

(1987) 07 PAT CK 0011

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No's. 4813, 5711 and 6061 of 1985 and Civil Writ Jurisdiction Cases No's. 747 to 749, 752 to 784, 884, 1266 and 1808 of 1986

Rita Mishra and others and 12 Other cases

APPELLANT

Vs

Director, Primary Education, Bihar, and Others

RESPONDENT

Date of Decision : 23-07-1987

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 23, 23(1)
Contract Act, 1872 — Section 17, 19, 227, 23, 24
Industrial Disputes Act, 1947 — Section 25F
Penal Code, 1860 (IPC) — Section 30, 415, 416, 417, 418

Citation : (1987) PLJR 1090

Hon'ble Judges : S.S. Sandhawalia, C.J;R.N. Prasad, J;L.M. Sharma, J

Bench : Full Bench

Advocate : B.P. Pandey, Ashok Kumar Jha, Rajeeva Roy, Ashok Priyadarshi, Sadanand Jha, J.K. Pandey and Rajendra Prasad Singh, for the Appellant; Ram Balak Mahto (A.G.) K.N. Keshav (G.P. IV), Ramanand Kumar . (S.C. II), Sailesh Chandra Jha, Harendra Narain Ojha, Vijayendra Mishra and N.K. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Sandhawalia, C.J.—Whether a public servant is entitled to a writ of mandamus for the payment of salary to him for work done despite the fact that his letter of appointment was forged, fraudulent or an illegal one-is the significant question in this set of 13 connected writ petitions referred for an authoritative decision to the Full Bench. Equally at issue is some cleavage of judicial opinion on this point within this Court. The broad matrix of relevant facts may be noticed from C.W.J.C. No. 6061 of 1985 Ram Mohan Mandal and others v. The State of Bihar and others with a brief reference to those in C.W.J.C. No. 4813 of 1985 (Rita Mishra and others v. Director, Primary Education and others) which now remain for adjudication as the other cases were withdrawn at the close of arguments. It emerges from the pleadings that the erstwhile district of

Santhal Praganas was carved into four districts including that of Sahebganj. At the material time in 1981-83 the District Superintendent of Education, Sahebganj was one Shri Bhola Ram to whom detailed reference follows hereinafter. In exercise of the powers u/s 8 of the Bihar Government Elementary Schools (Take Over and Control) Act, 1976 the Government issued notification dated the 15th of December, 1981 (annexure A to counter affidavit) laying down in detail the procedure for selection and appointment of the teachers of an elementary school. Thereby, the power of appointment of elementary school teachers was clearly vested in the District Establishment Committee. The procedure prescribed was that the said committee after going through the prescribed procedure of advertisement, selection, etc., would prepare a list of selected candidates and submit the same to the Regional Deputy Director, who was required to carefully scrutinise the same and forward it to the Divisional Commissioner for his approval. The list of such approved candidates was then required to be sent to the District Superintendent of Education who was to issue the appointment letters strictly according to the serial number of names mentioned in the approved list. In view of the International Handicap Year 1981, by another order 50 percent of the existing vacancies were earmarked to be filled up by handicapped persons and with certain marginal modifications the prescribed procedure was equally applicable to them. It would appear that there were a very large number of vacancies running into a thousand or more against which the appointments were made. However, later on, it came to the notice of the authorities that certain forged and bogus letters of appointment had been engineered on the basis of which some persons were claiming to have been appointed and were making a demand for the payment of their salaries. A searching enquiry was consequently got conducted which revealed that Shri Bhola Ram, the District Superintendent Education, Sahebganj, who was the kingpin of a conspiracy, had, in consideration of illegal gratification received, engineered the issuance of innumerable forged, bogus and fraudulent letters of appointment and unauthorised persons were allowed to join the teacher's posts by dubious means. Consequently, the said Bhola Ram was suspended and a criminal case against him for serious offences was registered. Later investigations disclosed the collusion and connivance of other local officers apart from the appointees to the posts and a charge sheet was submitted also against Shri Gopi Krishna Jha, Deputy Inspector of Schools, Sahebganj, Shri Chandra Mohan Singh, Block Education Extension Officer, Pakur, Shri Anandi Lal Poddar, Clerk in the office of the District Superintendent of Education, Sahebganj, Shri Nishi Kant Jha, Headmaster, and a number of others for being party and privy to a deep-rooted and wide-ranging criminal conspiracy in the whole transaction. The said criminal case is apparently yet under trial.

2. The writ petitioners herein belong to the dubious cases of the aforesaid appointees to the posts of elementary school teachers. Without even disclosing the date and authority of their letters of appointment, far from placing the same on the record, it is their claim that they joined different schools in pursuance of

the purported appointment letters and thereafter started teaching work and receiving salary therefor. It is claimed that the service books of the petitioners were opened under the signature of the Block Education Extension Officer and salary was distributed to them through the State Bank of India by crediting the amount in the account books of the teachers concerned. It is averred that sometime in the month of August-September, 1983 a police case was registered against respondent no. 4, the District Superintendent of Education of Sahebganj, who secured anticipatory bail from the High Court and several other teachers were also involved who similarly were granted regular or anticipatory bail by the court of session or the High Court. Consequent upon the discovery of the conspiracy and the registration of criminal cases the salary of the petitioners was allegedly stopped in October, 1983. The petitioners and others similarly situated represented and even raised an agitation, but it would appear that the salary bills of the petitioners are being withheld. Consequently the present writ petition has been filed primarily claiming a writ of mandamus commanding the respondents to pay the salary to the petitioners for the period for which they have worked prior to the issue of the termination letters of their services. Reliance is placed on a number of interim orders passed by this Court that if the petitioners have worked either under legal or illegal appointment letters, they must nevertheless be paid.

3. In the detailed counter affidavit filed on behalf of Respondent No. 4, the undisputed factual position culminating in the prosecution and the pendency of the criminal trial against Bhola Ram, the then District Superintendent of Education, Sahebganj, and his co-conspirators, is reiterated. The categorical stand taken is that not even one of the five writ petitioners, who have herein joined together, was ever considered or selected by the District Selection Committee or the District Establishment Committee, as the case may be. Not one of their names finds place in any of the selection lists, far from the approved lists at all. It is firmly averred that the mandatory procedures for the appointment of elementary school teachers qua the petitioners far from being adhered to have not even been remotely complied with and consequently, the purported appointments on this score also are wholly unauthorised, illegal and invalid. Equally it is pointed out that petitioners' names at no stage were considered by the Regional Deputy Director of Education, nor even approved by the Divisional Commissioner, which was a pre-requisite for an appointment. The overall stand of the Respondent State, therefore, is that the present petitioners were equally colluding or conniving in the wide spread conspiracy and the appointment letters are forged and wholly frivolous and bogus. Consequently, the very appointment letters being not forthcoming and being wholly non est neither any right to work against the posts nor any claim for salary therefor could possibly be maintainable in writ jurisdiction. It is highlighted that the petitioners, far from producing the appointment letters, which was the sheet anchor of their claim, have neither mentioned the date of the appointment letters, nor the appointing authority nor the alleged place of posting which apparently goes to show that the petitioners

have no claim. In fact, a frontal challenge is thrown to the petitioners in paragraph no. 21 of the counter affidavit, with a prayer that this Court may direct the petitioners to file their appointment letters and others connected papers on affidavit in support of their claim.

