WP(C) 99/2006
BEFORE
HON'BLE MR. JUSTICE B.K. SHARMA

JUDGMENT AND ORDER (CAV)

Both the writ petitions under same set of facts have been heard together and are being disposed of by this common judgment and order.

2. For convenience sake and as agreed to by the learned counsel for the parties, the facts stated in the writ petition being W.P. (C) No.118/2006 are primarily discussed. Both the writ petitioners are with educational qualification of B.A. and B.Ed. They responded to the employment notice issued by the respondent-Corporation and published in the issue of The Assam Tribune dated 20.10.1997 inviting applications from intending candidates for the post of teacher, primary school (English medium) against the permanent vacancies. As per the advertisement, the pay scale for the post was indicated as Rs.2366 - 4521 plus other allowances as admissible under the Rules. It was also indicated that the appointed teachers would be entitled to Corporation's housing accommodation, C.P.F., Group Insurance, Leave Travel Concession, Gratuity, Medical facilities, productivity Linked Bonus, Group Savings Linked Insurance etc. as per Corporation's rules. Although in the advertisement, the number of vacancies was indicated as two, but by the time the selection was held, another post fell vacant and accordingly, the selection was conducted for three posts.

3. Accepting the candidatures offered by both the petitioners, they were called upon to appear in the written test on 27.11.1997. The petitioners appeared in the written test along with other candidates. Thereafter, by letter dated 28.11.1997, issued by the Chief Personnel Manager of the Corporation, they were asked to report in the office on 12.12.1997 at 7 AM for class room teaching test and interviews (viva voce). By the said letter, the petitioners were also directed to bring with them all original certificates, mark sheets, testimonials etc.

4. Pursuant to the said letter dated 28.11.1997 issued individually to the petitioners, they appeared for class room teaching test and interview on 12.12.1997. Both the petitioners came out successful in the selection and the Chief Personnel Manager by his telegram dated 20.12.1997 directed both the petitioners to report in empty stomach on 26.12.1997 at 7 AM in the office with all testimonials and passport size photographs for medical examination.

5. Pursuant to the direction contained in the said telegram, both the petitioners appeared in the office for medical test etc. and the petitioners along with one Smti. Sultana Begum Borah were selected. While the petitioners were selected against two advertised posts, said Smti. Borah was selected against the 3rd post which fell vacant subsequently.

6. Although the petitioners were selected against the advertised vacancies with the assurance and promises made in the advertisement, the petitioners came to be appointed firstly by engagement advice dated 1.1.1998 and 2.1.1998 respectively as teachers for less than 45 days with the basic pay of Rs.2366/- per month. In the engagement advice, their occupation code, grade code, token code and registration No. were indicated as 346/04/T and 37026/37027 respectively. The Receiving Department was indicated as 068 and Job No./Title was indicated as Teacher, Pry School (Eng Med.).

7. Their such initial appointment/engagement on less-than-45 days-basis continued with the issuance of time to time engagement advice like the ones dated 20.5.1999, 12.5.2000, 25.5.2001, 8.11.2002, 24.1.2003, 21.6.2004, 8.11.2005, 26.

12.2005 etc. At the time of filing the writ petition, the rate of payment to the petitioners raised up to Rs.5400/- per month. Such time to time engagements of the petitioners are with artificial break for one/two days.

8. The petitioners being aggrieved by the contrary action on the part of the respondent-Corporation in not appointing them as per the promises made out in the advertisement, they made time to time representations. By one of such representations dated 9.1.2001, the petitioners urged upon the Deputy General Manager of the Corporation to look into the matter and to regularize them in their services in terms of the conditions stipulated in the advertisement. In the representation, they had indicated about the selection strictly in conformity with the advertisement and as to how other teachers working at par with the petitioners had been receiving the benefits indicated in the advertisement only to the deprivation of the petitioners.

