

(1992) 09 PAT CK 0014

In the Patna High Court

Case No : Civil Write Jurisdiction Case No. 4742 of 1991

Teja Prasad and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 14-09-1992

Acts Referred:

Citation : (1992) 09 PAT CK 0014

Final Decision : Dismissed

Judgement

S.N. Jha, J.—Natural justice is once again the central theme of debate in these writ petitions. Issues are whether Sub-section (2) of Section 66B of the Bihar Co-operative Societies Act, by necessary implication, excludes the application of the rules of natural justice; and even if it does, whether the procedure adopted for cancelling the appointments of the Petitioners without any enquiry determining the legality or nullity of their appointments can be said to be fair. Incidentally, in order to escape its rigour, if I may say so, (sic) the provision has also been challenged. The writ petition arising out of the cancellation of appointments, as they are, attempt has also been made to show that not only their appointments do not suffer from any infirmity but also that the grounds of cancellation are irrelevant, improper and arbitrary. This being the broad spectrum of the controversy, the details of the submissions will be noticed at the appropriate place in the judgment.

2. The venue of the dispute is the Bihar State Scheduled Castes Co-operative Development Corporation Limited (in short "the Corporation") about which there is no dispute at the Bar that it is an instrumentality of the State within the meaning of Article 12 of the Constitution. The Corporation, a society registered under the Bihar Co-operative Societies Act, 1935 (in short "the Act"), was established with loud sounding objects as mentioned in its bye-laws to ameliorate and promote the interest of the members of the scheduled castes. One can almost take judicial notice of the fact that most of the "societies" although thriving on State assistance became sick because of the mal-

administration and financial and administrative vagaries, one of the reasons in particular being over-staffing and indiscriminate, illegal and wrong appointments. The co-operative movement over the decades has remained a non-starter as an instrument of socioeconomic development in the State of Bihar.

3. Being aware of the on going large scale appointments in the various societies without following any norms and contrary to the constitutional provisions, Section 66B was inserted by Bihar Act 39 of 1982 conferring upon the State Government the power, inter alia, to determine from time to time by special or general order the nature and number of posts, qualifications, mode of recruitment, conditions of service etc. of the personnel in the co-operative societies. In 1989 a new Sub-section, numbered as Sub-section (2) was inserted, deemed always to have been so inserted, by Bihar Act 5 of 1989 repealing the previous Ordinances on the subject, according to which any appointment made in contravention of the aforementioned order of the State Government would be void "as if no such appointment ever existed", I shall refer to the provision in details since it comprises the core of controversy.

4. Before taking up a discussion of the questions raised, it would be worthwhile to notice the facts giving rise to the writ petitions. C.W.J.C. No. 4742 of 1991 has been argued as the leading case and, therefore, I would briefly refer to the relevant facts as stated therein.

There are four Petitioners in this case. They were engaged on daily wages on various dates, to wit, 2.8.83, 1.7.83, 1.7.84, 1.5.83 respectively. About Petitioner No. 1 it has been specifically stated that he was disengaged after sometime but again engaged to work by order dated 2.8.85. He was again disengaged but later allowed to work as before by order dated 16.3.89 in the light of the certain communication from the Assistant Labour Commissioner, Patna. No such detail has been furnished with respect to Petitioner Nos. 2 to 4. All of them, however, were regularly appointed although on temporary basis by office order dated 22.4.90 and they continued to work as such until their appointments were cancelled by the impugned office order dated 3.5.91, a copy whereof has been marked Annexure-6 to the said writ petition. It would appear from perusal of the said office order that the appointments of the Petitioners had been cancelled on the ground that they are contrary to the order of the State Government contained in the notification dated 9.2.89. A copy of the said notification has been marked Annexure-7.

5. The facts stated in other writ petitions reveal similar pattern of appointment and its cancellation. A salient feature in the case of the Petitioner of C.W.J.C. No. 4027 of 1991 is that he was appointed on compassionate ground initially on daily wages basis on 27.7.89 which was purportedly regularised by giving him the regular scale on 7.12.90. Although his appointment was, likewise, cancelled on 3.5.91 he was continued to work on daily wages basis. Having regard to the common questions raised factual details need not detain us any longer.

6. The relevant part of the notification dated 9.2.89 reads as follows:

In exercise of the powers conferred upon the State Government u/s 66B of the Bihar Co-operative Societies Act 1935, the following mode and method of recruitments is prescribed for recruitment of personnels by the co-operative societies:

(1) There shall be a Selection Authority for the recruitments of all grades of the employees of all the State level co-operative societies.