4. It would seem that because of the vastness of the problem and the wide-ranging fraud committed in preparing the purported appointment letters as also the pendency of the criminal prosecution against Bhola Ram and the co-conspirators, the Respondent State took the policy decision to resort to the easier course of dispensing with the fraudulent and illegal appointments (barring those of the principal offenders in the criminal conspiracy) of such temporary teachers by issuing letters of termination simpliciter, which were wholly unstigmatic and complying with the terms of one month's notice prescribed for such temporary appointments. Apparently, the tortuous and prolonged process of launching criminal prosecution against every appointee for criminal forgery and fraud or the alternative of instituting departmental inquiries and thereafter dismissing them, was found to be somewhat cumbersome. Nevertheless, the Respondent State is categorical in its stand in paragraph 19 of the counter-affidavit that none of the petitioners was ever appointed to any post or paid any salary and indeed the question of their working and the claim of any salary does not arise at all. Equally dogmatic are the assertions in paragraphs 23 and 24 of the counter-affidavit that the petitioners were never posted at any point of time as teachers and that they never worked at any school whatsoever, and, thus the question of serving under the Respondents at no stage arises at all. The concluding stand of the Respondent State is in the terms following :--

As stated earlier, these petitioners were never appointed by the State Government, rather their appointment is an outcome of fraud committed by these petitioners. Hence the same is not available to them. It is also wrong to say that the respondents have no power to terminate them. The termination has been ordered by the State Government itself and are by competent authority hence termination is unassailable.

Basic reliance on behalf of the respondent State is placed on the Division Bench judgment in Diwakar Prasad Yadav alias Diwakar Prasad v. The State of Bihar and others 1986 P L J 873. Therein the issue of termination of service simpliciter in such like cases came frontally for consideration and, whilst dismissing the writ petitions, B.P. Sinha, J., speaking for the Bench, concluded as follows, in reply to the three distinct issues posed therein: --

To sum up, I find and hold that the petitioners of these writ applications have not been validly appointed. They cannot challenge the impugned orders on the ground of alleged violation of principles of natural justice. I also hold that they are not entitled to any direction for payment of arrears of their salary for the period they claim to have worked.

5. On the aforesaid finding, the firm stand on behalf of the respondent State is

that the termination of the petitioners' services is unassailable and no right to salary can possibly flow from a forged, fraudulent or illegal order of appointment, and, in any case, such a relief cannot be claimed by way of a mandamus in the limited confines of the writ jurisdiction.

6. Now it is manifest that the narrow and limited claim in these writ petitions is that irrespective of the invalidity or the petitioners' letters of appointment, they are nevertheless entitled to a mandamus for the payment of salary for actual work done in the writ jurisdiction itself. It is alleged that the salary of the writ petitioners was withheld over varying periods and they having worked for the period are right or wrong--entitled to be not only remunerated but equally to claim a writ of mandamus from this Court. For such relief, the basic reliance has been placed on *Md. Husain and others v. The State of Bihar and others* C.W.J.C. 5451 of 1984. decided on the 12th February, 1986 wherein at the admission stage it has been observed as a dictum as follows :--

The petitioners claim that they were appointed as teachers. Their grievance is that they have not been paid their salaries since October, 83 which they are entitled.

Mr. Damodar Tiwary, learned Junior Counsel to Mr. J.N. Pandey, G.P. II, states that a large number of persons unauthorised were appointed by the District Superintendent of Education in the district of Santhal Pargana and Sahebganj and that they have not worked.

It goes without saying that, if the petitioners have, worked either under legal or illegal appointment they must be paid.

It would seem that the aforesaid view once rendered was inevitably followed later at the motion stage and a number of similar orders have been passed in accord therewith. This view, however, has been seriously challenged on behalf of the respondent State necessitating this reference to the larger Bench for pointedly adjudicating on the significant issue.

7. Now, on behalf of the petitioners a tall claim has been pressed that even assuming that the letters of appointment of the petitioners were forged or obtained by fraud or are illegal, yet they are entitled to a writ of mandamus commanding the respondents to pay their salary for the period of actual work done. It had, however, to be conceded that no considered precedent can be cited in support of this blanket stand. Learned Counsel, however, had to go to the logical length of saying that howsoever grave the infirmity in the letter of appointment may be and irrespective of the fact that the transaction may amount to a punishable crime, the salary for the period of work done could not be denied and further that the forum therefor was the writ jurisdiction and the relief of mandamus directing the payment of money due.

8. With the deepest respect, it seems to me that on principle the aforesaid stand has only to be noticed and rejected as wholly untenable. However, since the

issue has been pressed with great vehemence before us, and support therefor does appear in the somewhat cryptic though axiomatic observations in a number of interim orders passed at the motion stage within this High Court, it becomes necessary to extend the compliment or a rational refutation thereto.

9. It would perhaps be apt first for the sake of clarity to consider the issue *striatum* on the declining order of gravity. Here we are primarily concerned with three categories and one may examine the issue separately in the context whether the appointment letters are either-

(i) expressly forged and thus amounting to a crime;

(ii) have been obtained fraudulently or for dubious considerations but not amounting to a criminal offence; or

(iii) are otherwise illegal being flagrantly violative of the statutory procedure prescribed for selection and appointment.

10. Taking up the first category of appointment letters which are established to be forged, it would perhaps appear that this is further divisible into two sub-categories, namely, those where the appointee is directly a party or privy to the forgery and where, in fact, he is not so. Adverting to the first sub-category it is plain enough that a forged document is *non est* and a nullity. As would be elaborated hereinafter, forgery apart from rendering the document of no value is also a punishable crime. To my mind, a relief in the extraordinary writ jurisdiction cannot be possibly rested on the foundational base of a crime. Without being dogmatic it appears to me that this proposition is so elementary that I must confess on being somewhat surprised at the logical temerity of the petitioners to claim that even if a letter of appointment stems from a serious punishable crime still their right of salary cannot be denied because they may have actually worked on the post on the basis of such crime. Not only that, the claim is that a *mandamus* in the writ jurisdiction must issue to enforce this purported right of salary therefor *peremptorily*. It would perhaps be apt to keep in focus two basic legal propositions for which neither authority seems to be needed nor any great elaboration is called for. The right to salary *stricto sensu* springs from a legal right to validly hold the post for which salary is claimed. It is indeed a right consequential to a valid appointment to such post. Therefore where the very root is non-existent, there cannot subsist a branch thereof in the shape of a claim to salary. Consequently if the very foundational right to hold the post is fouled by the crime of forgery, no consequential right to salary can possibly emanate therefrom. In such a situation the question is not that the appointee allegedly purported to work against the post on the basis of a forgery but the real question is whether he was at all entitled to so work and has lawfully worked thereon. The litmus test would be whether when specifically challenged, the claimant can show and uphold his lawful right, to the post and thereafter alone can he possibly seek the ancillary claim of salary flowing therefrom.

11. I may at the very outset narrow down the field and pinpoint that herein we

are dealing with public service alone and not a private one. It is by now well settled that governmental or public service though originating in a contract becomes wholly statutory in status when the appointee enters the portals thereof. It is unnecessary to dilate on this aspect because it is well settled both on the principle and on an unbroken line of binding precedent, way back *Roshan Lal Tandon v. Union of India* in AIR 1967 S.C. 1887 the Constitution Bench had held as follows:--

...It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee..... But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest.....

12. It is manifest from the above that the rights to salary, pension and other service benefits are entirely statutory in nature in public service. Therefore, these rights, including the right to salary, spring from a valid and legal appointment to the post. Once it is found that the very appointment is illegal and is non est in the eye of law, no statutory entitlement for salary or consequential rights of pension and other monetary benefits can arise. In particular, if the very appointment is rested on forgery, no statutory right can flow from it.

