998

D.S. Veer Ranji

APPELLANT

Vs

Ciba Speciality Chemicals (I) Ltd. and Others

RESPONDENT

Date of Decision : 09-10-2001

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2002) 2 BomCR 29 : (2002) 92 FLR 1048 : (2002) 2 LLJ 569

Hon'ble Judges : B.P. Singh, C.J.; S. Radhakrishnan, J.; D.Y. Chandrachud, J

Bench : Full Bench

Advocate : Pakale, for the Appellant; J.P. Cama, instructed by Crawford Bayley and Co., Khan and R.J. Mane, for the Respondent

Final Decision : Dismissed

Judgement

S. Radhakrishnan, J.—This petition has been placed before us inasmuch as in Kamgar Sabha v. State of Goa and Ors., 1998 III LLJ 798 and in Panther Power Kamgar Sanghatana and Ors. v. Jhalani Y. C. and Ors., 1998 I LLJ 884, two Division Benches of our High Court had issued writ of mandamus under Article 226 of the Constitution of India wherein a private employer had acted contrary to the provisions of Standing Orders in one case and in the other a private employer had committed a breach of a statute like Factories Act. When the present petition was placed before another Division Bench for admission the said Division Bench was doubtful whether a writ could be issued against a private entity, without any discernible statutory public duty, as such, to decide upon the correctness of the view taken in the aforesaid two Division Bench judgments, the present matter has been placed before this Full Bench inasmuch as a similar issue arises in the present petition also wherein a writ of mandamus has been sought against a private employer with regard to a breach of a private contract of employment. In the instant case admittedly the petitioner was employed as a Corporate Legal Manager with the respondent No. 1-Company which is a private company. The petitioner's services were terminated w.e.f. June 1, 1998 rather abruptly. By this

writ petition the petitioner is seeking a relief of reinstatement with full back-wages. The petition was admitted and no interim relief was granted with a recommendation to the learned Chief Justice to refer the matter to a larger Bench. The present respondent No. 1-Company is a private company which manufactures certain specialised chemicals wherein the present petitioner is employed as a Corporate Legal Manager. There is no dispute that the petitioner is not covered by any Industrial or Labour Law and also that the contract of employment provides for termination of service by giving a month's notice. In fact Clause 7(d) of contract of employment entered into between the petitioner and the respondent No. 1 very specifically provides that after confirmation, contract may be terminated by either party by giving 30 days' notice or on payment of 30 days' salary in lieu of such notice.

2. By this writ petition the petitioner is seeking the following reliefs:

(a) That this Hon'ble Court be pleased to exercise the jurisdiction vested in it under Article 226 of the Constitution of India and issue a writ and/or an appropriate order and quash and set aside the termination order dated June 1, 1998 being Exhibit "J" hereto.

(b) That this Hon'ble Court be pleased to exercise the jurisdiction vested in it under Article 226 of the Constitution of India and issue a writ of mandamus and/or a writ in the nature of mandamus, order and direction directing the respondents to allow the petitioner to report for work on the same grade and pay-scale before terminating his services and pay his salary and perquisites as admissible to his post and seniority and continuity of service from the date of his termination, i.e. June 1, 1998."

In substance by the aforesaid reliefs the petitioner is seeking for an appropriate writ to quash the termination order dated June 1, 1998 and also for a writ of mandamus under Article 226 of the Constitution of India to allow the petitioner to report back in the same grade and pay scale with continuity of service and seniority and back-wages.

3. The basic issue raised in this matter is whether this Court can issue a writ of mandamus against a private employer with regard to breach of a private contract of employment.

4. Shri Pakale the learned counsel appearing for the petitioner brought to our notice the judgment of the Division Bench of our High Court in Kamgar Sabha v. State of Goa and Ors. (supra), wherein the petitioner Union had sought a writ of mandamus against the respondent-company that the employees of the contractor working in a canteen be treated as regular employees of the company. In the said judgment it was held that a writ of mandamus can be issued inasmuch as running a canteen u/s 46 of the Factories Act is a statutory duty of the respondent-company which is in the nature of a public duty and when injustice is done by violating public duty or statutory duty by any person or body then a writ should reach to undo it or for doing justice. In the said judgment

there is a reference to The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others, and also Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, and the judgment of the Apex Court in Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., . After analysing the aforesaid judgments the Division Bench has concluded that a mandamus is a wide remedy. Wherever injustice is done by violating public duties or statutory duties any person or body it must reach to undo it for doing justice hence the Court was of the view that a writ of mandamus can be issued in the said case with regard to employees appointed by a private contractor in a canteen run by a company as per provisions of Factories Act, and the relevant paragraphs are paragraphs 36 to 39, which read as under:

"36. The learned counsel for respondents 2 and 3 next submitted that mandamus under Article 226 of the Constitution cannot be issued for granting the prayers. The learned counsel for the petitioner submitted that the petitioner is asking the respondents 2 and 3 to follow the statutory duty which is cast upon them for the welfare of the workers. It is in the nature of public duty. The learned counsel relied upon the Division Bench judgment of this Court reported in Scindia Steam Navigation Co. Ltd. and Anr. v. Scindia Employees Union and Ors. 1983 (47) FLR 1. The Division Bench relied upon the observation of the Apex Court in case of The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others, . In the said case the Apex Court has observed at pp. 753 & 754 of LLJ:

"No doubt, Article 226 provides that every High Court shall have power to issue to any person or authority orders and writ including writs in the nature of habeas corpus, mandamus, etc. or any of them for the enforcement of any of the rights conferred by Part III of the Constitution for any other purpose. But it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligation owed by a company towards its workmen or to resolve any private dispute... Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, Corporation or an inferior. Tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings."

In view of this, the Division Bench observed:

"It is now well-established that a mandamus lies to secure the performance of a public or statutory duty, though it is not necessary that the person or authority on whom the statutory duty is cast need be a public official or an official body. If it is found that the company has some obligation to perform a statutory or a public duty, then it may not be possible to contend that no writ can be issued to the company merely because the Companies Act to enforce the performance of the public duty or a statutory duty." 37. The learned counsel for the petitioner relied upon *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, : "Article 226 confers on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "Any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied."

38. The learned counsel for the petitioner also relied upon *Unni Krishnan and Ors. v. State of Andhra Pradesh and Ors.* (supra). In the said case it was held that mandamus can even be issued to a private educational institution whether receiving aid or not for complying with the statutory provisions and in view of the statutory duty cast upon it. In turn the Apex Court relied upon the judgment of that Court in *Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another*, .

39. As against this the learned counsel for the respondent Nos. 2 and 3 relied upon the Division Bench judgment of this Court in *Dayandeo Dattatraya Kale and Others Vs. State Of Maharashtra and Others*, . In that case the petitioners sought for cancellation of selection and appointment of clerks and peons by respondent No. 8 the Ahmednagar District Central Co-operative Bank Ltd. on the ground that the interviews that were held were nothing but a farce. They prayed for fresh recruitment etc. setting aside the earlier one. In view of that it was held that writ of mandamus cannot be granted under Article 226. This has no application. On the contrary the Division Bench has pointed out what P.P. CRAIG in his book on ADMINISTRATIVE LAW, 2nd Edition, page 391 has observed. The observation was that the duty is public if it flows from the statute, prerogative, common law, charter, custom or even contract. In the present case Section 46 of the Act imposed statutory duty for the welfare of working class. The title of the said Chapter V in which this section falls is welfare. It is in the nature of public duty. mandamus is a wide remedy. Wherever injustice is done by violating public duty or statutory duty by any person or body, it must reach to undo it or for doing justice. Hence we hold that mandamus in the present case can be issued."