9. It is the case of the petitioners that since they were selected against the permanent posts, the authority could not have taken recourse to the kind of appointment indicated above and that they are entitled to get all the benefits including the salary in the Time Scale of Pay, as was indicated in the advertisement. The petitioners made further representation dated 24.8.2001 urging the authority to provide them with the benefits since they were appointed pursuant to the advertisement followed by the selection in terms of the said advertisement. According to the petitioners, whenever they had approached the authority towards redressal of their grievance, they were assured of doing the needful in the matter without, however, any materialization of such assurance.

10. In paragraph-11 of the writ petition, the petitioners have named Shri Dipsekhar Borah, Shri Pradip Kumar Borthakur and Smt. Manju Baruah working in the particular department of the Corporation, who were also initially appointed on 45 days-basis like that of the petitioners. According to the petitioners, the said three persons have been regularized in their services on 21.1.1999, 21.1999 and 31.1.1999 respectively. Therefore, the petitioners again on 11.11.2002 submitted another representation urging for similar treatment. The petitioner in the first writ petition i.e. WP(C) No.118/2006 made two applications on 25.6.2003 and 25.9.2003 urging the officials of the respondent-Corporation to grant her maternity leave from 3rd week of October, 2003 as she was expecting a baby. Be it stated here that after the appointment of the petitioner in the services of the Corporation, she got married. Her prayer for maternity leave was rejected on the ground that such leave was applicable only to regular employees. Such rejection was made by Annexure-L letter dated 15.10.2003.

11. The petitioners made further representation dated 3.8.2004 in continuation of their earlier representations urging for service benefits like that of any other regular employee. In response to the said representation dated 3.8.2004, the Chief H.R. Manager of the Corporation by his letter dated 25.8.2004 (Annexure-N) intimated the petitioners that sincere efforts were being made since the year 2001 to regularize the services of the petitioners. For a ready reference, the said letter dated 25.8.2004 is quoted below :-

Ref.ERS.5/15(EMPL)-171 Date 25.8.2004

Ms Anima Gogoi,
Emp.No.37027 &
Other Signatories of the
Joint Petition dtd.3.8.04
Thro DM(MS & HR)

Dear Madam,

Non-Regularization of Service.

We refer to your joint petition dtd. 3.8.2004 requesting for regularization of your service in the Corporation.

In this regard, Management constraints in regularizing your service have been a

lready clarified to you by our Ms R. Goswami, DM(MS&HR) on 13.8.2004. Sincere ef forts have been made by AOD Management in this regard since the year 2001 and e fforts are continuing.
Meanwhile the possibility of extending certain facilities to you and your depend ents are being looked into.

Yours faithfully,
Indian Oil Corporation Ltd.
(Assam Oil Division)
Sd/- (W.R. Borbora)
CHIEF HR MANAGER

12. In spite of the said letter issued on 25.8.2004 with the kind of assura nce indicated therein, the respondents having not done anything in the matter, t he petitioners have invoked the writ jurisdiction of this Court by filing the wr it petitions.

13. The respondents have filed their counter affidavit. While not denying th e basic fact stated in the writ petition, it is their stand that the petitioners were appointed to work as teachers on temporary basis in the school run by Assa m Oil Division of the Corporation. According to the respondent-Corporation, the school in which the petitioners have been engaged is not an integral part of the Corporation. They have admitted that the petitioners were selected for appointm ent as Primary School Teachers pursuant to the aforesaid advertisement. It is th e stand of the respondent-Corporation that the school in which the petitioners w ere appointed was eventually closed in 2004 owing to declining an enrolment. How ever, the Corporation with a sense of responsibility towards the teachers includ ing the petitioners has re-deployed them as Temporary Junior Clerk Typists in Ma y 2006. It is the further stand of the respondents that the petitioners are enti tled to medical facilities, housing accommodation, annual bonus, leave encashmen t to the extent of 4 days in every spell of 45 days in lieu of earned leave. Th ey have admitted that the petitioners are not being provided with the benefits o f annual increments, loans and advances, which are applicable only to regular em ployees. It has been stated that presently there is no decision to regularize th e services of the petitioners.