13. In this context it is, perhaps, equally well to recall that forgery is a serious public crime in the Indian law from the very beginning, and, in particular, since the enforcement of the Indian Penal Code, 1860, for now more than a century and a quarter. Chapter XVIII of the said Code deals with crimes of this nature. Both forgery u/s 463 and the making of a false document u/s 464 are couched in the widest terms. Equally well it is to recall the earlier definition of "valuable security" in section 30 of the said Code. This wide ranging definition denoting it, (which is important for our purpose) as a document, whereby any legal right is created, extended, transferred, extinguished or relinquished is again framed so broadly that a letter of appointment creating a legal right to the post would come within its ambit. How gravely the law disfavors the serious aspects of the crime is manifest from the fact that more grievous forms of forgery under sections 467,

474 and 475 are made punishable with imprisonment for life. Once that is so, could it possibly be said that a person who is guilty of a crime of this nature and is liable to punishment therefor, can, nevertheless, come in the writ jurisdiction and claim the right to salary on the basis of a document which steeps him in serious guilt? The answer must obviously be rendered in the negative.

14. To sum up on this aspect it seems somewhat plain that where the letter of appointment is a forgery and the appointee is a party and privy to the same, no substantive right of salary would arise, however, long the person may have fraudulently worked on the post in actuality. To my mind, no legal right can stem from a crime herein because of the original factum of forgery. Such a person is not an employee at all and far from being a public servant in the eye of law. Even if on the basis of a forged letter he has imposed himself on the post and worked thereon, he cannot take advantage of his own wrong because he would not have worked lawfully thereon. Even in a suit u/s 70 of the Contract Act the requirement is that the claimant had lawfully done something not intending to do it gratuitously and in the absence of such lawfulness even in that forum the plaintiff might well be defeated. That being so the legal position in the case of a forged appointment letter, to which the appointee is himself a party and privy, is clear and categorical and no substantive right to salary whatsoever can accrue therefrom, far from the same being claimable by way of mandamus in the writ jurisdiction.

15. As regards the subcategory, where the appointment letter is established to be forged but as co-tenants is not a party or privy to the same, the position would only be a step down the same ladder. What has been said above would *mutatis mutandis* apply to this situation as well. As observed earlier, the very forged letter of appointment itself is *non est* and a nullity, and therefore, no consequential right to statutory salary *stricto sensu* can flow from it. This is so on the basic principle that public service is a matter of status and governed by statute and no rights of this nature can stem from crime. Therefore, as a matter of pristine law the substantive right to salary which is statutory in nature has, strictly speaking, to be negative in this sub-category as well. Hence, no question of a writ of mandamus in such a situation can possibly arise. However, such an appointee might well perhaps be at a slightly better footing in a claim for compensation for services tendered not gratuitously in a situation u/s 70 of the Contract Act or any other analogous law. It is neither necessary nor desirable for us to pronounce on this aspect and I would advisedly refrain from doing so. Herein the sharp distinction between salary *stricto sensu* and compensation for work done may be kept in sharp focus. The two are separate and distinct. In fairness to the learned Advocate-General, I must notice that he rightly highlighted the uphill task even in a civil suit because it is not easy to establish that a person in whose favour entirely a forged document is and who is the sole beneficiary thereof, would be wholly innocent of its true nature. It was, therefore, rightly pointed out that even a claim for compensation in such a situation could be sustained only if the *bona fides* of the claimant are firmly established as a

question of fact that he was wholly unaware of the factum of forgery and the nature of the document and, therefore, worked against the post in perfect good faith. The onerous burden of proof in this situation would lie entirely upon the claimant. Plainly enough these are tangled and contentious issues of fact, which can, if at all, be determined in a well contested and well fought out suit in the civil forum only, These are matters far remote and removed from an adjudication in the extraordinary writ jurisdiction.

16. I may now advert to category (ii) (enumerated in paragraph 10) where the letter of appointment has been obtained fraudulently or for dubious considerations. One may only consider the less graver situation where such fraud or dubiousness may be civil in nature but is not aggravated enough to come within the ambit of criminality and cheating as defined in sections 415 and 416 of the Indian Penal Code and may be punishable under sections 417, 418, 419 and 420 thereof. Even in such a situation it seems to me that if fraud or dubious considerations stand established, then in the eye of law no right or remedy can stem from such a fraudulent base. Generically, it is a maxim of law that fraud vitiates everything. Reference in this connection may be made to the larger principles of contract which underlie sections 17, 19, 23 and 24 of the Contract Act. It is well settled that both suggestion false and suppressio veri u/s 17 of the Contract Act defining fraud would go to the root of the agreement and would invalidate the same. Even in the realm of contract where the rule of caveat (sic) or the principle of law --let the buyer beware applies, still if active concealment of frauds established, the contract would stand vitiated. Again u/s 23 of the Contract Act if the consideration of the object of the agreement is fraudulent, the agreement is rendered (sic). Now if that be so, could it possibly be said that in the higher realm of status, obligations and the liability of the State for public services rendered, fraud, which is now universally condemned in the eye of law, could nevertheless become the cause of a legal right to salary stricto sensu against the State. The answer seems to me as somewhat plain and frontally against the petitioners. In *Lezarus Estates Ltd., v. Beasley* (1956) 1 All. E.R. 341 345 Lord Denning observed as under :

.....I cannot accede to this argument for a moment. No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever;.....

The aforesaid observations were expressly quoted with approval by their Lordships of the Supreme Court in *S. Pratap Singh Vs. The State of Punjab*, .

17.A. It is unnecessary to multiply authority and there is no dearth thereof that fraud would thus vitiate even bilateral rights arising from a contract. Once it is so held rights springing from law and states and the high pedestal of public employment having a statutory base deserve even greater protection and

sanctity. Consequently, it must be held in no uncertain terms that where source of the right is rooted in fraud or established dubious considerations no right *stricto sensu* for salary could arise and far less be enforceable by way of *mandamus* in the writ jurisdiction.

17. Adverting now to the last category (iii) where the letter of appointment is illegal being flagrantly violative of the statutory procedure prescribed for selection and appointment again the position does not appear to be materially different. It bears repetition and reiteration that the statutory right to salary in public service stems from the legal right to hold the post. If it is once held that the very threshold stage of appointment is illegal then there is in the eye of law no appointment to the post or entry into the public service. The door stands barred and slammed in the face of such an intruder. I was contended forcefully that where the procedural requirements of selection and appointment are statutory and have not been complied with at all, there is no appointment in the eye of law. Consequently, no right of salary *stricto sensu* can arise where the very threshold stage is tainted with illegality. The learned Advocate-General was thus right in the firm stand he took that where the original appointment void *ab initio* then no question of salary for the post accruing therefrom can possibly arise. Firm reliance was placed by him and, in my view, rightly on *University of Kashmir and Others Vs. Dr. Mohd. Yasin and Others*, for contending that an appointment contrary to and in opposition to the teeth of the law cannot confer any legal rights. Therein even an appointment contrary to the statutory provision by so high an authority as a Vice-Chancellor of the University was held to be non est and no theory of *factum valet* was allowed to be countenanced with the following categorical observations : --

The ground urged successfully, as it were, before the High Court, of an implied engagement cannot in our view, be sustained. When a statute creates a body and vests it with authority and circumscribes its powers by specifying limitations, the doctrine of implied engagement *de hors* the provisions and powers under the Act and would be subversive of the statutory scheme regarding appointments of officers and cannot be countenanced by the Court. Power in this case has been vested in the University Council only and the manner of its exercise has been carefully regulated. Therefore, the appointment of the respondent could be made only by the Council and only in the mode prescribed by the statute. If a Vice Chancellor by administrative drift allows such employment it cannot be validated on any theory of *factum valet*. We cannot countenance the alleged continuance of the respondent in the University campus as tantamount to regular service under the University with the sanction of law. In short, the respondent has no presentable case against the direction to quit.