5. Similarly the learned counsel Mr. Pakale also pointed out another Division Bench judgment of our High Court in Panther Power Kamgar Sanghatana and Ors. v. Jhalani V. C. and Ors. (supra). In this case the issue of maintainability of a petition against Respondent No. 1 who was neither a State nor instrumentality of State was considered. The Division Bench referred to the Standing Orders issued by the company under the Industrial Employment (Standing Orders) Act, 1946 and observed that Standing Orders framed and certified under the Industrial Employment (Standing Orders) Act have a statutory force and the Court has observed as under at pp. 888 to 891 of LLJ:

"9. The second ground of challenge regarding the maintainability of this petition is that the respondent Nos. 1 and 2 are not a State or a State instrumentality as defined under Article 12 of the Constitution of India and hence no writ or a direction in the nature of writ can be issued against the said respondents. It is not necessary for us to dwell upon the issue whether the respondent Nos. 1 and 2 are a State as defined in Article 12 of the Constitution of India and even if it is for the time being, accepted that they are not a State as defined under the said Article, the present petition is even otherwise maintainable. Undoubtedly the factory at Aurangabad is covered under the Industrial Employment (Standing Orders) Act, 1946 and the said Act is to provide for defining with sufficient precision certain conditions of employment in industrial establishments and for certain other matters. In Section 2(g) of the said Act the term "Standing Orders" has been defined to mean the Rules relating to matters set out in the Schedule and Item 2 of the said Schedule to the Act of 1946 pertains to the manner of intimating to workmen periods and hours of work, holidays, pay-days and wage rates. It is thus clear that the employer is required to make a provision in the Standing Orders providing for wage rates and pay day etc. amongst other things. The respondents management has framed the Standing Order in respect of Aurangabad factory and the said Standing Orders have been certified by the Certifying Officer as per provisions of Section 5 of the Act of 1946 way back in February 1978. Standing Orders No. 7(c) and Standing Order No. 8 which are relevant for the present purpose are produced herein below:

"7(c) the days on which wages are to be paid shall be displayed on the notice board at the time office or at or near the main entrance of the establishment."

"8. Wage Notice:

(i) Notice specifying rate of wages showing separately the allowances, if any, payable to each class of workman and each class of work shall be displayed in conspicuous position in the departments in which the workmen concerned are working or at/or near the main entrance of establishment.

(ii) An unclaimed wage pay day for each week (i.e. a day on which wages due to workman but not paid on the usual day on account of their being unclaimed, are to be paid) shall be notified on the notice board alongwith notices to be displayed under Standing Order No. 7.

(iii) The unclaimed amount of wages due to a workman shall be paid on the days notified under the Standing Orders and on the unclaimed wages pay day following the date on which a substantiated claim was presented by workman, or on his behalf, by his legal representative."

It has been held by a catena of decisions that the Standing Orders framed and certified under the Act of 1946 have statutory force and such Standing Orders create a statutory provision regulating the employer and employee relation and terms of employment of the employees. If there is any breach by an employer of a provision incorporated in such certified Stand Orders based on the requirement stipulated in the Act of 1946 and inspite of all efforts made by the employees as well as the Conciliation Officer, the employer is consistently refusing to comply with such obligation cast on it, we are of the considered view that a writ or a direction in the nature of writ is liable to be issued against such an employer for enforcing the right of an employee emanated from the provisions of the Act of 1946.

10. On perusal of the affidavit filed by the Deputy Labour Commissioner, who is also a Conciliation Officer under the Industrial Disputes Act, 1947, it is clear that inspite of the conciliation proceedings having been arranged, respondent No. 1 did not attend the conciliation meetings and though he attended such a conciliation meeting on January 17, 1997 and agreed to disburse some wages, failed to maintain this commitment. The Act of 1946 creates an obligation on and mandates the employer to pay the wages to the employees on a particular date and such a provision is incorporated in the certified Standing Orders as reproduced hereinabove. The failure on the part of the respondents-management in respect of the payment of wages or the payment of balance of wages for the period from October 1995 to February 1997 amounts to breach of the statutory provisions on the part of the employer management and hence writ petition in such a situation is certainly maintainable against a body corporate.

"11. In the case of Senior Regional Manager, Food Corporation of India, Calcutta Vs. Tulsi Das Bauri and others, , a Division Bench of Calcutta High Court called upon Food Corporation of India to pay wages/balance of wages of the employees of the contract as the contractor had failed to pay such wages/balance of wages in terms of Section 21 of the Contract Labour (Regulation and Abolition) Act, 1970, it was the responsibility of the Food Corporation of India as principal employer to pay wages to the contract labourers in case the contractor failed to do so. The decision of the Calcutta High Court came to be challenged before the Supreme Court and while confirming the decision of the Calcutta High Court, the Apex Court held that on reading the scheme of Section 21 of the Contract Labour (Regulation and Abolition) Act, 1970 the principal employer is statutorily responsible to ensure payment of wages as per law and in case the contractor commits default in the payment of wages, the principal employer is made responsible for due payment. It was further held that the term "wages" includes the balance of wages or arrears thereof. We are, therefore, fortified in our view

that a direction can be issued under Article 226 of the Constitution of India against the respondent Nos. 1 and 2 to pay balance of wages or unpaid wages to which the employees are entitled to and to further direct the employer to disburse such amounts within a specified period."

6. In the said judgment the Division Bench has also concluded that the failure on the part of the respondent Management in respect of payment of wages or payment of balance back-wages for the period from October 1995 to February 1997 amounts to breach of a statutory provision on the part of the Management hence writ petition in such a situation was maintainable against such a body corporate.

7. Mr. Pakale the learned counsel for the petitioner also referred to and relied upon a judgment of Division Bench of Madras High Court in *Sadasivan V. and Ors. v. Binny Ltd.* and Anr. 1998 I LLJ 349. In the said case the constitutional validity of a clause of contract of employment providing for discharge simpliciter was challenged. In the said judgment Madras High Court has held as under in paragraphs 9, 10, 11, and 12 at pp. 360, 361, 362.