14. In the reply affidavit filed by the petitioners, they have questioned th e very authority of the deponent, who has filed the counter affidavit on behalf of the respondents. The counter affidavit has been filed on behalf of the Respo ndents No.1 to 6 by the Chief Manager (Marketing Operation) of the Indian Oil Co rporation. According to the petitioners, the competent authority to file counte r affidavit is the Chief H.R. Manager under whose authority, the petitioners hav e been serving. They have denied that the school is not an integral part of the Corporation. In this connection, they have stated that the teachers of the sc hool can also be transferred to other departments of the respondent-Corporation. As per the transfer policy of the Corporation, a school teacher of the A.O.D. can be transferred from the school to any other department of the Corporation. The petitioners have also mentioned about the schools like AOD Primary School, AOD Higher Secondary School, AOD Hindi Higher Secondary School etc. which are in tegral part of the Corporation. In this connection, they have also annexed Anne xure-P document dated 27.6.1994, which is the letter of appointment to the post of Primary School Teacher (English medium). As per the said appointment order, the appointee is liable to be transferred to any place in India in the services of the Corporation at the discretion of the management and that the management m ay transfer the appointee to work in Section/Plant/Department/Unit of the Corpor ation.

15. The petitioners in their reply affidavit have also denied the plea of th e respondents in their counter affidavit that the posts were temporary and the a ppointments were made for temporary durations. According to them, had that been made known in the advertisement, they would not have applied in response to the

advertisement. According to the petitioners, the respondent-Corporation having i nvited applications from the experienced hands cannot now turn around such a pos ition so as to brand the petitioners as temporary appointees. In this connectio n, they have referred to Annexure-R and Q series appointment letters indicating therein about the temporary nature of the vacancies, but continuation of the inc umbents in the services of the Corporation with all service benefits.

16. I have heard Mr. C. Baruah, learned Sr. counsel assisted by Mr. R.K. Dut ta, learned counsel for the petitioners as well as Mr. S.N. Sarma, learned Sr. c ounsel assisted by Mr. N. Sarma, learned Standing Counsel, I.O.C.

17. When the matter was partly heard on 20.1.2009 fixing the matter for furt her hearing on 17.2.2009, Mr. Sarma, learned counsel representing the respondent -Corporation was requested to produce the records relating to appointment and co ntinuation in services of the petitioners. Mr. Sarma, learned counsel for the re spondents had produced two files, one of which was File No.QTR.3/97-ii Dated 23. 8.1997. Other file was without any number. As recorded in the order dated 3.3.2 009, it was found that the files were only in respect of the advertisement in qu estion, the authority which conducted the selection and assessment of suitabilit y of the petitioners for the post in which the petitioners were found suitable. The files did not throw any light as to under what circumstances the petitioner s were appointed on less than 45 days basis with time to time extension.

18. Having noticed the above, by order dated 3.3.2009, the learned counsel r epresenting the respondent-Corporation was requested to produce the relevant fil e, which would indicate as to what had prompted the authority to take recourse t o take action in deviation of the terms of the advertisement and selection condu cted.

19. On the last day of hearing of the matter, i.e. 26.3.2009, Mr. Sarma, lea rned counsel submitted that there is no such records. He only produced the phot ocopies of some documents to show the present basic pay of the petitioners which have got no relevance to the issue in hand. If the respondent-Corporation had a cted contrary to the promises made out in the advertisement and the selection, t he Court is entitled to find out the reasons thereof. Nothing could be produced by the respondent-Corporation in support of their stand in the counter affidavi t as to under what circumstances, the petitioners were so appointed on fixed pay basis for limited duration with time to time extension with artificial breaks.

20. The petitioners were selected for appointment as teachers, primary schoo l (English medium). As per the advertisement, the selected candidates were to b e appointed in the Time Scale of Pay of Rs.2366 - 4521/- plus other allowances a s admissible under existing rules. Even the total emoluments at the minimum of the scale was indicated as Rs.3900/-. As noted above, it was also indicated tha t the selected candidates would be entitled to all other service benefits of the Corporation after the appointment.