(2)xx xx xx

(3) (i) The Selection Authority shall prepare a panel of personnels to be appointed in the different grades of the State level co-operative societies.

(ii) Notwithstanding anything contained in the bye-laws of the State level cooperative societies or rules made therein, no appointment in any grade from outside the panel shall be valid.

Clause (2) of the notification provides for the composition of the State level Selection Authority headed by the Member, Board of Revenue. With respect to the appointment in the district level co-operative societies, similar provisions have been made, providing for the Selection Authority headed by the Collector/ Deputy Commissioner of the district. It is not necessary to set out the other provisions except that, as per Clauses (9) and (10) the rules framed by the State Government for the recruitment of Government employees in Various grades, including rules relating to reservation as amended from time to time are made applicable, mutatis mutandis, in the preparation of the panels by the Selection Authority. It is not in dispute that the Corporation is a State- level co-operative society and, therefore, in its case the selection has to be made by the Authority envisaged under Clause (1) consisting of the Member, Board of Revenue, as the Chairman, Chairman of the concerned society, one representative of the scheduled caste or scheduled tribe (nominated by the Secretary, Department of Co-operation), nominee of NABARD and Managing Director of the concerned State Level Co-operative Society as the members, the last one being the Secretary to the Selection Authority.

7. At this stage it would also be appropriate to notice the provisions of Section 66B of the Act:

66B. (1) Notwithstanding anything contained in this Act or the rules and bye laws made thereunder, the State Government may, from time to time, by special or general order, determine the nature and number of post to be created and the mode of recruitment of personnel by Co-operative Societies and prescribe among other things-

(1) the qualifications, age and experience,

(2) the pay scale and other emoluments,

- (3) the method of recruitment;
- (4) the condition of service, and
- (5) the disciplinary procedure to be followed.

(2) Any appointment made in contravention of the order of the State Government under Sub-section (1) shall be void as if no such appointment ever existed and salary and other allowances paid if any, shall be recoverable u/s 40.

8. Dr. Sada Nand Jha on behalf of the Petitioners submitted on the question of the contravention of the aforesaid order of the State Government dated 9.2.89 that the constitution of the Selection Authority was not complete at least until 29.8.91 when the representative of the scheduled castes/scheduled tribes was nominated as a member and, therefore, any appointment made prior to that date cannot be said to be violative of the spirit and objects of the order of the State Government since no such authority could be said to be in existence during the relevant period. It was also submitted that in view of the Government circulars providing for regular appointment of such persons who have been working for more than 240 days, the appointment of the Petitioners by order dated 22.2.90 must be held to be in conformity with the express provision of the said order. Learned Counsel in support of the contention placed reliance on State of Sikkim Vs. Dorjee Tshering Bhutia and others, .

9. The fallacy of the submission becomes obvious when juxtaposed with the provisions contained in Clause 3(ii) of the Order prohibiting any appointment in any way from outside the panel. The fact that the Selection Authority had not been fully constituted until 29.8.91 cannot be a ground to ignore the mandate of the statutory Order. The Petitioners and many Ors. were working on daily wages basis and even after the impugned orders, cancelling their appointments, they are working on daily wages. In face of the express bar, it is difficult to hold that regular appointments could be made without following the prescribed method and procedure or any norm of selection and from other sources merely because the Selection Authority had not been fully constituted. Similarly, the government circulars providing for regular appointments of those who had worked for certain period, which are administrative and directory in nature, cannot override the statutory effect of the notification. In the case cited, their Lordships were not considering the effect of any like order, having statutory force, containing such prohibition. If the submission of the learned Counsel is accepted, the express provision of the notification Order, read with the provisions of Section 66B(2), would become meaningless and redundant. The ratio of law laid down in that case, therefore, cannot be a safe guide to determine the fate of these cases.

10. Learned Counsel, aware of his limitations, concentrated on the larger question, namely, violation of the rules of natural justice. He dwelt upon the expanding scope the natural justice and submitted that the violation of those rules is itself a prejudice and no proof of any other prejudice is needed. It was also alternatively submitted that even if application of rules of natural justice is

excluded by reason of Sub-section (2), the procedure to be adopted in taking the impugned action, in the instant cases, cancellation of appointments, has to be fair. Thus, even if the appointment is alleged to be contrary to the statutory provision, an enquiry should be held to determine the illegality and, therefore, the Petitioners were at least entitled to an opportunity of hearing before their appointments were cancelled. Another limb of the submissions on the principle of natural justice was that on the facts of the case post-decisional hearing is no substitute for the contravention of the rules which has rendered the action void from its very inception and a void action cannot be revalidated or brought back to life.