"9. We have carefully considered the submission of the learned counsel appearing on either side. In our view, the expansive use and exercise of powers under Article 226 of the Constitution of India cannot be made as a matter of course, merely because some grievance of a wrongful dismissal is made, despite the fact that such grievance is against a private party and not even any other authority and notwithstanding the position that an adjudication of the issues raised involve determination of question of fact which could be properly and effectively determined only on appreciation of materials placed on record documentary or oral, or gathered in the manner known to and in accordance with law. Even the Division Bench decision professes to cull out of the *Madras Labour Union Vs. Binny Ltd. (Buckingham and Carnatic Mills)* and others, though profess to call out certain principles as flowing from out of the various decisions considered therein and stated such principles in a little too general and wide terms, the facts that ultimately the very Bench in applying those principles only took the view that the earlier decision of the Division Bench of this Court reported in *The Workmen of Buckingham and Carnatic Mills and Others Vs. The State of Tamil Nadu and Others*, taking the view that the implementation of a settlement entered into u/s 12(3) of the Industrial Disputes Act cannot be had in exercise of the writ jurisdiction will govern the case before them. The plea of alleged violation of Sections 25-N and 25-O was refused to be gone into as involving consideration of disputed questions of facts. Therefore the exercise of powers would always depend upon the peculiar facts and circumstances of the case and there cannot be any hard and fast Rule of universal application

10. We now proceed to consider the area of disputes between parties in this case. There are vertical differences of vital and serious nature in the claim made of the nature of relationship between parties which is a fundamental and basic issue and which will have great impact upon the right to claim relief in this

proceedings itself. Whereas the management claims that the staff in question are managerial staff, that they were promoted to such positions with higher scales of pay and that they also executed the required contracts of service and have been enjoying benefits under the same and it is not open to them, to wriggle out of their commitments, the petitioners would contend that they continue even thereafter to do works and attend to jobs which entitle them the retention of the status of workers and unionised staff and, therefore, in the teeth of the alleged violation of the statutory provisions in the Industrial Disputes Act, protecting their rights, they are entitled to seek relief in this writ petition in the absence of proper investigation and determination of the factual issues disputed, after collecting the required materials in accordance with law, it would be not only inappropriate but impossible also for this Court to effectively adjudicate on those factual issues concerning the status of the petitioners and the nature of relationship between parties in these proceedings under Article 226 of the Constitution of India. Consequently, we are well justified in declining to go into such factual issues in these proceedings.

11. In the absence of such findings, to what relief the petitioners would be entitled to and to what extent the petitioners can agitate their grievance in these proceedings under Article 226 of the Constitution of India, would be the next question that requires consideration in our hands. Normally, we would not have ventured to undertake this question but for some extraordinary features indisputably present in this case. The petitioners' services came to be terminated not on account of any charges of misconduct or as a sequel to any findings recorded against them in any properly constituted or conducted enquiry. On the other hand, the termination was only on the basis and in exercise of the powers said to be available to the management under Clause 8 of the Memorandum of Agreement/Contract of Employment entered into between the petitioners and the management, and on the sole ground that their services are no longer required. The Contract or Agreement of Employment states clearly about the position and nature and category of staff on which the respective petitioners are employed. It further while providing for the various conditions of service also incorporated Clause 8 which reads as hereunder:

"8. The employment of the employed may be put an end to be terminated by either the employer or the employed giving to the other one calender month's notice to such effect or by the employer tendering to the employed one month's salary and cash allowances in lieu of such notice. The employed agrees to pay to the employer by way of liquidated damages one month's salary and cash allowances in the event of his failure to give one calender month's notice to put an end to and determine his employment."

The decisions of the Supreme Court of India reported in 1986 I LLJ 171 (supra), O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others, and D.T.C. Worker's Union and Others Vs. Delhi Transport Corporation, have declared the position of law beyond doubt that a Rule or Clause in the contract or

Agreement of Service which entitles the management to determine the services of an employee by merely giving one calendar month's notice or one month's salary in lieu of such notice would be ultra vires Article 14 of the Constitution of India and that such provision would also be opposed to public policy and violative of Section 23 of the Indian Contract Act. The petitioners, even if relegated to the relief of it or the Industrial Dispute in the Labour Court, as it may deem fit, there could be no difficulty for those forums to strike down such a Rule or declare such a clause to be void and unenforceable and it may not involve or necessitate any serious exercise or effort or any detailed enquiry to strike down such a rule or declare void such a clause, even in an agreement of service. The determination of the validity of such a clause as noticed above does not involve any factual investigation or appreciation of evidence and adjudication of factual issues. Consequently, instead of driving the petitioners to the appropriate forum, having regard to the facts that the writ petition has been filed and has been pending, on being entertained on the file of this Court so long we consider it appropriate, in the interests of justice to declare Clause 8 of the Agreement of Service extracted above to be void and unenforceable against the petitioners as being violative of Section 23 of the Indian Contract Act, applying the law declared by the Apex Court in the cases noticed supra. Consequently, the orders of termination in these cases are also declared illegal and non est, having no legs to stand in the absence of the provision contained in Clause 8 above, which has been declared void.

12. The consequential relief cannot be granted in these proceedings, inasmuch as the nature of relief to be granted as to either reinstatement with or without back-wages or merely damages would depend upon the status of the petitioners and character of their employment and those issues could be determined and relief granted only by the relevant and appropriate forum or Court, on a determination of the above factual issues. The writ petition is partly allowed only to the extent of the declaratory relief granted as above". The petitioners shall be at liberty to work out their consequential reliefs and remedies as are available in law, before the appropriate forum or Court, as permissible. Consequently, the writ petition shall stand disposed of on the above terms"

8. Mr. Pakale also referred to a judgment of the Apex Court in Rohtas Industries Ltd. and Another Vs. Rohtas Industries Staff Union and Others, , wherein the Supreme Court has held as under at pp. 278 & 279 of LLJ: .

"10. But it is one thing to affirm the jurisdiction, another to authorize its free exercise like a bull in a china shop. This Court has spelt out wise and clear restraints on the use of this extraordinary remedy and High Courts will not go beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent drug should be judiciously administered. Speaking in critical retrospect and portentous prospect, the writ power has, by and large, been the people's sentinel on the qui vive and to cut

back on or liquidate that power may cast a peril to human rights. We hold that the award here is not beyond the legal reach of Article 226, although this power must be kept in severally judicious leash.

12. We agree that the position of an arbitrator u/s 10-A of the Act (as it then stood) vis-a-vis Article 227 might have been different. Today, however, such an arbitrator has power to bind even those who are not parties to the reference or agreement and the whole exercise u/s 10-A as well as the source of the force of the award on publication derives from the statute. It is legitimate to regard such an arbitrator now as part of the methodology of the sovereign's dispensation of justice, thus falling within the rainbow of statutory Tribunals amenable to judicial review. This observation made en passant by us is induced by the discussion at the Bar and turns on the amendments to Section 10-A and cognate provisions like Section 23, by Act 36 of 1964."

9. Mr. Pakale the learned counsel for the petitioner also referred to a very recent judgment of the Apex Court in VST Industries Ltd. v. VST Industries Workers Union and Anr. 2001 I LLJ 470. In fact this judgment runs contrary to what has been proposed and contended by Mr. Pakale. In this judgment the Supreme Court was dealing with an issue whether a public limited company manufacturing and selling cigarettes having a statutory duty to maintain a canteen u/s 46 of the Factories Act and the said canteen was run through a contractor. The contract labourers were claiming the status of direct employees of the said public limited company. Both the learned single Judge as well as Division Bench of the Andhra Pradesh High Court had considered that a writ would lie under Article 226 of the Constitution of India even with regard to the said company manufacturing cigarettes and as there being a statutory duty u/s 46 of the Factories Act to run a canteen. Before the Apex Court it was very strongly contended by the appellant company that a writ would not lie against the appellant inasmuch as the appellant was engaged in manufacturing and selling cigarettes and as an incident thereto has provided a canteen to its workmen pursuant to scheme u/s 46 of the Factories Act. In the said judgment in fact the Apex Court in an unambiguous clear term has held that High Court had no jurisdiction to entertain and issue a writ under Article 226 of the Constitution of India.