21. The records produced by Mr. Sarma, learned counsel for the respondent-Co rporation have revealed that the petitioners were selected for such appointment and the selection was conducted strictly in conformity with the stipulations mad e in the advertisement. Nowhere in the records/two files produced by Mr. Sarma, learned counsel representing the respondent-Corporation, there is any indication as to what led to the situation in which the petitioners were appointed in the manner and method indicated above. If the petitioners had been appointed on reg ular basis pursuant to the advertisement and selection, even on closure of the s chool, their services would have been continued in some other departments, as ha s been done even in case of temporary appointments with the consequential benefi ts. It is in this context, the petitioners have referred to Annexure-P appointme nt order dated 27.6.1994 annexed to the reply affidavit to show as to how even a school teacher is liable to be transferred to Section/Plant/ Department/ Unit o

f the Corporation.

22. Although the respondents have contended that the school in question is n ot an integral part of the Corporation, but Mr. Sarma, learned counsel represent ing the respondent-Corporation fairly submitted that such stand on the part of t he respondent-Corporation may not be sustainable. The petitioners have indicated some other schools, which are the integral parts of the Corporation. Even othe rwise also, if the school in question was not an integral part of the Corporatio n, there was no question of issuing the advertisement and making the selection b y the Corporation itself. The very fact that the services of the petitioners ha ve been continuing in some other departments and in some other capacity will go to show that the school was an integral part of the Corporation. Thus, the corp oration cannot obviate itself from the liability to maintain the petitioners eve n after discontinuation of the school. As to what consequence would follow after discontinuation of the school is not the issue in hand, but the issue is as to whether the petitioners have received fair treatment at the hands of the respond ent-Corporation and as to whether there has been violation of Article 14 and 16 of the Constitution of India.

23. The petitioners are qualified candidates. As noticed above, they are B.A . and B.Ed degree holders. They fulfilled the eligibility criteria laid down in the advertisement. The advertisement was for regular appointment and had never i ndicated that the petitioners might find themselves in the kind of situation in which they found themselves, now with the issurance of the engagement advice app ointing them for less than 45 days with time to time extension by various orders with the artificial break for one or two days. The petitioners were the experie nced hands and accordingly, they responded to the advertisement leading incorpor ating the promises made therein. However, the respondents acted contrary to such promises and extracted the services of the petitioners in exploitative terms. The petitioners being at the receiving ends could not do anything in the matter except raising time to time protest before the authorities of the Corporation.

24. The Chief H.R. Manager of the Corporation by his aforementioned Annexure -9 letter dated 25.8.2004 stated that the efforts are being made to regularize t he services of the petitioners since the year 2001 and such efforts were still c ontinuing. It was also conveyed that the possibility of extending certain facili ties to the petitioners were being looked into. Thus, the respondent-Corporatio n was not oblivious of the illegality meted out to the petitioners.

25. It is in the above context, the Apex Court in its landmark judgment rela ting to service condition, reported in AIR 1986 SC 1571 (Central Inland Water Tr ansport Corporation v. Brojo Nath Ganguly) spoke of unconscionable contract. Th at was a case relating to the particular clause in the service rule entitling th e employer to terminate the services even of the permanent employees without giv ing any reason and by giving notice. It was held that such a clause is void und er Section 23 of the Contract Act being opposed to the public policy. It was fur ther held to be ultravires of Article 14 of the Constitution of India and also v iolative of the Directive Principles contained in Article 39 (a) and 41 of the C onstitution of India. Such a clause in the rules was described by the Apex Court as a naked hire and fire rule and its only parallel is to be found in the He nry VIII clause so familiar to administrative lawyers.

26. When it was found that such a clause does not even state who on behalf o f the Corporation is to exercise that power and the impugned letters of terminat ion do not refer to any resolution or decision of the Board, the Apex Court made the following observation:-