11. Natural justice, which is an expression evolved and sanctified by the English Common Law, initially rested on two broad principles derived from the maxims, namely, *audi alteram partem*, which means that no person should be condemned without hearing and *nemo debet esse judex in propria causa* which means that no one should be a Judge in his own cause or that the Court or tribunal must be impartial and free from bias. The turning point in the development of the doctrine came after *Ridge v. Baldwin* (1964 A.C. 40) holding that for application of the principles of natural justice the classification of functions as judicial or quasi-judicial or administrative is not necessary. The rules were held to be applicable to administrative bodies as much as to judicial or quasi-judicial bodies. In India the break came with *State of Orissa v. Dr. (Miss) Binapani Dei* (AIR 1967 SC 1369) and *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, . The concept has ever since been making great strides, decisions rendered by the apex Court and different High Courts from time to time adding new horizons to it. I shall notice some of them, as indeed we are called upon to do, hereinafter in this judgment.

12. It has, however, to be always borne in mind that the question as to the applicability, and the extent, the rules of natural justice in the instant cases has to be viewed and answered in the context of express provisions of Sub-section (2) of Section 66B. As is well known the rules of natural justice are not like rigid formulae which can be put in strait-jacket. They are not "cut and dried" rules. They vary infinitely depending on facts of each case, more so, when a provision like the one contained in Sub-section (2) of Section 66B exists. We have noticed the provision above, which, *inter alia*, says that any appointment made in contravention of the order of the State Government under Sub-section (1) shall be void as if no such appointment ever existed. The moot question, therefore, that arises for consideration is whether and to what extent the rules of natural justice can be said to be applicable if the appointment made in contravention of the express bar contained in a statutory order and, therefore, void and non-existent in the eye of law is sought to be "cancelled".

13. It is well settled that the application of the rules of natural justice can be excluded by express words or even by necessary implication. The aforesaid exception to the rules was succinctly laid down in *Union of India (UOI) Vs. Col.*

J.N. Sinha and Another, in the following words:

But if on the other hand, a statutory provision either specific or by necessary implication excludes the application of any or all the rules of principle of natural justice then the Court cannot ignore the mandate of the Legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purposes for which it is conferred and the effect of exercise of that power.

The same principle was re-interated in Baldev Singh and Others Vs. State of Himachal Pradesh and Others, and many other cases. From a plain reading of Section 66B(2) it becomes obvious that the rule of audi alteram partem i.e. no person should be condemned unheard cannot be applicable. If by express provision of the statute the appointments are to be deemed to be null and void it cannot be said that it is a case of its "cancellation". In such a case, order of cancellation of appointments, as the one dated 3.5.91 (Annexure-6 in C.W.J.C. 4742/91) is to be issued only as the logical consequence and in order to give effect to the mandate of the statute.

14. Learned Counsel, however, was at pains to argue that before the appointment of the Petitioners is said to be null and void by reason of Section 66B(2) there has to be determination as to its nullity and this cannot be done without notice to the persons concerned.

15. It is, no doubt, true that natural justice in its essence means, to use the oft quoted expressions, "fairness of procedure", "fair play in action", "duty to act fairly" and so on. It is also correct to say, as contended by learned Counsel, that breach of rules of natural justice is itself a prejudice and no further proof thereof is required. It is, however, equally true that the rules are not to be observed as a formality for the sake of observance. In S.L. Kapoor Vs. Jagmohan and Others, , relied upon by learned Counsel, after observing that the non-observance of natural justice is itself a prejudice and proof of prejudice independently of proof of denial of natural justice is unnecessary, their Lordships stated:

As we have said earlier where on the admitted and undisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because Courts do not issue futile writs.

The question that, therefore, arises for consideration is whether the grievance that even if rules of natural justice are held to be excluded by necessary implication, in the strict sense of the term, the Petitioners were still entitled to notice for determining the nature of their appointments as to whether it was null and void or not, has any substance. In other words, if the facts are in dispute an enquiry may be necessary to determine the facts but if the facts attracting the

mischievous of Section 66B(2) are not in dispute inasmuch as the appointments are in contravention of the order of the State Government issued under Sub-section (2) thereof, whether an enquiry or opportunity of hearing will still be necessary? Whether such an enquiry will not be an exercise in formality and writ or direction of the Court futile?