We, therefore, declare that Annexure "A" is void but further hold that the respondent has no right to "continue in service and the direction to him that he should leave his post as Professor and Head of the Post Graduate History Department is good. The High Court's order of reinstatement is quashed.

18. I read the aforesaid enunciation and the ratio of the said judgment as conclusive on the point that an appointment flagrantly contrary to statutory requirements is non est and cannot be validated on any theory of factum valet.

19. On behalf of the petitioners much store was set on the allegation that one of the letters of appointment bore an endorsement by the District Superintendent of Education and allegedly the Headmaster may have allotted some work to one of the petitioners on the basis of the purported letter of appointment, it was contended that having allegedly worked on the post salary stricto sensu was claimable for the period.

20. I may highlight that every material factual averment made on behalf of the writ petitioners has been hotly controverted and contested on affidavit by the respondent State.

21. However, as a matter of law even assuming (though without remotely holding) that the letter of appointment may have borne an official's endorsement or the Headmaster misled by the purported authority of such a document may have allocated some work, it would make no material difference to the legal situation. If once the order of appointment is clearly illegal, the ancillary considerations, so far as the strict right to salary is concerned are of no great relevance. Learned Advocate-General placed reliance on section 227 of the Contract Act for pinpointing that the ordinary law of agency is not applicable in its totality in State transactions. Particular reliance was placed on *Shalimar Paint Colour and Varnish Co. Ltd. and another v. Chief Secretary to Govt. of Travancore-Cochin* ILR 1954 T C 453: AIR 1955 NUC T C 4125 holding that if the State has not authorised its agent then the State cannot possibly be bound therefor. Even nearer home, it is now well settled that the State cannot be bound by the unauthorised acts of its employee-far from it being so, bound by acts which are plainly illegal. No concept of promissory estoppel arises against the State if its servants either act beyond the scope of their duty or contrary to its directions or standing administrative instructions. This aspect has been recently examined by the Full Bench in *Chetlal Sao and another v. State of Bihar and others* 1986 BBCJ 109: 1986 PLJR 749, wherein after considering both principle and precedents it has been held as under :--

To conclude on this aspect, the answer to question no. 3 is rendered in the negative and it is held that the State is not bound, by the doctrine of promissory estoppel for the acts of its subordinates done in violation of its directions or administrative instructions.

22. Before parting with this aspect, one must notice the somewhat fair stand of the learned Advocate General that the legal position might well be different when there is only a minor irregularity in the letter of appointment and the same is not void ab initio. An example which he gave was where the initial entry into the service is valid but further continuation may not be in absolute conformity with the law. In such a situation perhaps the person having bona fide and diligently

worked on a post may be entitled to be compensated. For example, if a public servant is appointed on an ad hoc basis for a limited time but allowed to continue far beyond that, he may become entitled to some emolument. However, in the present case we are not called upon to adjudicate on this aspect and I would decline to express any opinion thereon.

23. To sum up on this aspect, I am inclined to the view that where the very letter of appointment is flagrantly violative of the statutory procedures prescribed for selection and appointment, the same would be illegal and there being no valid appointment in the eye of law, no consequential right to salary *stricto sensu* would arise. In any case, no writ of mandamus can possibly be claimed in such a situation.

24. Having dealt above with the aspect of the substantive right to salary *stricto sensu* in the aforesaid situation, one may now embark upon its procedural aspect in detail which appears to me of not only equal but even of greater importance. The writ petitioners herein, irrespective of the invalidity or illegality of the letter of appointment and equally of the termination of their services or otherwise, claimed a writ of mandamus commanding the respondents to pay the salary for the alleged work period in the following terms: --

It is, therefore, prayed that your Lordships may be graciously pleased to issue rule nisi calling upon the respondents to show cause as to why a writ in the nature of writ of mandamus or any other appropriate writ, order or direction be not issued directing them to pay the salaries of the petitioners and also arrear of salaries due to them.....

Now the claim for the aforesaid relief goes to the root and scope of a mandamus in the writ jurisdiction. Even at the risk of some prolixity, it becomes necessary to reiterate the same because of the vehement claim raised on behalf of the petitioners and some precedent to the contrary within the Court.

25.A. The primary scope and function of writ of mandamus has been pithily expressed in the phrase that this writ is issued to command and execute; and not to inquire and adjudicate. It is not to establish a legal right but to enforce one. It is only where the legal public duty is clear, unqualified and specific that a writ of mandamus can be truly claimed. It is not to be granted where the claim of the petitioner has, in fact, to be first established and adjudicated upon before it can be enforced. As in the present case, a frontal challenge is laid to the petitioner's claim on every aspect and the averments on their behalf are sought to be controverted at every step. It is manifest that first the petitioners' claim has to be gone into, adjudicated and then established. That obviously is not the scope of a writ of mandamus. Ferris in the Law of Extraordinary Legal Remedies has said--

The office of mandamus is to execute, not adjudicate. It does not ascertain or adjust mutual claims or rights between the parties. If the right be doubtful, it must be first established in some other form of action; mandamus will not lie to

establish as well as enforce a claim of uncertain merit. It follows, therefore, that mandamus will not be granted where the right is doubtful.

Equally instructive it is to notice the scope and nature of a writ of mandamus authoritatively described as follows in Halsbury's Law of England:--

The order of mandamus is an order of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty.

The statement of the law on the scope of mandamus in *Corpus Juris Secundum* is--

.....as a writ commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. It is a proceeding to compel someone to perform some duty which the law imposes on him, and the writ may prohibit the doing of a thing, as well as command it to be done.

25. It is evident from the authoritative exposition of the law that the sine qua non for the issuance of a writ of mandamus is the existence of a statutory or a public duty devolving, upon the person or the body against whom or which the said writ is directed. Equally settled it is that along with this must co exist a corresponding right in the petitioners who were entitled to claim the enforcement of the said statutory public duty. Unless these two pre-conditions are satisfied, the requisite foundation for the issuance of a writ of mandamus case hardly be said to exist. Applying the twin test in the present context, I am of the view the neither one stands satisfied. The learned counsel for the petitioners were wholly unable to pinpoint even a single statutory provision which imposed upon the respondents any statutory public duty to pay the salary, where the very appointment of the petitioners may well be forged, fraudulent or illegal. Equally no provision can possibly be pointed out which would inhere in the petitioners an established enforceable right to the relief which they seek to claim.

26. I would refrain from enlarging the examination of the issue on principle because it seems to me that the matter is equally well covered by binding precedent. On the scope and nature of the jurisdiction in a writ of mandamus it would suffice to recall the following observations of their Lordships in *Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others*, :--

But even on the assumption that the order of the Deputy Custodian terminating the management of the appellant is illegal the appellant is not entitled to move the High Court for grant of a writ in the nature of mandamus under Article 226 of the Constitution. The reason is that a writ of mandamus may be granted only in a case where there (sic) duty imposed upon the officer concerned and there is a failure on (sic) that officer to discharge that statutory obligations. The chief function of the writ is to compel the performance of public duties prescribed by

statute and to keep the subordinate tribunals and officers exercising public functions within the limits of their jurisdiction. In the present case, the appointment of the appellant as a Manager by the Custodian by virtue of his power u/s 10 (2) (b) of the 1950 Act is contractual in its nature and there is no statutory obligation as between him and the appellant. In our opinion, any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 226 of the Constitution.