99. No apter description of Rule 9(i) can be given than to call it the Henry V III clause . It confers absolute and arbitrary power upon the Corporation. It do es not even state who on behalf of the Corporation is to exercise that power. It

was submitted on behalf of the appellants that it would be the Board of Directo rs. The impugned letters of termination, however, do not refer to any resolution or decision of the Board and even if they did, it would be irrelevant to the va lidity of Rule 9(i). There are no guidelines whatever laid down to indicate in w hat circumstances the power given by Rule 9(i) is to be exercised by the Corpora tion. No opportunity whatever of a hearing is at all to be afforded to the perma nent employee whose service is being terminated in the exercise of this power. I t was urged that the Board of Directors would not exercise this power arbitraril y or capriciously as it consists of responsible and highly placed persons. This submission ignores the fact that however highly placed a person may be, he must necessarily possess human frailties. It also overlooks the well-known saying of Lord Acton, which has now almost become a maxim, in the appendix to his Histori cal Essays and Studies , that: Power tends to corrupt, and absolute power corru pts absolutely. As we have pointed out earlier, the said Rules provide for four different modes in which the services of a permanent employee can be terminated earlier than his attaining the age of superannuation, namely, Rule 9(i), Rule 9 (ii), sub-clause (iv) of clause (b) of Rule 36 read with Rule 38 and Rule 37. Un der Rule 9(ii) the termination of service is to be on the ground of: Services n o longer required in the interest of the Company. Sub-clause (iv) of clause (b) of Rule 36 read with Rule 38 provides for dismissal on the ground of misconduct . Rule 37 provides for termination of service at any time without any notice if the employee is found guilty of any of the acts mentioned in that rule. Rule 9(i ) is the only rule which does not state in what circumstances the power conferre d by that rule is to be exercised. Thus, even where the Corporation could procee d under Rule 36 and dismiss an employee on the ground of misconduct after holdin g a regular disciplinary inquiry, it is free to resort instead to Rule 9(i) in o rder to avoid the hassle of an inquiry. Rule 9(i) thus confers an absolute, arbi trary and unguided power upon the Corporation. It violates one of the two great rules of natural justice - the audi alteram partem rule. It is not only in cases to which Article 14 applies that the rules of natural justice come into play. A s pointed out in Union of India v. Tulsiram Patel040: (at SCC p. 463, par a 72) The principles of natural justice are not the creation of Article 14. Art icle 14 is not their begetter but their constitutional guardian. That case has traced in some detail the origin and development of the concept of principles of natural justice and of the audi alteram partem rule (at pp. 463-80). They appl y in diverse situations and not only to cases of State action. As pointed out by O. Chinnappa Reddy, J., in Swadeshi Cotton Mills v. Union of India141 they are implicit in every decision-making function, whether judicial or quasi-judicial o r administrative. Undoubtedly, in certain circumstances the principles of natura l justice can be modified and, in exceptional cases, can even be excluded as poi nted out in Tulsiram Patel case40. Rule 9(i), however, is not covered by any of the situations which would justify the total exclusion of the audi alteram parte m rule.

27. In the aforesaid decision, it was held by the apex Court that when a con sent to an agreement is caused by coercion, fraud or misrepresentation, the agre ement is a contract voidable at the option of the party whose consent was so sou ght for. It was also observed that certain types of contracts are void which are opposed to the public policy and tend to commit legal wrong. In paragraph 90 of the judgment, the Apex Court observed thus: -

90. It is not as if our civil courts have no power under the existing law. Unde r Section 31(1) of the Specific Relief Act, 1963 (Act 47 of 1963), any person ag ainst whom an instrument is void or voidable, and who has reasonable apprehensio n that such instrument, if left outstanding, may cause him serious injury, may s ue to have it adjudged void or voidable, and the court may, in its discretion, s o adjudge it and order it to be delivered up and cancelled.

28. Dealing with the power conferred by the clause in question, it was held that such a clause is not only arbitrary but also discriminatory for it enables

the Corporation to discriminate between employee and employee. In this context, it was observed as follows:-

100. The power conferred by Rule 9(i) is not only arbitrary but is also discriminatory for it enables the Corporation to discriminate between employee and employee. It can pick up one employee and apply to him clause (ii) of Rule 9. It can pick up another employee and apply to him clause (d) of Rule 9. It can pick up yet another employee and apply to him sub-clause (iv) of clause (b) of Rule 36 read with Rule 38 and to yet another employee it can apply Rule 37. All this the Corporation can do when the same circumstances exist as would justify the Corporation in holding under Rule 38 a regular disciplinary inquiry into the alleged misconduct of the employee. Both the contesting respondents had, in fact, been asked to submit their explanation to the charges made against them. Sengupta had been informed that a disciplinary inquiry was proposed to be held in his case. The charges made against both the respondents were such that a disciplinary inquiry could easily have been held. It was, however, not held but instead resort was had to Rule 9(i).