10. Mr. Pakale also referred to and relied upon an unreported judgment of the Division Bench of this Court in P.R Kulkarni v. Sangli Bank Ltd. and Ors., Writ Petition No. 977 of 2000 wherein this Court had held that as the first respondent being a Commercial bank which is under and over all control of Reserve Bank of India which was a regulatory bank of country a writ would lie. The said Division Bench judgment has also cautiously observed that for want of any material otherwise, the first respondent Sangli Bank was held to be amenable to writ jurisdiction within the meaning of "other authorities" as per Article 12 of the Constitution,

11. Mr. Pakale apart from the issue of maintainability of writ also contended that as the employer had terminated the service of the petitioner the said termination

violates the. Section 23 of the Indian Contract Act, 1872 and as such violative of principles of natural justice and opposed to public policy. In that context Mr. Pakale also referred to another Apex Court judgment in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, and specifically referred to paragraphs 91, 92, 93, 94, 95, 96, 97, 103, 104, 106 which read as under at pp. 208, 209, 210, 211, 212, 213 of LLJ:

"91. As seen above, apart from judicial decisions the United States and the United Kingdom have statutorily recognized, at least in certain areas of the law of contracts, that there can be unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, Section 138(2) of the German Civil Code provides that a transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages..... which are obviously disproportionate to the performance given in return." The position according to the French law is very much the same.

92. Should then our Courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth- century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the Courts sit back and watch supinely while the strong trample under foot the rights of the weak? We have a Constitution for our country. Our Judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No Court can visualise the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means

of livelihood only or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contract parties is equal or almost equal. This principle may not apply where both the parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The Court must judge each case on its own facts and circumstances."

93. It is not as if our civil Courts have no power under the existing law. u/s 31(1) of the Specific Relief Act, 1963 (Act No. 47 of 1963), any person against whom an instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion so adjudge it and order it to be delivered up and cancelled.

94. Is a contract of the type mentioned above to be adjudged voidable or void? If it was induced by undue influence, then u/s 19 of the Indian Contract Act, it would be voidable. It is, however, rarely that Contracts of the types to which the principle formulated by us above applies are induced by undue influence as defined by Section 16(1) of the Contract Act, even though at times they are between parties one of whom holds a real or apparent authority over the other. In the vast majority of cases, however, such contracts are entered into by the weaker party under pressure of circumstances, generally economic, which results in inequality of bargaining power. Such contracts will not fall within the four corners of the definition of "undue influence" given in Section 16(1). Further, the majority of such contracts are in a standard or prescribed form or consist of a set of rules. They are not contracts between individuals containing terms meant for those individuals alone. Contracts in prescribed or standard forms or which embody a set of rules as part of the contract are entered into by the party with superior bargaining power with a large number of persons who have far less bargaining power or no bargaining power at all. Such contracts which affect a large number of persons or a group or groups of persons, if they are unconscionable, unfair and unreasonable, are injurious to the public interest. To say that such a contract is only voidable would be to compel each person with whom the party with superior bargaining power had contracted to go to Court to have the contract adjudged voidable. This would only result in multiplicity of litigation which no Court should encourage and would also not be in the public interest. Such a contract or such a clause in a contract ought, therefore, to be adjudged void. While the law of contracts in England is mostly judge made, the

law, of contracts in India is enacted in a statute, namely the Indian Contract Act, 1872. In order that such a contract should be void, it must fall under one of the relevant sections of the Indian Contract Act. The only relevant provisions in the Indian Contract Act which can apply is Section 23 when it states that "The consideration or object of an agreement is lawful, unless ... the Court regards it as ... opposed to public policy."

95. The Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular Government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the Courts and similarly where there has been a well recognized head of public policy, the Courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought "the narrow view" school and "the broad view" school. According to the former, Courts cannot create new heads of public policy whereas the latter countenances judicial law making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well established by authorities. Hardly even has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in *Janson v. Driefontein Consolidated Mines, Limited*, 1902 AC 484. "Public Policy: is always an unsafe and treacherous ground for legal decision." That was in the year 1902. Seventy-eight years earlier, BURROUGH, J. in *Richardson v. Mellish*, 1874 (2) Bing 229, 252 SC 294,; and (1824) All ER 258 described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great Taming Bucephalus, he said in *Enderby Town Football Club Ltd. v. Football Association Ltd.* 1971 Ch. 591. "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles." Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the Principles of Equity would never have evolved. SIR WILLIAM HOLDSWORTH in his "HISTORY OF ENGLISH LAW, Volume III, page 55, has said:

"In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them."

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the Court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our Courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the Court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

96. The normal Rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of *A. Schroeder Music Publishing Co. Ltd. v. Macaulay* 1974 (1) WLR 1308, however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. - In *Kedar Nath Motani and Others Vs. Prahlad Rai and Others*, , reversing the High Court and restoring the decree passed by the trial Court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian Law on the subject, said:

"The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiffs conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the Court. They are opposed to public policy and require to be adjudged void.

97. We will now test the validity of Rule 9(i) by applying to it the principle formulated above. Each of the contesting respondents was in the service of the Rivers Steam Navigation Company Limited and on the said Scheme of Arrangement being sanctioned by the Calcutta High Court, he was offered

employment in the Corporation which he had accepted. Even had these respondents not liked to work for the Corporation, they had not much of a choice because all that they would have got was "all legitimate and legal compensation payable to them either under the Industrial Disputes Act or otherwise legally admissible". These respondents were not covered by the Industrial Disputes Act for they were not workmen but were officers of the said company. It is, therefore, difficult to visualize what compensation they would have been entitled to get unless their contract of employment with their previous employers contained any provision in that behalf. So far as the original terms of employment with the Corporation are concerned, they are contained in the letters of appointment issued to the contesting respondents. These letters of appointment are in a stereotype form. Under these letters of appointment, the Corporation could without any previous notice terminate their service, if the Corporation is satisfied on medical evidence that the employee was unfit and was likely for a considerable time to continue to be unfit for the discharge of his duties. The Corporation could also without any previous notice dismiss either of them if intemperance or other misconduct, or of any breach of any rules pertaining to his service or conduct or non performance of his duties. The above terms are followed by a set of terms under the heading "Other Conditions". One of these terms stated that "you shall be subject to the service rules and regulations including the conduct rules". Undoubtedly, the contesting respondents accepted appointment with the Corporation upon these terms. They had, however, no real choice before them. Had they not accepted the appointments, they would have at the highest received some compensation which would have been probably meagre and would certainly have exposed themselves to the hazard of finding another job.

103. The Corporation is a large organization. It has offices in various parts of West Bengal, Bihar and Assam, as shown by the said Rules, and possibly in other States also. The said Rules form part of the contract of employment between the Corporation and its employees who are not workmen. These employees had no powerful workmen's Union to support them. They had no voice in the framing of the said Rules. They had no choice but to accept the said Rules as part of their contract of employment. There is gross disparity between the Corporation and its employees, whether they be workmen or officers. The Corporation can afford to dispense with the services of an officer. It will find hundreds of others to take his place but an officer cannot afford to lose his job because if he does so, there are not hundreds of jobs waiting for him. A clause such as Clause (i) of Rule 9 is against right and reason. It is wholly unconscionable. It has been entered into between parties between whom there is gross inequality and bargaining power. Rule 9(i) is a term of the contract between the Corporation and all its officers. It affects a large number of persons and it squarely falls within the principle formulated by us above. Several statutory authorities have a Clause similar to Rule 9(i) in their contracts of employment. As appears from the decided cases, the West Bengal State Electricity Board and Air India International have it.