16. As noticed above, Sub-section (1) of Section 66B empowers the State Government by general or special order to determine, inter alia, the mode and method of recruitment of the personnel by the co-operative societies. It appears that the State Government on previous occasions also had issued general order prohibiting appointments in the various cooperative societies. One such order dated 18.4.84 has been marked Annexure-A/1 to the counter affidavit filed on behalf of the Respondent Corporation in C.W.J.C. No. 4742 of 1991, which says that on complaints received regarding large scale irregular appointments from amongst the daily wage employees in contravention of the policy and procedure laid down by the State Government, the Government has decided that till appropriate orders are issued u/s 66B no appointments in the apex co operative society including on daily wages shall be made. Learned Counsel for the Corporation submitted that this too must be deemed to be an order u/s 66B inasmuch as the said provision does not prescribe any format for issuing any order. It is not necessary to go into the legal effect of the order as contained in the said communication dated 18.4.84. There cannot be any doubt, however, about the legal effect of the notification dated 9.2.89 which has been expressly issued u/s 66B(1). The aforesaid Government order, inter alia, provides for constitution of Selection Authority and creates an embargo against making any appointment from any source other than the panel prepared by the said Selection Authority. Sub-section (2), which by reason of its deeming clause will always be deemed to be part of statute provides that any appointments made in contravention of the order of the State Government shall be void as if no such appointment ever existed. There is no controversy, nor can there possibly be any, that the appointment of the Petitioners was not made from the panel prepared by the Selection Authority. As a matter of fact, as pointed out by the learned Counsel for the Petitioners the constitution of the committee was not complete until 29.8.91. If they were appointed by process of regularisation from their erstwhile status as daily wagers I fail to understand as to what could be the subject of enquiry for the purpose of determining the nullity. It is not the case of the Petitioners that they were appointed from and on the basis of any panel prepared by the Selection Authority constituted under the aforesaid order of the State Government or by any other authority after observing the well-established norms of selection. If that be so, the one and the only conclusion that will irresistibly follow is that the appointments were void, being in contravention of the Order of the State Government aforesaid. Nothing more was to be seen by the Department.

17. Learned Counsel submitted that in the absence of any express bar as to giving of a show cause notice, like in Section 314 of the Bombay Municipal

Corporation Act giving the Commissioners power to remove the encroachment without notice, which provision fell for consideration in *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, , it cannot be said that the application of the rules of natural justice is barred and no "show cause" was necessary. In that case, it would appear, the Court gave opportunity of hearing denied by the Commissioners and upheld the impugned action directing removal of encroachment. In doing so their Lordships followed the rule laid down in *S.L. Kapoor (supra)*. Accordingly, we called upon the learned counsel to satisfy us that denial of opportunity of hearing had caused them some real prejudice. He reiterated the same very submissions stating, in particular, that if an opportunity had been provided, they would have shown that on account of non-constitution of the Selection Authority until 29.8.91, the government order dated 9.2.89 was unworkable and, therefore, the mischief of Sub-section (2) of Section 66B was not applicable. It was also pointed out that if appointment is made from any source other than prescribed, the same per se could not be bad or illegal. In support of the contentions, reliance was placed on *State of Sikkim Vs. Dorjee Tshering Bhutia and others*, and *Union of India (UOI) and Others Vs. N. Hargopal and Others*, .

18. In *Bhutia's* case upon which heavy reliance was placed, the facts were entirely different. Rule 4 of the *Sikkim State Civil Services Rules 1977* provides for method of recruitment by competitive examination to be held by the Public Service Commission as also by selection from among persons serving in connection with the affairs of the State of Sikkim. Sub-rule (3) of that Rule empowers the State Government, in exigency of service, to adopt any other method of recruitment after consultation with the Commission. In exercise of that power the Government of Sikkim issued a notification adopting a particular method of recruitment as mentioned therein. It was held that since the Public Service Commission was not in existence for about five years the aforesaid rules remained unworkable and, therefore, it was competent for the State Government to issue the said notification in exercise of its executive power in exigency of service, namely to remove stagnation and to afford an opportunity to the eligible person to enter the service. It is thus obvious that appointment through any other agency than the Commission could not be said to be contrary to rules. In the instant case no provision of law like Rule 4(3) of the *Sikkim State Civil Services Rules* was brought to our notice. Reliance on *N. Hargopal (supra)* is equally misplaced. That case has been cited for the proposition that appointment can be made from sources other than the prescribed agency, namely, Employment Exchange. In that case the provisions of *Employment Exchanges (Compulsory Notifications of Vacancies) Act, 1959* had come up for consideration. It was held on interpretation of Section 4(4) of that Act that what the provision mandates is that the vacancies should be notified and does not cast any obligation upon the employer to recruit any person through the employment exchange to fill in the vacancies. Accordingly, it was held that the employer was competent to make appointment through other agencies.

