

(1987) 07 CAL CK 0008
In the Calcutta High Court

K.K. Majumder

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 20-07-1987

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 15, 16, 226

Citation : 93 CWN 203 : (1989) 1 LLJ 426

Hon'ble Judges : Umesh Chandra Banerjee, J

Bench : Single Bench

Judgement

Umesh Chandra Banerjee, J.—The concept of fair play is no longer in the realm of judicial consideration but a well-settled principle of law. Fair play and fair treatment, being the "soul of natural justice", ought to be the most accepted methodology of all Governmental action. The observations of the Supreme Court in the case of Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, seem to be very apposite in this context. The Supreme Court observed:

Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and, over the years it has grown into a widely pervasive rule effecting which arises of administrative action.

Thus, the soul of natural justice is the fair play in action and that is why it has received the widest recognition throughout the democratic world.

2. The Supreme Court of New South Wales in the case of Asmand v. Public Service Board of New South Wales and Anr. reported in 1985 L R 1041, after noticing the American and English Law as also the development of doctrine of natural justice in the other Commonwealth countries, including India, observed:

What cannot be doubted is that there has been a growing body of precedent and other support for the desirability of, and sometime the obligations upon, Public Administrative Tribunal, atleast to state reasons for their decisions affecting seriously the interest of the person seeking those reasons. Sometimes this is expressed to be based on the requirements of natural justice and fairness.

Sometimes it is articulated in terms of the inherent necessities of the proper operation of judicial process...

3. The general duty of fairness as regards administrative action has also been accepted as a guiding principle by Megarry, J. in the case of *Bates v. Lord Hailsham* reported in (1972) All ER. 12019.

4. Fair play and fair treatment ought to be given its due recognition and, in the event the Governmental action suffers therefrom, the Law Court be within its jurisdiction to extend its judicious hand to grant relief to those who have fallen a prey for reason of the administrative ipse dixit.

5. Before, however, adverting on to the rival contentions; which are interesting as well as important, a brief reference to facts ought to be noticed at this juncture.

6. The petitioner is a member of the Indian Revenue Service (Income Tax) having been appointed to the Revenue Service in February, 1954. Whilst working as a Commissioner of Income Tax, the petitioner, at the invitation of the Public Enterprises Selection Board in June 1982, appeared at the interview for the post of Director (Finance) in Bridge & Roof India Ltd.

7. By an office Memorandum dated 2nd August, 1982, the Under Secretary to the Government of India, Ministry of Petroleum, Chemicals & Fertilizers, informed the petitioner that the Public Enterprises Selection Board has recommended the name of the petitioner for the post of Finance Director in the Bridge & Roof Company, in Schedule "C" scale of pay of Rs. 2500-3000. The Under Secretary to the Government of India has also asked the petitioner to indicate the petitioner's willingness to be absorbed on a permanent basis in the company so as to enable the Ministry to take further steps in the matter of appointment of the petitioner as Finance Director, Bridge & Roof Company. Subsequently a reminder was sent to the petitioner in regard to the permanent absorption. After, however, the intimation of the petitioner's selection and prior to the receipt of the reminder, the petitioner, as appears from records, on 31st August, 1982 addressed to the Under Secretary, Government of India, Department of Petroleum, Ministry of Energy, while exercising option for appointment on permanent absorption basis, categorically pointed out that such absorption of the petitioner should be according to the terms of the Bureau of Public Enterprises regulating the procedure and policy in the matter of appointment to top posts in the Public Enterprises. In the letter dated 31st August, 1982 the petitioner specifically stated:

I assume that my absorption would enable me to continue in service upto the normal age of superannuation as under Government. This would mean that I will be retained in service atleast till I attain the age of 58 i.e. 1st August 1986.

8. The petitioner further stated that such absorption should be in such a manner that he does not lose the retirement benefits.

9. On 10th November, 1982 the petitioner was informed by the Under Secretary to the Government of India that the Government has approved the proposal for appointment of the petitioner as a Director (Finance), Bridge & Roof India Ltd. on immediate absorption basis in the revised Schedule "C scale of pay of Rs. 3500-4000 initially for a period of two years only. On the same date another letter was sent informing the petitioner that the performance would be reviewed by the Government at the end of the first year tenure in order to decide whether the remaining part of the tenure would be confirmed. With the 2nd letter, a copy of the appointment letter issued by the Ministry was sent to the petitioner. On 11th March, 1983 the petitioner was further informed that he would be absorbed in the pay scale of Rs. 3500-4000 on immediate absorption basis and for a period of two years in the first instance. Subsequently, on 30th September, 1983 the Presidential sanction to the permanent absorption of the petitioner as the Director (Finance) with effect from the 31st March, 1983 was sent to the petitioner.