Several Government companies apart from the Corporation (which is first appellant before us) must be having it. There are 970 Government Companies with paid up capital of Rs. 16,414.9 crores as stated in the written arguments submitted on behalf of the Union of India. The Government and its agencies and instrumentalities constitute the largest employer in the country. A clause such as Rule 9(i) in a contract of employment affecting large sections of the public is harmful and injurious to the public interest for it tends to create a sense of insecurity in the minds of those to whom it applies and consequently it is against public good. Such a Clause, therefore, is opposed to public policy and being opposed to public policy, it is void u/s 23 of the Indian Contract Act.

104. It was however, submitted on behalf of the appellants that this was a contract entered into by the Corporation like any other contract entered into by it in the course of its trading activities and the Court, therefore, ought not to interfere with it. It is not possible for us to equate employees with goods which can be bought and sold. It is equally not possible for us to equate a contract of employment with a mercantile transaction between two businessmen and much less to do so when the contract of employment is between a powerful employer and a weak employee.

106. The contesting respondents could therefore, have filed a civil suit for a declaration that the termination of their service was contrary to law on the ground that the said Rule 9(i) was void. In such a suit, however, they would have got a declaration and possibly damages for wrongful termination of service but the Civil Court could not have ordered reinstatement as it would have amounted to granting specific performance of a contract of personal service. As the Corporation is "the State", they, therefore, adopted the far more efficacious remedy of filing a writ petition under Article 226 of the Constitution."

Therefore Mr. Pakale contended that in the light of the aforesaid judgment of the Apex Court and our High Court, this Court can entertain writ petition under Article 226 of the Constitution of India. He also contended that as the said contract of employment providing for simpliciter termination is opposed to public policy and as such violative of Section 23 of the Indian Contract Act and the same would be injurious and harmful to public and public interest. Mr. Pakale also contended that the said termination in an arbitrary manner is violative of the principles of natural justice as well as Article 14 of the Constitution of India.

12. Mr. Pakale also contended that the right to live as a workman includes the right to employment which is not a bounty of the employer nor can the survival of the workman be at the mercy of the employer therefore Mr. Pakale contended that this termination amounts to violation of even Article 21 of the Constitution of India which guarantees personal liberty and right to life.

13. Under these circumstances Mr. Pakale contended that in the light of the aforesaid Judgments, this Court has the jurisdiction under Article 226 of the Constitution of India to issue a writ of mandamus directing the employer to

reemploy the petitioner along with continuity of service and arrears of salary. Mr. Pakale contended that as the aforesaid contract is opposed to public policy and violative of Section 23 of Indian Contract Act thereby a statutory obligation is imposed on the employer to enter into such a contract and to remedy such a situation the employer ought to be compelled, to take back the petitioner and as there is violation of Section 23 of the Contract Act a writ under Article 226 of the Constitution of India would lie against the respondent-Company.

14. Mr. Pakale the learned counsel for the petitioner contends that both the aforesaid two judgments of our High Court have been correctly decided in the sense in one case a writ of mandamus was issued to a private entity for violation of Standing Orders issued under Industrial Employment (Standing Orders) Act, 1946 and in the, other also a writ of mandamus was issued for violating statutory public duties in the sense termination of the employees engaged by a company through a private contractor in a canteen run by the company in pursuance of the statutory duty imposed on it u/s 46 of the Factories Act, 1946.

15. Mr. Cama, the learned counsel for the" respondents contended that in the instant case this Court has no authority or jurisdiction to issue a writ under Article 226 of the Constitution of India and especially a writ of mandamus. He strongly contended that both the aforesaid judgments of our High Court were not sustainable in law inasmuch as they were issued against private entities for mere violation of certain statutory provisions when no public duty or public law element was involved. Mr. Cama contended that such a writ of mandamus can only be issued when there is a violation of a public duty is concerned that is to say Mr. Cama contended that there must be a public element in the said statutory duties imposed on the said person. Mr. Cama conceded that a writ may lie even against a private entity performing public duty imposed by virtue of a statute which should have a public element and not in a case in which it is purely of a private character. Mr. Cama referred to and relied upon *The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others*, :

"In our view the High Court was correct in holding that the writ petition filed under Article 226 claiming against the company mandamus or an order in the nature of mandamus was misconceived and not maintainable. The writ obviously was claimed against the company and not against the conciliation officer in respect of any public or statutory duty imposed on him by the Act as it was not he but the company who sought to implement the impugned agreement. No doubt, Article 226 provides that every High Court shall have power to issue to any person or authority orders and writs including writs in the nature of habeas corpus, mandamus, etc. or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor

can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. See *Sohanlal Vs. The Union of India (UOI)*, . In *Regina v. Industrial Court*, 1965 (1) QB 377 mandamus was refused against the Industrial Court Act, 1919 on the ground that the reference for arbitration made to it by a minister was not one under the Act but a private reference. "This Court has never exercised a general power" said BRUCE, J. in *R. v. Lewisham Union*, 1897 (1) QB 498 "to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus should have a legal and specific right to enforce the performance of those duties. Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, Corporation or an inferior Tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is however not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or Corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purposes of fulfilling public responsibilities, (of HALSBURY'S LAWS OF ENGLAND (3rd Ed), Vol.11, p.52 and onwards).

7. The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company.

8. The High Court, however, relied on two decisions of this Court as justifying it to issue the said declaration. The two decisions are *Bidi, Bidi Leaves and Bidi, Bidi Leaves*" and *Tobacco Merchants Association Vs. The State of Bombay*, , and *A.B. Abdulkadir and Others Vs. The State of Kerala and Another*, . But neither of these two decisions is a parallel case which could be relied on. In the first case, the declaration was granted not against a company, as in the present case, but against the State Government and the declaration was as regards the invalidity of certain Clauses of a notification issued by the Government in pursuance of power u/s 5 of the Minimum Wages Act, 1948 on the ground that the said Clauses were beyond the purview of that section. In the second case also, certain rules made under the Cochin Tobacco Act of 1081 (M. E.) and the Travancore Tobacco Regulation of 1087 (ME.) were declared void ab initio. These cases were therefore not cases where writ petitions were held to be not maintainable as having been filed against a company and despite that fact a declaration of

invalidity of an impugned agreement having been granted. In our view once the writ petition was held to be misconceived on the ground that it could not lie against a company which was neither a statutory company nor one having public duties or responsibilities imposed on it by a statute, no relief by way of a declaration as to invalidity of an impugned agreement between it and its employees could be granted. The High Court in these circumstances ought to have left the workmen to resort to the remedy available to them under the Industrial Disputes Act by raising an industrial dispute thereunder. The only course left open to the High Court was therefore to dismiss it. No such declaration against a company registered under the Companies Act and not set under any statute or having any public duties and responsibilities to perform under such a statute could be issued in writ proceedings in respect of an agreement which was essentially of a private character between it, and its workmen. The High Court, therefore, was in error in granting the said declaration."