It would be manifest from the aforesaid authoritative enunciation that herein the two basic conditions precedent for the issuance of a writ of mandamus are, thus, non-existent.

27. There is yet another impassable hurdle in the way of the petitioners in this context. As stands already noticed, every conceivable material fact averred on their behalf has been categorically contradicted and challenged in the pleadings and even more forcefully assailed at the Bar. It needs no great erudition to see that the writ jurisdiction is clearly confined to facts alleged and admitted on affidavits or those not seriously traversed on the record. As is well known, it is an extraordinary remedy resorted to when the basic factual position is not in dispute. It is to be borne in mind that the writ jurisdiction is not and cannot be made a substitute for a regular trial by way of a Suit for determination of contentious matters in which the parties are diametrically opposed on material facts. This indeed is a reason for declining to exercise the discretionary writ jurisdiction in cases where intricate and disputed questions of facts are raised unless of course as a very exceptional measure, the writ Court itself proceeds to record evidence and then arrives at a finding thereon. Apart from the fact that this is rare and is indeed resorted to for very special reasons, it is elementary that the Court would then allow the parties the right of leading evidence, production and cross-examination of witnesses and the rebuttal thereof in order to arrive at a considered finding of fact. This is the position generically in the writ jurisdiction and, in my view, it would be doubly so when a writ of mandamus is sought to be claimed. As was noticed earlier, a mandamus issues only to enforce an unqualified established right and not where the petitioners' claim has to be first adjudicated and thereafter established. It is unnecessary to multiply authorities because way back in *Union of India (UOI) Vs. T.R. Varma, Venkatarama Aiyar, J.*, speaking for the Court, observed as follows:--

That is a question on which there is a serious dispute which cannot be satisfactorily decided without taking evidence. It is not the practice of Courts to decide questions of that character in a writ petition and it would have been a proper exercise of discretion in the present case if the learned Judges had referred the respondent to a suit.

The aforesaid view has never been deviated from and, indeed, has been reiterated times out of number and reference may instructively be made to *D.L.F. Housing Construction (P) Ltd. Vs. Delhi Municipal Corpn. and Others*, , *Arya*

Vyasa Sabha and Others Vs. The Commissioner of Hindu Charitable and Religious Institutions and Endowments, Hyderabad and Others, , P. Radhakrishna Naidu and Others Vs. Government of Andhra Pradesh and Others, and Guru Nanak University Vs. Dr. (Mrs.) Iqbal Kaur Sandhu and Others, .

28. Lastly, in this context one must hearken back to an equally hallowed rule that those who come to invoke the extraordinary jurisdiction must come with clean hands. This is a principle of long standing derived from the old equity jurisdiction as well. It is more than well settled that far from criminality even a calculated and designed suppression of material facts from the writ Court would, by itself non-suit the petitioners at the very threshold without any examination of merits. Reference in this connection may be made to the long line of English precedent and the observations of Viscount Reading, C.J., in *The King v. The General Commissioner* (1917) 1 KB 486. The same view has been unreservedly adhered to within this country as well and reference may well be made to the Full Bench judgment in *Charanji Lal and Others Vs. Financial Commissioner Haryana, Chandigarh and Others*, .

29. Now once it is so that even a calculated and designed suppression of material facts in the writ jurisdiction would non-suit the petitioners then it seems the more so that where the stand of the respondent State is that the claim is based on a punishable crime like forgery or fraud, the lis cannot be gone into in the writ jurisdiction.

30. To conclude on the procedural aspect, it appears to me that where the basic and material facts are categorically controverted and traversed, the exercise of the writ jurisdiction would be inapt and doubly so no mandamus can possibly issue on such a slippery base. Equally where the petitioners do not come to the portals of the writ Court with clean Hands, they must be relegated to their ordinary remedies by way of civil suits.

31. Somewhat curiously Learned Counsel for the petitioners attempted to seriously invoke Article 23 in their aid. It was sought to be contended that denial of salary amounts to begar and forced labour on the assumption that the petitioners may have worked on the post. It was submitted that refusal of remuneration therefore would straightaway be a violation of Article 23. Basic reliance herein was sought to be placed on *Suraj Narain Vs. State of M.P. and Others*, , *People's Union for Democratic Rights and Others Vs. Union of India (UOI) and Others*, and *In Re: Prison Reforms Enhancement of Wages of Prisoners etc.*, .

32. Since the argument aforesaid was somewhat seriously pressed and pertains to a fundamental right, it becomes necessary to examine it somewhat closely. Article 23 is in the terms following: --

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

law.

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

Even a plain reading of clause (1) thereof would make it manifest that it pertains to three aspects and nothing more, namely, (i) traffic in human beings, (ii) begar and (iii) other similar forms of forced labour. Plainly enough no question of traffic in human beings arises in the present situation and, indeed, it was not even remotely so argued. The basic issue, therefore, is whether a mere refusal of contractual or status remuneration would be begar or forced labour.

The word "begar" has not been defined in the Constitution itself but it is sought to be defined by Molseworth as "labour or service exacted by a Government or a person in power without giving remuneration for it". Again in Wilson's Glossary it is described as--

forced labour, one pressed to carry burden for individuals or public; under old system when pressed for public service no pay was given.

It would thus appear that invoking the concept of begar in the field of public service and remuneration therefor is something wholly bizarre. Such a contention forgets the long drawn out historical retrospect of the evil institution of begar in our country which Article 23 sought to prohibit. It needs no great erudition to recall that begar was a relic of a dictatorial practice of feudal times earlier in the country where hordes of weaker subjects were compelled to bondage and forced labour and, therefore, Article 23 sought to prohibit and abolish the same and even envisaged that it should be made an offence punishable in accordance with law. Therefore the analogy of begar in its historical perspective as against a claim to remuneration and salary for the voluntary rendering of public service is so remote as to be bordering on the irrelevant.

33. What would then call for notice is the fact that Article 23 envisages some kind of force or involuntariness in the commandeered labour. The learned Advocate-General had attempted to argue that the phrase "other similar forms of forced labour" must be read as ejusdem generis to the previous two concepts of traffic in human beings and begar. This is now no longer tenable in view of the recent precedent in *People's Union for Democratic Rights and others v. Union of India and others* (AIR 1982 SC 1473). Therein the word "forced" has been liberally construed so as to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no choice or alternative to a person in want and compels him to provide labour or service; However, even keeping that in mind, a degree of involuntariness and compulsion is still inherent in the concept of forced labour under Article 23. Consequently the very basis of a voluntary agreement either by contract or status and the seeking and joining of government service would negate the concept of begar or forced labour. Therefore, the issue herein as whether the respondent State has forced

and compelled anyone to work or labour for it. The learned Advocate-General was eminently right in contending that in these cases the boot is on the other leg and it is the petitioners who, on the basis of forged, fraudulent and illegal letters of appointment claim to have thrust and imposed themselves upon the State and entered wrongfully in the precincts of public service. It was highlighted that far from being forced to work the State Government in the eye of law had never even offered them to work and there was no appointment as such. Consequently, the very sheet anchor of Article 23 in the context of forced labour even when most liberally construed would disappear.

34. Now apart from principles, any notion of begar or forced labour in the field of civil service, to my mind, is authoritatively negated by the Constitution Bench in *S. Pratap Singh Vs. The State of Punjab*, in the following words: --

The services to be rendered by the Government servant subsequent to such an age, in view of R. 3.26 (d), is in no sense a service which can be equated with the expression "begar" or "forced labour" in Art. 23, The appellant is not forced to do any work.