101. The Corporation is a large organization. It has offices in various parts of West Bengal, Bihar and Assam, as shown by the said Rules, and possibly in other States also. The said Rules form part of the contract of employment between the Corporation and its employees who are not workmen. These employees had no powerful workmen's Union to support them. They had no voice in the framing of the said Rules. They had no choice but to accept the said Rules as part of their contract of employment. There is gross disparity between the Corporation and its employees, whether they be workmen or officers. The Corporation can afford to dispense with the services of an officer. It will find hundreds of others to take his place but an officer cannot afford to lose his job because if he does so, there are not hundreds of jobs waiting for him. A clause such as clause (i) of Rule 9 is against right and reason. It is wholly unconscionable. It has been entered into between parties between whom there is gross inequality of bargaining power. Rule 9(i) is a term of the contract between the Corporation and all its officers. It affects a large number of persons and it squarely falls within the principle formulated by us above. Several statutory authorities have a clause similar to Rule 9(i) in their contracts of employment. As appears from the decided cases, the West Bengal State Electricity Board and Air India International have it. Several government companies apart from the Corporation (which is the first appellant before us) must be having it. There are 970 government companies with paid-up capital of Rs 16,414.9 crores as stated in the written arguments submitted on behalf of the Union of India. The government and its agencies and instrumentalities constitute the largest employer in the country. A clause such as Rule 9(i) in a contract of employment affecting large sections of the public is harmful and injurious to the public interest for it tends to create a sense of insecurity in the minds of those to whom it applies and consequently it is against public good. Such a clause, therefore, is opposed to public policy and being opposed to public policy, it is void under Section 23 of the Indian Contract Act.

29. In Secretary-cum-Chief Engineer v. Hari Om Sharma reported in (1998) 5 SCC 87, the Apex Court having found the particular service condition, an unconscionable condition imposed by the Government interferred with the same. in the said case, the dispute was relating to promotion to the post of Junior Engineer. The respondent was promoted as Junior Engineer in 1990 and was continuing on that basis without being paid salary for that post or without being promoted to regular post. The Tribunal allowed the claim of the respondent with the direction that he should be paid salary for the post of Junior Engineer and shall also be considered for promotion on regular basis. The respondent had put in 10 years of service.

30. Upholding the direction of the Tribunal and rejecting the plea of the appellant that the respondent was promoted on stop-gap-arrangement and he has also given undertaking that he would not claim promotion as of right nor would he claim any benefit pertaining to that post, it was observed that such plea is prepo

sterous. In paragraph 8 of the judgment, it has been observed thus:-

8. Learned counsel for the appellant attempted to contend that when the respondent was promoted in stop-gap arrangement as Junior Engineer I, he had given an undertaking to the appellant that on the basis of stop-gap arrangement, he would not claim promotion as of right nor would he claim any benefit pertaining to that post. The argument, to say the least, is preposterous. Apart from the fact that the Government in its capacity as a model employer cannot be permitted to raise such an argument, the undertaking which is said to constitute an agreement between the parties cannot be enforced at law. The respondent being an employee of the appellant had to break his period of stagnation although, as we have found earlier, he was the only person amongst the non-diploma-holders available for promotion to the post of Junior Engineer I and was, therefore, likely to be considered for promotion in his own right. An agreement that if a person is promoted to the higher post or put to officiate on that post or, as in the instant case, a stop-gap arrangement is made to place him on the higher post, he would not claim higher salary or other attendant benefits would be contrary to law and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act, 1872.