16. Mr. Cama thereafter referred to another judgment of the Apex Court in *Workmen Employed in the Canteen in S.R.F. v. Government of Tamil Nadu and Ors.*, 1996 (72) FLR 28 (Sum), wherein in para 4 the Apex Court has held as under:

"4. When these special leave petitions were taken up for hearing, a preliminary objection was raised by Sri K.K. Venugopal, the learned Counsel for the company, that the writ petition was not maintainable, in that, no writ petition could lie for a writ of mandamus against a company for seeking the relief which the canteen employees had sought in the said petitions. This contention was raised before the High Court, but the High Court did not examine it and instead went into the question whether the claim of relationship of direct employment with the company was not founded. It is another thing that the High Court ultimately dismissed the writ petition but that is not a matter of significance because if a writ petition was not maintainable ab initio the High Court ought not to have entertained it and ought not to have examined the merits. When we enquired of the learned counsel for the petitioners employees to satisfy us as to how the writ petition seeking writ of mandamus against the company is maintainable he was unable to do so. We are, therefore, of the opinion that these petitions which arise out of the said writ petition cannot be entertained."

17. Mr. Cama also referred to and relied" upon a judgment in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, :

"11. Two questions, however, remain for consideration: (i) The liability of the appellants to pay compensation under Ordinance 120 E and (ii) The maintainability of the writ petition for mandamus as against the management of the college. The first question represents no problem since we do not find any sustainable argument. The power of the Syndicate to enact the ordinance is not in doubt or dispute. What is, however, argued is that the ordinance is not binding

on the management since it was enacted before the college was affiliated to the University. This appears to be a desperate contention overlooking the antecedent event. The counsel overlooks the fact that the college had temporary affiliation even earlier to the ordinance. That apart, the benefit under the ordinance shall be given when the college is closed. The college in the instant case was closed admittedly after the Ordinance was enacted. The appellants cannot, therefore, be heard to contend that they are not liable to pay compensation under the Ordinance.

12. The essence of the attack on the maintainability of the writ petition under Article 226 may now be examined. It is argued that the management of the college being a trust registered under the Public Trusts Act is not amenable to the writ jurisdiction of the High Court. The contention in other words, is that the Trust is a private institution against which no writ of mandamus can be issued. In support of the contention, the counsel relied upon two decisions of this Court: (a) Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, and (b) Deepak Kumar Biswas v. Director of Public Instruction 1987 (54) FLR 588. In the first of the two cases, the respondent institution was a Degree College managed by a registered Co-operative society. A suit was filed against the college by the dismissed principal for reinstatement. It was contended that the Executive Committee of the college which was registered under the Co-operative Societies Act and affiliated to the Agra University (and subsequently to Meerut University) was a statutory body. The importance of this contention lies in the fact that in such a case, reinstatement could be ordered if the dismissal is in violation of statutory obligation. But this Court refused to accept the contention. It was observed that the management of the college was not a statutory body since not created by or under a statute. It was emphasised that an institution which adopts certain statutory provisions will not become a statutory body and the dismissed employee cannot enforce a contract of personal service against a non-statutory body.

13. The decision in Vaish Degree College was followed in Deepak Kumar Biswas case. There again a dismissed lecturer of a private college was seeking reinstatement in service. The Court refused to grant the relief although it was found that the dismissal was wrongful. This Court instead granted substantial monetary benefits to the lecturer. This appears to be the preponderant judicial opinion because of the common law principle that a service contract cannot be specifically enforced.

14. But here the facts are quite different and, therefore, we need not go thus far. There is no plea for specific performance of contractual service. The respondents are not seeking a declaration that they be continued in service. They are not asking for mandamus to put them back into the college. They are claiming only the terminal benefits and arrears of salary payable to them. The question is whether the trust can be compelled to pay by a writ of mandamus?

15. If the rights are purely of a private character no mandamus can be issued. If

the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants trust was managing the affiliated college to which public money is paid as Government aid. Public money paid as Government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like Government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. (See - THE EVOLVING INDIAN ADMINISTRATIVE LAW by M.P. JAIN, (1983) p. 266. So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.

16. The law relating to mandamus has made the most spectacular advance. It may be recalled that the remedy by prerogative writs in England started with very limited scope and suffered from many procedural disadvantages. To overcome the difficulties, LORD GARDINER (the Lord Chancellor) in pursuance of Section 3(1)(e) of the Law Commission Act, 1965, requested the Law Commission "to review the existing remedies for the judicial control of administrative acts and commissions with a view to evolving a simpler and more effective procedure." The Law Commission made their report in March 1976 (Law Commission No. 73). It was implemented by Rules of Court (Order 53) in 1977 and given statutory force in 1981 by Section 31 of the Supreme Court Act, 1981. It combined all the former remedies into the proceeding called Judicial Review. LORD DENNING explains the scope of this "Judicial review":

"At one stroke the Courts could grant whatever relief was appropriate. Not only certiorari and mandamus, but also declaration and injunction. Even damages. The procedure was much more simple and expeditious. Just a summons instead of a writ. No formal pleadings. The evidence was given by affidavit. As a rule no cross-examination, no discovery, and so forth. But there were important safeguards. In particular, in order to qualify, the applicant had to get the leave of a Judge. The statute is phrased in flexible terms. It gives scope for development. It uses the words "having regard to". Those words are very indefinite. The result is that the Courts are not bound hand and foot by the previous law. They are to have regard to it. So the previous law as to who are - and - who are not public authorities, is not absolutely binding. Nor is the previous law as to the matters in respect of which relief may be granted. This means that the Judges can develop the public as they think best. That they have done and are doing." (See - THE

CLOSING CHAPTER - by RT. HON LORD DENNING p. 122).

17. There, however, the prerogative writ of mandamus confined only to public authorities to compel performance of public duty. The public authority for them means every body which is created by statute and whose powers and duties are defined by statute. So Government departments, local authorities, police authorities, and statutory undertakings and corporations, are all public authorities. But there is no such limitation for our High Courts to issue the writ in the nature of mandamus. Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to any person or authority. It can be issued for the enforcement of any of the fundamental rights and for any other purpose",

18. Article 226 reads:

"226. Power of High Court to issue certain writs (1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases, any Government within those territories directions, orders or writs, including (writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari) or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose.

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19. The scope of this Article has been explained by SUBBA RAO, J., in *Dwarkanath v. Income Tax Officer* AIR 1996 SC 81:

"This Article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the Article itself."

20. The term "authority" used in Article 226 in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose

of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non fundamental rights. The words "Any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied.

21. In *The Praga Tools Corporation Vs. Shri C.A. Imanuel and Others*, this Court said that a mandamus can issue against a person or body to carry out the duties placed on them by the Statutes even though they are not public officials or statutory body. It was observed:

"It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities. (See HALSBURY'S LAWS OF ENGLAND (3rd Ed. Vol. II p. 52 and onwards)."

22. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor DE SMITH states:

"To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter common law, custom or even contract. The (JUDICIAL REVIEW OF ADMINISTRATIVE ACT Ed. P. 540). We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into water tight compartment. It should remain flexible to meet the requirements of variable circumstances, mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition."