Again in *Dubar Goala and Another Vs. Union of India (UOI) and Others*, Bose, J., had occasion to consider the concept of "forced labour" and "begar under Article 23 and concluded as under :-- Coming now to the question whether the work done by the petitioners can be regarded as Begar or forced labour within the meaning of Art. 23(1) of the Constitution it appears to me that upon the facts of this case it cannot be said that the petitioners are doing Begar or forced labour. As I have pointed out already the very idea that the petitioners had voluntarily agreed to do this extra work by entering into a contract to that effect repels the idea of their work being a forced labour.

35. Learned Counsel's reliance on *Suraj Narain v. State of M.P. and others* (supra) is hardly well placed. Therein it was the admitted position that the petitioner was lawfully appointed to the job and was lawfully working on his post. The Madhya Bharat Civil Service (Classification, Control and Appeals) Rules, 1956, which were applicable to the situation did not even remotely prescribe for the withholding of salary by way of punishment. It was consequently held that an order of the stoppage of the petitioner's salary was unwarranted and was ultra vires the said Rules. This reasoning is impeccable and there can possibly be no quarrel with such a proposition and the judgment is thus distinguishable. However, the learned single Judge proceeded to observe that the reason why the withholding of pay is not one of the punishments retained in the Rules aforesaid is that Article 23 of the Constitution India prohibits begar. He then proceeded to hold additionally that the stoppage of salary was not only against the Rules out also offended again the spirit of Article 23 of the Constitution. With respect, the 4-line observation in this context was made as a dictum without citing principle or precedent in its support. It is manifest that the issue was not even raised far from being debated before the Court. On behalf of the respondent, the learned Advocate-General front-ally assailed this as an unwarranted extension of an

altogether different concept, rooted as it is in the history of the country and the concept of the involuntary and compulsive forced labour even when liberally construed. With respect, the solitary observation in this case cannot be easily subscribed to and I would wish to record my dissent therefrom.

36. Reliance of the Learned Counsel for the petitioners on Sanjit Roy Vs. State of Rajasthan, which, in turn, followed and reiterated People's Union for Democratic Rights and Others Vs. Union of India (UOI) and Others, is yet again misplaced. These judgments are only authority for the proposition that if a person faced with the specter of famine and death by starvation or by similar compulsions is forced and compelled to work for wages below the statutory minimum prescribed by the Minimum Wages Act then the same may well come within the meaning of forced labour" under Article 23. In the end their Lordships in terms spelt out this ratio in the following words :--

We are therefore of the view that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words "forced labour" under Article 23

To my mind, extending the aforesaid enunciation to the illogical length that a person may forge or fraudulently obtain a letter of appointment and by false pretences impose his services on the unwary State and when discovered in his crime or duplicity, he may turn round and say that Article 23 it violated, appears to me as bordering on the farcical.

37. Equally no aid can be derived by the petitioners from In Re: Prison Reforms Enhancement of Wages of Prisoners etc.,

which followed in the foot steps of the aforesaid two Supreme Court cases. This was a case of persons convicted to life imprisonment or other imprisonment terms and the issue was whether during such imprisonment they could be compelled to work in jail either without remuneration or a measly wage of Rs. 1.60 per day. The Bench held that on the principle of the Minimum Wages Act a reasonable wage should be paid to such prisoner and fixed Rs. 8 per day subject to alteration. I think no elaboration is necessary to show that a school teacher's claim for salary or remuneration is not the equivalent or the analogy of a convicted person's claim to remuneration for compelled work whilst confined in a jail.

38. Clutching at straws, Learned Counsel for the petitioners attempted to invoke the principle of equal pay for equal work whilst relying on Surinder Singh and Another Vs. Engineer-in-chief, C.P.W.D. and Others, . In the said judgment their Lordships reiterated the doctrine of equal pay for equal work and directed that persons employed on a daily wage basis by the Central Public Works Department should be paid same wages as other employees doing identical work. With respect, I am unable to discern even the remotest analogy of this case and the doctrine of equal pay for equal work to the present case.

39. Yet again Article 21 was sought to be invoked by the petitioners on the basis of *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, for contending that the right to life includes the right to livelihood. Here again I find both the said case and the principle of the right to livelihood irrelevant to the issue.

40. Reliance was lastly placed on *Gokaraju Rangaraju Vs. State of Andhra Pradesh*, which case pertains to the de facto theory of holding a post and held that even where the appointment of a Sessions Judge was not sustainable de jure, the work done and the judgments rendered by him would nevertheless not be vitiated owing to the reason of his having held such post in a de facto capacity. This judgment can possibly be no authority for the proposition that a person having a forged, fraudulent or illegal letter of appointment holds the post de facto and is consequently entitled to salary. With respect I am unable to find what aid can be derived by the petitioners from the ratio of the aforesaid case. However, even here the learned Advocate-General rightly distinguished it and pointed out that even on this basis the only result would be that the teaching work, if any, at all done by the petitioners would not be deemed to be vitiated. Just as in the said case judgments rendered would not be void, so in the present case with regard to students it could not be said that they had not been taught at all.

41. Repelled on all other fronts Learned Counsel for the petitioners had then clutched at a straw by relying on a solitary cryptic observation of Sarwar Ali, J. in *Bijoy Kumar Bharti v. State of Bihar* 1984 B.B.C.J. 335:1983 PLJR 667 observing that such appointees cannot be deprived of their right to receive salary etc. provided they have worked on the post on which they were appointed (at page 348 of the Report). (at Page 679 of PLJR). It would appear that the observation was made in the context of irregular appointment though, as a matter of somewhat loose terminology, the word "illegal" was also used along therewith, it is however more than manifest that the issue of salary was not even remotely before the Full Bench in the said case. In the very opening part of the judgment Sarwar Ali, J. himself noticed that only two controversies therein arose, firstly that whether certain departments, agencies or corporations were industries within the meaning of the Industrial Disputes Act, 1947, and their employees were entitled to the protection of section 25F thereof, and, secondly, whether such employees, whose services had been terminated, were entitled to an opportunity of being heard. The intricate issue of a right to salary in the peculiar circumstances was not even remotely before the Full Bench and was neither debated, argued nor adjudicated upon. A reading of the exhaustive judgment would indicate that the whole attention was focused on the aforesaid two matters. Indeed, N.P. Singh, J, who prepared the more exhaustive judgment, did not even remotely advert to or opine on any question of salary. A perusal of both the judgments would make it manifest that the whole focus of attention was whether the Departments of Forest, Health, Irrigation, Agriculture, and the Bihar Hill Area Lift Irrigation Corporation came within the sweep of "industry" and

whether some of the terminated employees were entitled to an opportunity of being heard. Neither any reasoning, principle or precedent was referred to by Sarwar Ali, J. in making his observation wholly as a dictum. It is thus clear and manifest that the said observation cannot even remotely be the ratio of the judgment and is entirely an obiter dictum. One has to remind himself of the hallowed rule enunciated by Halsbury in *Quin v. Leathem* 1901 A C 495 that what is of essence in a decision is the logic, reasoning and ratio and not every observation found therein nor all that may logically flow (sic the) observations made therein. This has been expressly approved in *The State of Orissa Vs. Sudhansu Sekhar Misra and Others*, with the added warning that it is not a profitable task to extract a sentence here and there from a judgment and to build upon it. It is thus manifest that solitary, isolated and passing observation by one of the learned Judges in the Full Bench aforesaid on a matter, which was not even remotely before the Bench and was neither argued nor adjudicated upon and for which no principle or precedent has been cited is totally an obiter dictum and not even remotely a ratio of the Full Bench. No aid can, therefore, be derived therefrom by the Learned Counsel for the petitioners.