19. On the point of opportunity of hearing, reliance was placed on the observations in paragraph 45 of the judgment in *L.N. Mishra Institute of Economic Development and Social Change Patna and Another Vs. State of Bihar and Others*, that where appointment is sought to be terminated on the ground that it was not done as per rules of the University or in accordance with the Government directions, an opportunity to make representation should be given so that the person concerned could substantiate that the finding was erroneous. It would appear that the aforesaid observations were made while considering the relevant paragraph of the Ordinance which provided that the State Government shall determine the term of appointment and other conditions of service of other category of a staff of the Institution on the basis of the facts to be ascertained either by a committee or by an officer entrusted with the task having regard to the provisions mentioned therein. In paragraph 44 their Lordships interpreted the aforesaid clause in these words- "It is clear from the provisions of sub-paragraph (4) of paragraph 6 that the services of the members of the non-teaching staff have been intended to be continued". It would, thus, appear that the observations relied upon by the learned Counsel were made in entirely different context.

Reliance was also placed on *Shridhar Vs. Nagar Palika, Jaunpur and Others*, . In that case it was held that if the order of appointment conferred a vested right in the person to hold the post of Tax Inspector that right could not be taken away without affording opportunity of hearing. In these cases, the Petitioners claim their rights under order of appointment which is per se void in terms of Section 66B(2). An appointment, which is per se void, cannot be said to be in existence right since its inception and, therefore, it cannot be said that it had created or vested any right in them. Counsel submitted that in *H.L. Trehan and Others Vs. Union of India (UOI) and Others*, the application of principles of natural justice has been extended to any existing advantage or benefit and it is no longer confined or limited to one's rights only. In that case the provisions of section 11 (2) of the *Caltex [Acquisition of Shares of Caltex Oil Refining (India) Limited and of the Undertakings in India of Caltex (Limited)] Act, 1977* had fallen for consideration. Dealing with the provisions in regard to the transfer of services of existing employees of Caltex (India) which provided that every whole time officer or other employee of the company shall continue to be an officer or employee of Caltex Oil Refining on the same terms and conditions with the same right to pension, gratuity other matters as are admissible to him shall continue to hold such office unless until his employment is duly terminated his remuneration or conditions of service duly altered, it was held on construction the word "duly" that there could not be any (sic) arbitrary or whimsical exercise of power under said provisions and any action affecting existing condition of service without give opportunity of hearing would offend against (sic) the provisions of Article 14 of the Constitution.

20. The cases in hand stand on altogether (sic) different footing. Where vested rights are (sic) right to be taken away rules of natural justice require giving of an

opportunity of hear(sic). The application of the rules, however, can be barred by express words or by necessary application. That is the ratio of J.N. Sinha's (sic) (supra). Where the appointment is void, if no such appointment ever existed", there is no question of taking away of any "vested" (sic) rights. There is no question of cancellation of (sic) appointments either. Only a declaration that effect is to be made. A thing which is void does not exist in the eye of law and, therefore, it is not necessary to formally do away with it by an instrument to that effect, it has only to be ignored. And a declaration to that effect would suffice. That is the (sic) well known meaning of a void instrument or (sic) order. In my opinion, therefore, while issuing order to that effect, although describing the (sic) same as an order of cancellation of appointment, rules of natural justice have no application and are not required to be followed.

21. In *Satish Kumar v. State of Bihar* 990 (1) PLJR. 219] the provisions of Section B, as it stood prior to the 1989 Amendment i.e. before Sub-section (2) was inserted, read with Rule 33 of the Bihar Co-operative Societies Rules came up for consideration in a somewhat similar context. The said Rule vests power in the Registrar, Co-operative Societies to prescribe conditions as to qualifications, scale of pay, allowances, transfer, punishment, suspension, removal or dismissal. The Registrar had directed the different co-operative societies to fix up the strength of the employees, qualifications and salary in accordance with the recommendations of the committee constituted by the State Government and prohibited them from making any appointment without proper creation of post with the approval of the Registrar keeping in view the financial condition of the society. Appointments of certain employees of the Magadh Central Co-operative Bank Ltd. were terminated on the ground that they were illegal and contrary to the procedure prescribed by the Registrar. It was held by a Division Bench of this Court that in terms of Rule 33 the Registrar was competent to issue the aforementioned direction and the order of the Administrator of the Bank terminating the services was an order of termination simpliciter and would not be invalid on the ground of violation of rules of natural justice. It is significant that the decision was rendered on construction of provisions of Rule 33 which is akin to Sub-section (1) of Section 66B, when Sub-section (2) was not there. After Sub-section (2) came into existence in 1989, the retrospective effect, the legal position has become clearer and more specific. If similar challenge was not accepted on the basis of Rule 33, it would be difficult to sustain the same in view of the specific mandatory provision of sub-section (2) of Section 66B.