18. Similarly Mr. Cama referred to and relied upon *LIC of India and Another Vs. Consumer Education and Research center and Others*, , wherein the Supreme Court in *LIC of India and Another Vs. Consumer Education and Research center and Others*, has held as under:

"23. Every action of the public authority or the person acting in public interest or

its acts give rise to public element, should be guided by public interest. It is the exercise of the public power or action hedged with public element becomes open to challenge. If it is shown that the exercise of the power is arbitrary unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simpliciter, do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. Every administrative decision must be hedged by reasons. The ADMINISTRATIVE LAW by WADE, 5th Ed. at p. 513 in Chapter 16, Part IV dealing with remedies and liabilities, stated thus:

"Until a short time ago anomalies used to be caused by the fact that the remedies employed in Administrative Law belong to two different families. There is the family of ordinary private law remedies such as damages, injunction and declaration and there is a special family of public law remedies particularly certiorari, prohibition and mandamus, collectively known as prerogative remedies. Within each family, the various remedies can be sought separately or together or in the alternative. But each family had its own distinct procedure."

At page 514 it was elaborated that "this difficulty was removed in 1977 by the provision of comprehensive, "application for judicial review", under which remedies in both facilities became interchangeable." At page 573 with the heading "Application for Judicial Review" in Chapter 17, it is stated thus:

"All the remedies mentioned are then made inter changeable by being made available as an alternative or in addition to any of them. In addition the Court may award damages, if they are claimed at the outset and if they could have been awarded in an ordinary action."

The distinction between private law and public law remedy is now settled by this Court in Life Insurance Corporation of India Vs. Escorts Ltd. and Others, by a Constitution Bench thus:

"If the action of the State is related to contractual obligation or obligations arising out of the Court (contract sic) the Court may not ordinarily examine unless the action, has some public law character attached to it. The Court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. This is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances."

24. In Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay,

it was held that the Corporation must act in accordance with certain constitutional conscience and whether they have so acted must be discernible from the conduct of such Corporations. Every activity of public authority must be informed by reasons and guided by the public interest. All exercises of discretion or power by public authority must be judged by that standard. In that case when the building owned by the Port Trust was exempted from the Rent Act, on terminating the tenancy for development when possession was sought to be taken, it was challenged under Article 226 that the action of the Port Trust was arbitrary and no public interest would be served by terminating the tenancy. In that context, this Court held that even in contractual relations the Court cannot ignore that the public authority must have constitutional conscience so that any interpretation put up must be to avoid arbitrary action, lest the authority would be permitted to flourish as imperium a imperia. Whatever be the activity of the public authority, it must meet the test of Article 14 and judicial review strikes an arbitrary action.

25. In *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, it was held that the State when acting in its executive power, enters into contractual relations with the individual, Article 14 would be applicable to the exercise of the power. The action of the State or its instrumentality can be checked under Article 14. Their action must be subject to rule of law. If the Governmental action even in the matter of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. Rule of reason and rule against arbitrariness and discrimination, rules of fair play, natural justice are part of the rule of law application in situation or action by State/instrumentality in dealing with citizens. Even though the rights of the citizens, therefore, are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play and natural justice, equality and non-discrimination. It is well settled that there can be "malice in law". It was also further held that whatever be the act of the public authority in such monopoly or semi-monopoly, it must be subject to rule of law and must be supported by reasons and it should meet the test of Article 14.

26. This Court has rejected the contention of an instrumentality of the State that its action is in the private law field and would be immuned from satisfying the tests laid under Article 14. The dichotomy between public law and private law rights and remedies, though may not be obliterated by any straight jacket formula, it would depend upon the factual matrix. The adjudication of the dispute arising out of a contract would, therefore, depend upon facts and circumstances in a given case. The distinction between public law remedy and private law field cannot be demarcated with precision. Each case will be examined on its facts and circumstances to find out the nature of the activity, scope and nature of the controversy. The distinction between public law and private law remedy has now become too thin and practicably obliterated.

27. In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest.

28. In *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, this Court in paragraph 22 pointed out that the private parties are concerned only with their personal interest but the public authority are expected to act for public good and in public interest. The impact of every action is also on public interest. It imposes public law obligation and impress with that character, the contracts made by the State or its instrumentality. "It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to the adjudication of their rights by reason to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.". In *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, , this Court held that "the mere reasonable or legitimate expectation of a citizen may not be itself a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the Rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process." In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, , it was held that even in commercial contracts where there is a public element, it is necessary that relevant considerations are taken into account and, the irrelevant consideration discarded. In *Union of India and others Vs. M/s. Graphic Industries Co. and others*, this Court held that even in contractual matters public authorities have to act fairly; and if they fail to do so approach under Article 226 would always be permissible because that would amount to violation of Article 14 of the Constitution. The ratio of *General Assurance Society Ltd. Vs. Chandumull Jain and Another*, , relied upon by the appellants that tests

laid therein to construe the terms of insurance contracts bears no relevance to determine the constitutional conscience of the appellant in fixing the terms and conditions in Table 58 and of their justness and fairness on the touchstone of public element. The arms of the High Court is not shackled with technical rules or of procedure. The actions of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amendable to judicial review and the validity of such an action would be circumspect to adjudicate the disputes arising out of the contract depending on the facts and circumstances in a given case. The distinction between the public law remedy and private law field cannot be demarcated with precision. Each case has to be examined on its own facts and circumstances to find out the nature of the activity or scope and nature of the controversy. The distinction between public law and private law remedy is now narrowed down. The actions of the appellants bear public character with an imprint of public interest element in their offers with terms and conditions mentioned in the appropriate table inviting the public to enter into contract of life insurance. It is not a pure simple private law dispute without any insignia of public element.

Therefore, we have no hesitation to hold that the writ petition is maintainable to test the validity of the conditions laid in Table 58 term policy and the party need not be relegated to a civil action."

19. Mr. Cama also referred to and relied upon Shrimati Vidya Verma, through next Friend R.V.S. Mani Vs. Dr. Shiv Narain Verma, , wherein even the Court has held with regard to violation of fundamental rights as under:

"As the question that arises here has been discussed at length in two earlier decisions of this Court we need not examine the matter in any detail. The fundamental right that is said to be infringed is the one conferred by Article 21; the right to personal liberty. In A.K.. Gopalan v. State of Madras, four of the six learned Judges who were in that case held that the word "law" in Article 21 referred to State-made law and not to law in the abstract. They rejected the contention that this was the same as the due process Clause in the American Constitution. One learned Judge dissented and one expressed no opinion on this point. PATANJALI SASTRI, J., (as he then was) said at page 204 that as a rule constitutional safeguards are directed against the State and its organs and that protection against violation of rights by individuals must be sought in the ordinary law; and S.R. DAS, J., dealing with the question of preventive detention said at page 324 that Article 21 protects a person against preventive detention by the executive without the sanction of a law made by the legislature.

This principle was applied to Articles 19(1)(f) and 31(1) by a Bench of five Judges in P.D. Shamdassani v. Central Bank of India, who held that violation of rights of property by a private individual is not within the purview of these Articles, therefore, a person whose rights of property are infringed by a private individual must seek his remedy under the ordinary law and not under Article 32."