31. In Rudra Kumar Sain v. Union of India, reported in (2000) 8 SCC 25, a 5-Judge-Bench of the Apex Court answering the question as to when an appointment can be described as ad hoc, stop-gap or fortuitous observed that such appointments should absolutely connote that if appointment is made accidentally, because of a particular emergent situation and such appointment obviously would not continue for a fairly long period. However, if an appointment is made under the recruitment rules and the appointee possesses the prescribed qualification, such appointment cannot be described as the one under any of the aforesaid 3 terms. In paragraph 20 of the judgment, noticing the fact that the petitioner was appointed following the due procedure and holding that the petitioner would be entitled to seniority from the initial date of appointment irrespective of terminology used in the appointment order observed thus :-

20. In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be stopgap or fortuitous or purely ad hoc . In this view of the matter, the reasoning and basis on which the appointment of the promotees in the Delhi Higher Judicial Service in the case in hand was held by the High Court to be fortuitous/ad hoc/stopgap are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous .

32. In Union of India v. Wing Commander T. Parthasarathi, reported in (2001) 1 SCC 158 it was observed by the Apex Court that a substantive legal right cannot be denied to a person merely on some policy decision of the Government or any certificate issued by him acknowledging a particular position which has no legal sanctity. In the instant case, the respondent-Corporation could not place on record any such policy decision warranting appointment of the petitioners contrary to the promises made out to them. In paragraph 9 of the judgment, the Apex Court observed thus:-

9. The reliance placed upon the so-called policy decision which obligated the respondent to furnish a certificate to the extent that he was fully aware of the fact that he cannot later seek for cancellation of the application once made for premature retirement cannot, in our view, be destructive of the right of the respondent, in law, to withdraw his request for premature retirement before it ever became operative and effective and effected termination of his status and relation with the Department. When the legal position is that much clear it would be futile for the appellants to base their rights on some policy decision of the D

epartment or a mere certificate of the respondent being aware of a particular po sition which has no sanctity or basis in law to destroy such rights which otherw ise inhered in him and available in law. No such deprivation of a substantive ri ght of a person can be denied except on the basis of any statutory provision or rule or regulation. There being none brought to our notice in this case, the cla im of the appellants cannot be countenanced in our hands. Even that apart, the r easoning of the High Court that the case of the respondent will not be covered b y the type or nature of the mischief sought to be curbed by the so-called policy decision also cannot be said to suffer any conformity (sic infirmity) in law, t o warrant our interference.

33. Our own High Court in the case of Radhika Ranjan Choudhury v. State of A ssam and others, reported in (1997) 1 GLJ 1 noticing the particular administrati ve order repugnant to the provisions of law observed that if any order is passed incorporating certain conditions which are repugnant to the provisions of law, the order shall be valid, however, without the condition which is repugnant to t he law and that the order will be accepted without condition.

34. In the instant case, the respondent-Corporation made out the promises to the petitioners for consideration of their case for appointment as primary scho ol teacher. Such promise was made out by the advertisement dated 20.10.1997 inc orporating the conditions of appointment. The petitioners responded to the said promises made out and did their best to get the selection. They were selected p ursuant to all the selections including the written test conducted by the author ities of the respondent-Corporation. At no stage, there was even any whisper tha t they might be appointed on temporary basis and that the posts were temporary.

35. Although in the counter affidavit, a feeble attempt has been made to sho w that the requisition placed before the Employment Exchange indicated that the posts were temporary in nature, but the same is wholly unsustainable. In the adv ertisement, there was no indication that the posts were temporary. Even otherwis e also, in the normal circumstances, the employer either in the advertisement or in the offer of appointment indicates the posts as temporary. That by itself ca nnot be decisive of the fact that the post is temporary and/or for a limited dur ation. It is not the case of the respondent-Corporation that since the posts wer e temporary and got abolished by the time the petitioners were so appointed they could not be appointed against the posts. Merely because, the posts were descr ibed as temporary, it did not give licence to the respondent-Corporation to deal with the case of the petitioners as per their whims and caprices. It is in this context, they were directed to produce the relevant file, in which the decision for appointment of the petitioners in the manner and method in which they were appointed, which the respondents failed to comply with. They could not produce any such file which has led to the irresistible conclusion that the treatment me ted out to the petitioners is nothing but exploitation requiring interference of this Court.