22. During hearing of the case at one stage learned Counsel accepted that the question as to whether the contravention is patent would lose its significance if it is held that in view of the legislative mandate of Section 66B(2) nothing is to be seen or determined. His stand, however, was that there has to be determination of the question as to whether there has been contravention or not and this determination could be made only before the impugned order was issued and not during the course of hearing in this Court. In other words, according to learned Counsel, personal hearing was necessary for the determination of the question of

contravention. However, as stated above, the basic facts are not in dispute. It is admitted that the Petitioners have been appointed after 9.2.1989 when the order of the State Government u/s 66B(2) was issued and prior to that also there had been general order of the State Government restraining the societies from making appointment. It is also not in dispute that the impugned appointments were made without following the mandate of the aforesaid order and, therefore, there cannot be any doubt, having regard to the clear and unambiguous language of the provision, that the consequence would automatically set in. Therefore, in my opinion, there is hardly any room for doubt that the contravention of the order of the State Government is so patent that no determination as to the nature of the appointment being null and void was required to be made.

23. Aware of his limitations learned Counsel sought to challenge the vires of Sub-section (2). It was submitted that the provision confers too wide power on the State Government to make the rules. Neither it has been indicated by the legislature as to what constitutes the contravention or its extent nor the order of the State Government provides any mechanism under which any such contravention can be determined. It was also submitted that the provision which invalidates the appointment and makes it null and void is arbitrary because it excludes the rules of principles of natural justice and creates a situation where even such appointees are deprived of their job who are not parties to the fraud. According to learned Counsel, therefore, the provision is violative of Article 14 the Constitution. The last part of the Sub-section regarding recovery of salary and other allowances was also separately challenged as being violative of Article 23.

24. Section 66B has been quoted above. It would appear from a bare perusal that the power has been conferred upon the State Government to determine the nature and number of posts, qualifications, mode of recruitment, conditions of service etc. of the personnel in the various co-operative societies. At the very outset I have briefly mentioned the background and the underlying object with which the provisions were incorporated in the statute book in 1982 and 1989. If in view of large scale illegal appointments made without following the established norms causing financial and administrative vagaries on account of inefficiency and over-staffing, provision was made to regulate the process of recruitment, conditions of service etc., it cannot be said to be arbitrary. Conferring power upon the State Government to frame rules laying down and determining the mode of appointment etc. is not uncommon to service jurisprudence. The submission as to absence of any mechanism for determination of the contravention has no substance. A grievance of that nature could be made only if any adjudication was necessary (sic) element of discretion in the autho(sic)t if the legislature itself provides and certain category of appointment void, requires to be adjudicated. Rules of justice are not statutory rules, the app(sic) of which cannot be excepted. It is true (sic)lation of rules of natural justice is its (sic)judice but if its exclusion is permission by necessary implication, I fail to and

how, for that reason, the provision said to be arbitrary and, therefore, violative of Article 14. In certain cases bona fide employees may also be deprived of their jobs, their interests can be protected by issuing appropriate directions as, indeed, I propose to these cases.

The last part of Sub-section (2) provides for recovery of salary and other allowances to the persons whose appointments are to be void "under Section 40". Section 40 of the Act, inter alia, empowers the Registrar to direct "any person who has taken part in the organisation or management of the society or any past or present officer of the society" to contribute to the assets of the society by way of compensation in respect of any payment which is contrary to the rules and bye-laws of the society and loss of money by reason of culpable negligence or misconduct, failure to include in the accounts or on account of misappropriation or fraudulent disposal of any property by him. Section 40, in terms, does not provide for recovery of money from the employees. The words "recoverable under section 40" may be interpreted to mean that the liability created by the provision is of similar nature and same persons as mentioned therein, i.e., a person who has taken part in the organisation or management of the society or any past or present officer of the society.