20. Mr. Cama, therefore, contended that for a writ of mandamus to lie there must be a "public element" and also a statutory obligation. Mr. Cama pointed out that in the instant case the petitioner is an officer not governed by any Labour or Industrial Laws and he had entered into a private contract of employment and even if there were to be an illegal breach, the remedy at the most will be by way of a civil suit for damages as Specific Relief Act does not permit specific enforcement of a contract of employment. Therefore, Mr. Cama contended that when even a Civil Court could not grant such a relief of reinstatement under Specific Relief Act in the instant case, this Court should not grant such a relief and that too by exercising the jurisdiction under Article 226 of the Constitution of India. Mr. Cama contended that there is no public element involved at all and it is purely a private contract between the employer and the employee. The respondent company does not owe any public duty to protect the interest of the petitioner employee.

21. Mr. Cama contended that even if there were to be any statutory violation the same could not give rise to issuance of writ of mandamus in the instant case that is to say even if the contract were to be found violative as per Section 23 of the Contract Act, still no writ of mandamus could lie in the instant case. The learned counsel pointed out that what is relevant is the action complained of must be in the realm of public law and there must be a public duty then only a writ of mandamus could lie. Mr. Cama stated that in the light of the expanded scope of issuance of writ of mandamus against various authorities apart from State and even the same could be issued even against a private entity provided such an entity is rendering a public duty and there is an element of public law involved in the same.

22. We have given our deep consideration to the whole issue as to whether a writ of mandamus would lie against a private company or a public limited company with regard to breach of a private contract of employment.

23. As pointed out in the various judgments of the Apex Court what is important is that a writ of mandamus can be issued not only against the State, Statutory authorities, instrumentality of State but also any other person or body performing a public duty. Therefore, what is important is not the form of the body but what is relevant and important is the nature of duty imposed on that body or person, the duty involved must be a public duty and there must be a public law element involved imposing an obligation to the affected party, then only a writ of mandamus can lie. Another vital aspect to be noted is that the action complained of must be in public law realm and not in the private law field.

24. As the Apex Court had pointed out in *Anadi Mukta's* case (supra) that when the authority or a person performing a public function or discharges a public duty then only Article 226 of the Constitution of India can be invoked. Therefore what is important is that the act complained of must be in the public law realm and there must be a public duty imposed on the said authority and person to render the same. Therefore a mere violation of a statutory provision by any authority or

a person could not be a ground for issuance of a writ of mandamus unless it is shown such a violation was in the realm of public law and public duties.

25. In fact now in view of the very recent judgment of the Apex Court in VST Industries Ltd. (supra) the very same issue that is a company engaging a contractor through whom labour is employed for running a statutory canteen u/s 46 of the Factories Act, was considered and it was held that no writ petition could lie under Article 226 of the Constitution of India. The Apex Court in very clear terms has held that there is no public duty involved in providing such canteen. In fact the Supreme Court has observed in the said judgment as under in 2001 1 LLJ 470 :

"8. In the present case, the appellant is engaged in the manufacture and sale of cigarettes. Manufacture and sale of cigarettes will not involve any public function. Incidental to that activity there is an obligation u/s 46 of the Act to set up a canteen when the establishment has more than 250 workmen. That means, it is a condition of service in relation to a workman providing better facilities to workmen to discharge their duties properly and maintain their own health or welfare. In other words, it is only a labour welfare device for the benefit of its work force unlike a provision where Pollution Control Act makes it obligatory even on a private company not to discharge certain effluents. In such cases public duty is owed to the public in general and not specific to any person or group of persons. Further the damage that would be caused in not observing them is immense. If merely what can be considered a part of the conditions of service of workmen is violated then we do not think there is any justification to hold that such activity will amount to public duty. Thus, we are of the view that the High Court fell into error that appellant is amenable to writ jurisdiction."

26. In view of the aforesaid judgment of the Apex Court in VST Industries case, our Division Bench judgment in Kamgar Sabha v. State of Goa and Ors. (supra) cannot be sustained.

27. The Apex Court in Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi, , has held in unambiguous terms as under:

"The law relating to master and servant is clear. A contract for personal service will not be enforced by an order for specific performance nor will it be open for a servant to refuse to accept the repudiation of a contract of service by his master and say that the contract has never been terminated. The remedy of the employee is a claim for damages for wrongful dismissal or for breach of contract. This is the normal rule and that was applied in Barber case and Francis case. But, when a statutory status is given to an employee and there has been a violation of the provisions of the statute while terminating the services of such an employee, the latter will be eligible to get the relief of a declaration that the order is null and void and that he continues to be in service, as it will not then be a mere case of a master terminating the services of servant."

28. Similarly, in S.R. Tewari Vs. District Board Agra and Another, a petition under

Article 226 was filed by an engineer contending that his services had been terminated by the respondent Board illegally and prayed for restoring him in service. Dismissing the petition, the Apex Court held that a contract of personal service cannot normally be enforced. The Court, however, observed that there are certain well recognised exceptions to the said Rule. They are (i) cases of public servants falling under Article 311 of the Constitution of India, (ii) cases falling under the Industrial Law, and (iii) cases when the statutory bodies have acted in breach of mandatory obligation imposed by a statute.

29. On this aspect of scope of issuance of a writ of mandamus, SIR WILLIAM WADE and CHRISTOPHER FORSYTH in their ADMINISTRATION LAW (Seventh Edition) observe:

"A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies."

30. Similarly DE SMITH, WOLF and JOWELL in their JUDICIAL REVIEW of ADMINISTRATIVE ACTION (Fifth Edition), say:

"It is possible for a statute to confer on a private body public functions and, at least when performing those functions, the body could be subject to judicial review."

"A dispute which affects a substantial number of employees may acquire a public law character if the issues at stake are of sufficient importance to the public at large to inject a public element into the dispute. The issue then ceases to be one confined to the respective contractual rights of the parties. The fact that there is a degree of public interest in the activity of the employee is not by itself sufficient"

31. P.P. CRAIG in ADMINISTRATIVE LAW (Fourth Edition) says:

"For mandamus to lie there must be a public duty owed to the applicant. This involves two distinct requirements. First, the duty must be of a public as opposed to a private character. Secondly, even if the duty is of a public character it must be a duty owed to this individual or type of individual."

32. Therefore we hold that for issuance of a writ of mandamus against a private entity or person, the following conditions must be fulfilled:

(a) public duty must be imposed on such an entity or person and not on (sic) a mere: statutory violation.

(b) the action complained of must fall within the public law realm and not in private law area.

(c) such a duty must be owed towards the person seeking relief.

33. From the above it is explicitly clear that to make a person or any other authority amenable to writ jurisdiction under Article 226 of the Constitution of India one has to establish very clearly the element of public duty in the realm of public law, with regard to the action complained of otherwise no writ would lie.

34. For the foregoing reasons, we hold that in both the aforesaid judgments of our Court in *Kamgar Sabha v. State of Goa and Ors.* and *Panther Power Kamgar Sanghatana and Ors. v. Jhalani Y. C. and Ors.* do not lay down the correct law with regard to issuance of a writ of mandamus against a private entity.

35. Under the aforesaid facts and circumstances we hold that this writ petition *ex facie* cannot be entertained under Article 226 of the Constitution of India as there is no public duty or public law element involved at all in this case and what is complained of is only a breach of a private contract of employment by a private employer. Therefore the writ petition stands dismissed.

36. Personal Assistant to issue an ordinary copy of the judgment to the parties.