36. The particular plea of the petitioners referred to in paragraph 11 of th e writ petition that the services of the petitioners named therein were also app ointed like that of the petitioners have been regularized in no time has not bee n denied by the respondents. However, their plea is that the said persons were a ppointed in some other departments/units. Merely because the said persons were a ppointed in some other units, that by itself will not justify differential appro ach of the respondents in dealing with the case of the petitioners. The responde nts with their eyes wide open made out the promises to the petitioners for regul ar appointment and conducted the selection on that basis. At no point of time, t hey were intimated that their appointment shall be on less than 45 days basis an d that they would also not be entitled to service benefits as promised in the ad vertisement.

37. The petitioners being at the receiving end and in this era of unemployment, had no other option than to accept the engagement offered to them which needless to say clearly in exploitative terms. It is not that the petitioners gladly accepted the engagement, but they made time to time representation in response to which the authority of the respondent-Corporation even admitted that the efforts had been made since 2001 to regularize the services of the petitioners. Once the petitioners were tested for regular appointment and were selected for the same, merely by extracting their services in exploitative terms and merely because the petitioners are pitted against the mighty administration of the respondent-Corporation, the respondents cannot derive the advantageous position from that kind of situation. The Court is bound to interfere with such exploitation. The Apex Court in Roshan Deen v. Pritee, reported in AIR 2002 SC 33 dealing with the power conferred on the High Court under Article 226 of the Constitution of India observed that the same has to advance justice and not to thwart it. In paragraph 12 of the judgment, it has been observed thus:

12. We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned single Judge in a case where judicial mind would be tempted to utilize all possible legal measures to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non-suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it) Vide State of Uttar Pradesh V. District Judge, Unnao and others, (AIR 1984 SC 1401) the very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law.

38. Needless to say that the jurisdiction of the High Court under Article 226 of the Constitution of India is equitable and discretionary power in that Article is exercised by the High Court to reach injustice wherever it is found . The facts of the present case deserve interference of this Court in exercise of equitable jurisdiction under Article 226 of the Constitution of India. The respondent-Corporation instead of behaving like a model employer has exploited the services of the petitioners in exploitative terms, which is not expected to a model employer. The exploitation meted out to the petitioners stares on the face of it.

39. In Mr. Gupta Vs. Union of India, reported in (1995) 5 SCC 628, the Apex Court dealing with the plea of limitation seeking relief for proper fixation of pay from the initial date of appointment (after 11 years), held that such plea is untenable as the grievance of the appellant was a continued wrong. The Apex Court, however, restricted the payment of actual arrears of pay. In paragraph 6 of the judgment, it was observed thus:-

The Tribunal misdirected itself when it treated the appellant’s claim as ’one time action’ meaning thereby that it was not a continuing wrong based on a recurring cause of action. The claim to be paid the correct salary computed on the basis of proper pay fixation, is a right which subsists during the entire tenure of service and can be exercised at the time of each payment of the salary when the employee is entitled to salary computed correctly in accordance with the rules. This right of a Government servant to be paid the correct salary throughout his tenure according to computation made in accordance with the rules, is akin to the right of redemption which is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists, unless the equity of redemption is extinguished. It is settled that the right of redemption is of this kind.

40. For all the aforesaid reasons, the writ petitions are allowed directing the respondent-Corporation to treat the petitioners as regularly appointed with effect from the initial date of appointment with all consequential service benefits including notional fixation of pay from the initial date of appointment and arrear salary with effect from 05.01.2006, i.e. the date of filing the writ petitions. In other words, the appointments of the petitioners shall be deemed to be the one as envisaged in the advertisement dated 20.10.1997 with all consequential benefits indicated above, taking the services of the petitioners to be regular in the time scale of pay with other service benefits, as indicated in the said advertisement dated 20.10.1997. The respondent-Corporation shall provide the petitioners with all consequential service benefits including their engagement/ absorption/transfer etc.

41. Writ petitions are allowed without, however, any order as to costs.