26. In my view, there cannot be any recovery of money from the employees received by them as salary or allowances. That would be contrary to the constitutional guarantee provided to every citizen under Article 23 of the Constitution and would also militate against the provisions of Section 70 of the Indian Contract Act. While Article 23 creates an injunction against trafficking in human beings and forced labour in any form, Section 70 of the Contract Act obliges the employer to compensate for every lawful non-gratuitous act done or service rendered by any person to him. I, thus, find substance in the submission of the learned Counsel that if a person has actually worked, he cannot be deprived of his emoluments actually received or receivable by him. However, for the reasons stated above, in my opinion, the Petitioners cannot make any complaint that the particular part of the provision is arbitrary or ultra vires if they are not liable to make any contribution by way of compensation under section 40.

27. In view of my conclusions on common questions of law, I do not consider it necessary to discuss each case separately except C.W.J.C. No. 4027 of 1991 and C.W.J.C. No. 562 of 1992. In the former, the Petitioner claims a special consideration as he was appointed on compassionate ground. It was submitted that the appointment referred to in the order of State Government dated 9.2.89 does not include compassionate appointment. It is not in dispute that there is no statutory sanction for appointment on compassionate ground and the right, if any, flows from the executive instructions and circulars of the Government. It was also conceded that it is permissible to exclude compassionate appointment by legislation. It is true that the appointment on compassionate ground has been held to be in consonance with Article 14 of the Constitution on the ground of reasonable classification. But it is difficult to make distinction between appointment on compassionate ground and general appointment if one has to

test its validity on the touch-stone of the provisions of Section 66B(2). An executive circular cannot override a statutory order. Therefore, the right of the person for consideration for appointment on compassionate ground which flows from circulars of the State Government cannot override the express bar of the statute. All that he is entitled to is consideration of his case as a separate class. It should be kept in mind that such an appointment is in the nature of exception to the general rule contained in Articles 14 and 16 of the Constitution and the matter has therefore, to be dealt with circumspection.

28. As regards C.W.J.C. No. 562 of 1992 the Petitioner was engaged on daily wages basis as Junior Engineer on 1.4.90 and "regularised" against the post of Junior Engineer on 3.4.91. It is said that this was done against sanctioned post on the basis of recommendation of Selection Committee. The order of regularisation, however, has been cancelled on 18.4.91 by Annexure-2. The order was challenged on the ground that only reason for cancellation is the alleged contravention of the letter dated 16.3.89 and not the contravention of the order dated 8.2.89 or Section 66B(2), Relying on Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , it was submitted that it is not open to the Respondents to defend the order on any additional ground in the shape of affidavit or otherwise. However, having come to the conclusion, that appointments made in contravention of the Government order dated 9.2.89 are null and void and rejected the related submissions, I do not think it would be sound exercise of discretion to interfere with the order on a technical ground. It is settled principle of law that the jurisdiction conferred by Articles 226 and 227 of the Constitution should not be exercised if it would result in restoration, revival or perpetuation of an illegal order. Reference in this connection may be made to Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, , Abdul Majid v. The State Transport Appellate Authority (AIR 1960 Pat 332) and Hari Prasad v. Additional Collector (1978 PLJR 575).

29. Counsel for the parties also made submissions on the point of the regularisation as a mode of recruitment. A number of cases, namely, Bhagwati Prasad Vs. Delhi State Mineral Development Corporation, ; Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others, ; U.P. Income Tax Department Contingent Paid Staff Welfare Association Vs. Union of India (UOI) and Others, ; B.R. Singh and others Vs. Union of India and others, ; Champaklal Chimanlal Shah Vs. The Union of India (UOI), ; and Workmen Vs. Williamson Magor and Co. Ltd. and Another, were cited. It would appear that the decisions in the aforesaid cases have been rendered on the facts of the case. In State of Punjab and others Vs. Surinder Kumar and others, their Lordships have observed that while the Supreme Court is competent under Article 142 of the Constitution to direct regularisation for doing complete justice in case or matter pending before it, the High Court does not enjoy any such power. It was said:

It is, therefore, futile to suggest that if this Court has issued an order which

apparently seems to be similar to the impugned order, the High Court can also do so. There is still another reason why the High Court cannot be equated with this Court. The constitution has, by Article 142, empowered the Supreme Court to make such orders as may be necessary "for doing complete justice in any case or matter pending before it", which authority the High Court does not enjoy. The jurisdiction of the High Court, is circumscribed by the limitations discussed and declared by the judicial decisions, and it cannot transgress the limits on the basis of whims or subjective sense of justice varying from Judge to judge.

It was also held that if Supreme Court (sic)ed any order, it has to be presumed "that special grounds which must have been available to the temporary employees in those (sic)s they were entitled to relief granted." (sic)ever, a decision is available as a precedent (sic) if it decides a question of law and, there(sic), the High Court while dealing with the petition has to decide the same on the (sic)s of the law laid down by judicial decisions cannot rely on such orders of Supreme Court as precedents.