42. Lastly, a faint attempt was made on behalf of the petitioners to refer to the provisions of section 70 of the Contract Act for contending (on the assumption that the petitioners had worked on the posts which, however, is categorically controverted by the State) that the petitioners could not possibly have intended to work on the posts gratuitously and the State was, therefore, bound to pay compensation to them in respect thereof. This stand, to my mind, boomerangs severely on the petitioners. It is more than well settled that section 70, widely couched as it is, is rested on the larger principles of quasi contract, unjust enrichment and of restitution. These are matters which can indeed only be determined in a well contested suit on the basis of the evidence adduced. They are indeed things alien to the writ jurisdiction. It is not the scope of mandamus to assess and determine compensation for allegedly quasi contractual rights or the infraction of the rule of unjust enrichment in the alleged claim of services rendered not gratuitously. Even in the context of a civil suit the learned Advocate-General highlighted that in order to succeed the plaintiff must show that he had lawfully worked or done something to claim relief. It was forcefully argued that the word lawfully was the core of the section and had been designedly employed by the statute. Consequently, where the letter of appointment is forged, fraudulent or illegal, there may well be no question of having worked lawfully. The argument, therefore, was that even in a suit the petitioners may risk failure to secure even compensation and cannot possibly either claim or hope for success in seeking a mandamus in the writ jurisdiction for salary. Even with regard to burden of proof it was pointed out that the moment defense plea of the nature as in this case is pressed not from a private but from a public or Governmental source, onus would forthwith shift and it is for the petitioners to first establish the validity of their appointment and having lawfully worked thereunder. This can possibly be done only in a properly constituted suit and on

the basis of credible and acceptable evidence and not in narrow confines of the writ jurisdiction and in particular even in more narrow ones for the issuance of a writ of mandamus.

43. It remains now to advert to the judgments of this Court, all passed at the motion stage itself directing the payment of salary in some cases somewhat similar to those of the petitioners, which indeed had necessitated this reference to the Full Bench. No considered judgment on the point could be brought to our notice but there is no gainsaying the fact that a number of motion orders of the same tenor were passed which were mechanically followed thereafter. As a representative order reference may be made to Md. Haasin and others v. State of Bihar and others C.W.J.C. 5451 1984 dated 12.2.1985. Undoubtedly, this would give more than ample support to the stand of the petitioners because it was observed therein as under:

It goes without saying that if the petitioners have worked either under legal or illegal appointment they must be paid.

With deepest respect the aforesaid dictum only pinpoints the pit-falls which lie in the way of summarily disposing of the significant and wide ranging legal issues at the motion stage itself. A reading of the short order would indicate that there is not even a hint of either principle or precedent for holding summarily that salary must be paid for all illegal appointments as well. It is significant that the firm stand in that case also on behalf of the State was that a large number of persons had been unauthorisedly and illegally appointed by the District Superintendent of Education, Sahibganj, and further that they had even not worked at their posts, nevertheless a mandamus in the aforesaid terms was issued. For the detailed and somewhat exhaustive reasoning given earlier I am of the view, with great respect, that no such axiomatic or all pervading dictum could be laid down nor a relief by way of mandamus could be granted where the basic stands on both appointment and working were denied on behalf of the respondent State. With great deference the order does not lay down the law correctly and is hereby overruled. It is unnecessary to advert individually to a host of other similar orders passed by other Benches following and taking the same view. With respect it has to be held that they are not good law and are hereby overruled.

44. In this somewhat exhaustive judgment it is indeed apt, if not necessary, to collate the basic conclusions arrived at. In the light of the aforesaid discussion it is consequently held -

(1) Where the letter of appointment is a forged one and the appointee is either a party or a privy thereto, then no substantive right to salary can accrue there from.

(2) Where the letter of appointment is forged, but the appointee is neither a party nor a privy to the same, even then, no substantive right to statutory salary can arise from a document which is non est or a nullity. It is neither necessary nor desirable to pronounce on the aspect, whether a civil suit for compensation u/

s 70 of the Contract Act for services rendered not gratuitously or any other analogous law would be successfully maintainable.

(3) Where the letter of appointment has been obtained by the appointee fraudulently or for dubious considerations, no substantive right to salary *stricto sensu* would arise.

(4) Where the letter of appointment is flagrantly violative of the prescribed statutory procedure for selection and appointment to the post, the same would be illegal and there being no valid appointment in the eye of law, no substantive right to salary would arise.

(5) On the procedural aspect, where the basic and material facts are categorically controverted and traversed, the exercise of writ jurisdiction would be inapt and this would be doubly so in the case of a writ of mandamus which cannot possibly issue on such a slippery base.

(6) Where the petitioners had not come to the portals of a writ Court with clean hands, they must be relegated to their ordinary remedies.

(7) That Article 23 of the Constitution is not attracted in a situation of statutory service, where the letter of appointment is forged, fraudulent or illegal.

(8) That the doctrine of equal pay for equal work is not at all attracted to the case.

(9) That Article 21 of the Constitution or the right of livelihood thereunder has not the remotest analogy to the particular context.

(10) That the *de facto* doctrine of working on a post is distinct and separate and cannot possibly be invoked to sustain any claim for salary *stricto sensu*, where the very appointment thereto is in serious doubt.

45. To finally conclude on the legal aspect, the answer to the question posed at the very outset is rendered in the negative and it is held that the public servant is not entitled to a writ of mandamus for the payment of salary to him for any work done in the event of his letter of appointment being forged, fraudulent or illegal.

46. The findings aforesaid would conclude the case against the petitioners as a matter of law. However, even assuming entirely as a matter of argument (without in the least holding so) that a writ could possibly issue, not the least ground for its grant has been made out on merits herein. Turning first to C.W.J.C. 6061 of 1985 (*Ram Mohan Mandal and others v. The State of Bihar and others*) it bears repetition that the categorical stand on behalf of the respondent State is that the names of all the five petitioners at no stage figured in the selection list prepared by the District Selection Committee or the District Establishment Committee. Nor were the names forwarded to the Regional Director and consequently no question of their approval would arise. Thus the respondent State's firm stand is that no letter of appointment was issued in favour of any of

the petitioners by any competent authority and consequently there is no appointment in the eye of law. Further it is the stand that no posting order was ever made by the State nor any one of the petitioners joined at any particular place of posting or served there and no question of paying any salary to them arises.