30. In *R.N. Nandunappa v. T. Thimmaiah* (sic)R 1972 SC 1767) while dealing with the question of regularisation it held that in the absence of rules regulation cannot be a mode of recruitment, in the words of their Lordships:

If the appointment itself is in infraction of the rules or if it is violation of the provisions of the Constitution illegality cannot be regularised. Regularisation or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with the procedure or manner which does not go to root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules.

In *B.N. Nagrajan v. State of Karnataka* (sic)R 1979 SC 1676), the same principle was re-iterated in these words:

When rules framed under Article 309 of the Constitution of India are in force, no regularisation is permissible in exercise of the executive powers of the Government under Article 162 thereof in contravention of the rules.

31. In the State of Bihar a general practice has grown to fill up class III and IV posts initially by engaging the person on daily wages and after some time to regularise his so called appointment. I can do no better than to quote the following observations which a learned Single Judge of the Court made in *Mahendra Ram v. Deputy Commissioner, Palamu* (1989 B.L.T. 27):

It is our judicial experience that Article 16 in this State is observed more in its breach. Appointments are made initially for temporary period, but thereafter continued sometimes under specific orders and sometimes without any order being passed. After sometime the appointee claims that by reason of his continuous officiation against a post, he should be regularised. It appears that

even the authorities do not realise that regularisation does not mean permanence, since very often it has been urged before us that 3 person whose appointment has been regularised becomes a permanent employee under the State. Article 16 is breached with such impunity that one cannot possibly ignore the phenomenon.

The phenomenon has recently been noticed by the apex Court in two cases. In *Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi and Ors.* (JT 1992 (1) 394), it has been observed-

We may take note of the pernicious consequences to which the direction or regularisation of workmen on the only ground that they have put in work for 240 or more days, has been leading. Although there is Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange, it has become a common practice to ignore the Employment Exchange and the persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The Courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchange for years. Not all those who gain such back door entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the Courts are of employment in Government Departments, Public Undertakings or Agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularisation has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that those who are employed on such works are required to be continued for 240 or more days have to be absorbed as regular employees although the works are time-bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts.

In *Karnataka State Private College Stop-Gap Lecturers Association Vs. State of Karnataka and Others*, , similar feeling of anguish has been expressed in these words:

Ad hoc appointments, a convenient way of entry usually from backdoor, at times even in disregard of rules and regulations, are comparatively recent innovation to the service jurisprudence. They are individual problems to begin with, become a

family problem with passage of time and end with human problem in Court of law. It is unjust and unfair to those who are lesser fortunate in society with little or no approach even though better qualified, more meritorious and well deserving. The infection is widespread in Government or semi-government departments or State financed institutions. It arises either because the appointing authority resorts to it deliberately as a favour or to accommodate someone or for any extraneous reason ignoring the regular procedure provided for recruitment as a pretext under emergency measure or to avoid loss of work etc. Or the rules or circulars issued by the department itself empower the authority to do so as a stop-gap arrangement. The former is an abuse of power. It is unpardonable. Even if it is found to have been resorted to as a genuine emergency measure the Courts should be reluctant to grant indulgence. Latter gives rise to equities which have bothered Courts every now and then.

32. Employment opportunity in public posts is a sacred right guaranteed to every citizen. Every eligible person is entitled to exploit those opportunities and have his share in the wealth of public employment. Any attempt to make appointments in public posts by surreptitious methods public would amount to stealing this wealth by denying to the eligible and suitable persons a chance of consideration. That would not be in the interest of the services either. Such a state of affairs cannot be judicially countenanced. In the instant cases, there is one thing which is common to all the Petitioners, and that is that they all were appointed in the first instance, on daily wages and in course of time, their services were regularised. I worder, apart (sic)om my conclusions on questions of law, in view of all that has said above, if there is any scope to interfere with the impugned order. All that I may observe is that at the time of regular appointments, the cases of the Petitioner will also be considered after relaxation of (sic)ge-bar if any, and they will also be entitled (sic) due consideration of their past satisfactory work experience. If vacancies are available be authorities will be advised to take steps 3 fill up the post in accordance with law with (sic)tmost despatch, rather than continue with he status quo of daily wages system.

33. Having, thus, given ray anxious consideration to the questions raised and arising or consideration, I do not find any merit in these writ petitions which are, accordingly, dismissed. There will be no order as to costs.