47. It is against the aforesaid pleadings of the respondent State that the learned Advocate-General forcefully contended that despite these averments not one of the petitioners had cared to produce the sheet anchor of their claim; namely, the original letter of appointment along with the writ petition. Only by way of supplementary affidavit in reply to the counter-affidavit, annexure 4/1 purporting to be an indecipherable photostat copy of the alleged letter of appointment was sought to be placed on the record. Despite repeated pinpointing even by the Court, the original was never produced during the long pendency of the writ petition and its hearing. It is somewhat surprising how a photostat copy had been averred to be a true copy but the original thereof is not being traced and is not being produced on the record, despite several demands. Indeed, the learned Advocate-General challenged that the production of the purported original appointment letter of the petitioners herein could only lead to the prosecution of the writ petitioners for forgery, far from affording them any relief by way of mandamus for salary. It was pointed out that photostat copy (annexure 4/1) did not bear the signature of the competent authority and the column for such signature was admittedly left blank. The desperate stand on behalf of the petitioners in reply was that the forwarding memo below the letter purported to be signed by one Bhola Ram. Herein again it was pointed out on behalf of the respondent State that annexure 4/1 was dated the 14th of September, 1983 purporting to direct the petitioners to join on the 25th of September, 1983. However, in the writ petition the averment in para 8 was that the petitioners who were previously being paid their salary were denied such salary in the month of October, 1983. On behalf of the respondents it was therefore, highlighted that on the petitioners own showing there could hardly be any question even of the payment of salary prior to October, 1983 and the whole thing was fraudulent because no question of any payment for the month of October would arise inasmuch as there was little or no possibility of any meaningful services being rendered in the month of September which alone could possibly become payable in October, 1983. The petitioners own purported document (annexure 4/1) thus seems to run counter to the petitioners' own stand. It is significant to recall that even though at the close of the argument Learned Counsel for the petitioners had stated that he would file the original letters of appointment on affidavit, no such document was ever filed right from the filing of the writ petition on 12th December, 1985 till the date of rendering the judgment. The inference therefrom seems to be somewhat obvious.

48. A somewhat curious and a last ditch attempt was then made on behalf of the petitioners to invoke the principles of natural justice. It was sought to be contended that the burden instead of being on the petitioner:) should be entirely

shifted on to the shoulders of the respondent State. It was argued that it was incumbent that the State should have first held a full-dress inquiry and after affording a reasonable opportunity to the petitioners should have established that the purported letters of appointment (which are admittedly in the petitioners' possession and within their special knowledge) are forged, fraudulent and illegal and only thereafter the petitioners' salary should be denied or stopped.

49. This stand has only to be noticed to be rejected. Undoubtedly, the burden must lie on the petitioners and it is they who have to establish their claim on the basis of a valid appointment and not for the respondent State to prove the negative. The claim of a full-dress inquiry after associating the petitioners in a writ of mandamus is plainly ill-founded and does not lie in the mouth of the petitioners. On principle and even on the basis of precedent on which reliance was placed by the petitioners too, it is wholly settled that when the very original appointment to the service is invalid or forged or fraudulent then in the eye of law there is no appointment at all and declaration by the State that the alleged appointment is non est does not attract any principle of natural justice. It is unnecessary to elaborate this on principle because it is covered by the observation of the Full Bench in the afore-mentioned case of Bijoy Kumar Bharti (supra). Therein S. Sarwar Ali, Acting C.J., observed--

No one has a right to be appointed irregularly. His position is that of a person who has no right to the post. There is no stigma attached in the removal.....

I do not think, therefore, that in such a situation there is anything, unfair in taking the decision without hearing the person likely to be affected.

In his concurring judgment, N.P. Singh, J. observed--

It cannot be disputed that whenever the service of a person appointed on temporary basis is terminated saying that the appointment in question had been made in an irregular or illegal manner, it does not amount to any stigma or penalty. In my view, such orders cannot be held to be invalid because before passing such orders opportunity to show cause was not given to the person concerned.

Even at the cost of repetition, particular reference is called for afresh to the case of Diwaker Prasad Yadav alias Diwaker Prasad v. The State of Bihar & others (supra) where in B.F. Sinha, J. speaking for the Division Bench held as follows;--

To sum up I find and hold that the petitioners of these writ applications have not been validly appointed. They cannot challenge the impugned orders on the ground of alleged violation of principles of natural justice. I also hold that they are not entitled to any direction for payment of arrears of their salary for the period they claim to have worked.

50. It would be manifest from the authoritative findings of the Full Bench and the Division Bench that even in cases of termination of services, the rules of natural

justice are not attracted where the original appointment itself is void ab initio. New once that is so, a fortiori no question of any rules of natural justice arises merely in the case of refusal of salary in an identical context.

51. In the light of the aforesaid exhaustive discussions both as a matter of law and on merits, Ram Mohan Mandal and others v. The State of Bihar and others C.W.J.C. No. 6061 of 1985 must fail. No mandamus for the payment of salary can possibly issue. The petitioners, if so advised, are relegated to their ordinary remedies by way of a suit. The parties will bear their own costs.

52. Rita Mishra and others v. Director, Primary Education, Bihar and others C.W.J.C. No. 4813, the facts and circumstances are identical. Herein also the appointments were again purported to be made by the then District Superintendent of Education, Sahibganj. This writ petition has been jointly preferred by as many as 15 petitioners who, to my mind, have distinct and separate causes of action, if any. Not a single letter of appointment was attached to the writ petition and it had been averred that they would refer to the respective appointment letters at the time of hearing of the application. As noticed earlier, despite pinpointing, no letter of appointment was ever adduced on the record. However, a claim is laid on behalf of the petitioners for having joined in different schools on different dates extending over one year and eight months beginning from 20th of February, 1982, to the 1st of October, 1983. Whilst petitioner nos. 9 and 12 are alleged to have not been paid their salaries from the very inception of their appointment, other petitioners claim to have received salaries upto individual different dates whereafter they are stated to have been stopped. Thereafter, they represented several times to the District Superintendent of Education, Sahibganj, but their salaries are allegedly not being paid without assigning any reason. On the basis of the earlier motion orders of the Court, the petitioners herein also seek a mandamus for the payment of their salaries.

53. It is somewhat plain that the position herein is virtually identical with the previous writ petition with indeed an added infirmity that a joint writ petition for distinct and separate causes of action would hardly be maintainable. The learned Advocate General took the firm position that even though no counter-affidavit could be filed in this writ petition yet the State's stand herein is not the least different and, therefore, same consideration should apply herein as well. For the detailed reasons recorded earlier, I am unable to take, in any way, a different view in this writ petition either.

54. Indeed the petitioners herein face another impossible hurdle in their way. On their own averments the 15 petitioners had earlier preferred C.W.J.C. No. 5485 of 1984 seeking the same relief and indeed the present petition is virtually a carbon copy thereof. In the said writ petition, the respondent State had filed a counter-affidavit stoutly controverting the stand of the petitioners. Specific application therein was moved seeking a direction to the respondents to make payment of salaries and arrears of salaries due to the petitioners for the period

they had worked. This, however, was declined by the Bench by its order the 5th of September, 1985. Thereafter on the 27th of September, 1985, the following order was recorded : --

Mr. Rajiv Roy Learned Counsel for the petitioners seeks permission to withdraw this application. Let this application be dismissed as withdrawn as prayed for.

R.C.P. Sinha, J.

It is plain from the above that the writ petition was withdrawn unconditionally without liberty to file a fresh one on the same cause of action. The case would thus come squarely within the ambit of *Kishori Singh v. State of Bihar and others* AIR 1985 Patna 298; 1985 PLJR 605. wherein it was held as under : --

6. To conclude, the answer to the question posed at the very outset is rendered in the affirmative and it is held that the unconditional withdrawal of a writ petition would operate as a bar to the filing of a second petition on the same facts and in respect of the same cause of action.

It calls for notice that barely three days after the unconditional withdrawal of the earlier writ petition, the present one was filed on the 30th of September, 1985.

55. For the reasons aforesaid, the claim for mandamus on behalf of these petitioners for salary alone cannot possibly be sustained. This Civil Writ application C.W.J.C. No 4813 of 1985 is consequently dismissed without any order to costs. The petitioners, if so advised, are relegated to the ordinary remedy by way of a civil suit. As was noticed at the outset, the remaining 11 applications were withdrawn after the close of arguments and separate orders therein to that effect be separately recorded.

Ram Nandan Prasad, J.--I agree with my Lord, the Chief Justice..For minority view of L.M. Sharma, J. see page 1085.