10. Whilst the 30th September letter containing the Presidential sanction did not mention any period, by the subsequent letter dated November 30, 1983, having an earlier reference to the 10th November, 1982's letter, further sanction of the President of India was conveyed to the petitioner as regards the appointment of the petitioner as Director (Finance), Bridge & Roof Co. In the letter dated November 30, 1983 it was specifically mentioned that the tenure of his appointment will be initially for a period of two years from the date he assumes the office of Director (Finance) which is 1st April, 1983. It was further mentioned that the appointment will be terminable by either side with three months' notice or on payment by the company of three months' salary in lieu thereof without assigning any reason.

11. On receipt of the letter of 30th November 1983, the petitioner prayed for reversion to the parent department which, however, was turned down on 14th December, 1984. Whilst representations were being made, the petitioner in the meantime obtained release and joined the Bridge & Roof Co.

12. On 20th September, 1985, the petitioner was informed by the Chairman-cum-Managing Director of Bridge & Roof Co. to the following effect:

In accordance with instruction received from the Ministry of Petroleum, I am relieving you of your duties as Director (Finance) of this company with immediate effect.

13. It is this order which is under challenge in this writ application.

14. Mr. Pal appearing in support of the writ petition strenuously contended that the expression "initially for two years" in common English parlance means and implies atleast an expectation for being continued thereafter. Whereas, Dr. Banerjee appearing for the Bridge & Roof Co., submitted that the petitioner at all material times was aware that the petitioner's employment would be for a period

of two years and is terminable on the expiration of the two years" period. Mr. Pal's submission as regards the fairness of the entire set of actions ought to be considered in extenso. but before so doing, an interesting and important question of law, viz., the domain of public and private law field ought to be discussed at this juncture since strenuous submissions have been made on that score.

15. Before considering the: Indian Law on the subject, let us now first consider the speech of Sir John Donaldson (MR) in a recent decision of the Court of Appeal in *R. v. East Berkshire Health Authority* reported in (1984) 3 All ER. 425. Donaldson, (MR) observed:

The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or reengagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee "public law" rights at least making him a potential candidate for administrative law remedies. Alternatively, it can require the authority to contract with its employees on specified terms with a view to the employee acquiring "private law" rights under the terms of the contract of employment. If the authority fails or refuses thus to create "private law" rights for the employee, the employee will have "public law" rights to compel compliance, the remedy being mandamus requiring the authority so to contract or a declaration that the employee had those rights. If, however, the authority gives the employee the required contractual protection, a breach of that contract is not a matter of "public Law" and gives rise to no administrative law remedies.

16. Lord Denning, however, in *O'Reilly v. Mackman* (1982) 3 All ER 680 stated the law to be as follows:

In modern times we have come to recognise two separate fields of law, one of private law and the other of public law. Private law regulates the affairs of subjects as between themselves. Public law regulates the affairs of subjects vis-a-vis the public authorities. for centuries there were special remedies available in public law. They were the prerogative writs of certiorari, mandamus and prohibition. As I have shown, they were taken in the name of sovereign against, a public authority which had failed to perform its duties to the public at large or had performed it wrongly. Any subject could complain to the sovereign; and then the Kings Court, at their discretion, would give him leave to issue such one of the prerogative writs as was appropriate to meet his case. But, these writs, as their names show, only gave the remedies of quashing, commanding or prohibiting. They did not enable a subject to recover damages against a public authority nor a declaration nor an injunction.

This was such a defect in public law that the courts drew on the remedies available in private law, so as to see that the subjects secured justice. It was

held that if a public authority failed to do its duty and in consequence, a member of public suffered particular damage therefrom, he could sue for damages by an ordinary action in the courts of common law.

And this remedy has been applied right upto the present time in ordinary actions brought without leave.

I always thought that this great reform should be done by statute as the Law Commission recommended. When the Rule Committee made Order 53, some of us on the Committee had doubts about whether some of it was not ultra vires, but we took the risk because it was so desirable. Now that the statute has been passed, I may say that it has in several respects altered the substance of the law for the better.

It includes all public authorities and public officers, and indeed any one acting in exercise of a public duty, including a University. It also enlarges the scope of a declaration and injunction so as to apply wherever it is just and convenient and Section 31(3) gives the remedy to anyone who has a sufficient interest, which is very wide in its scope. Those provisions rid us of a whole mass tactical litigations which were thought previously to exist.

Now that judicial review is available to give every kind of remedy, I think it should be the normal recourse in all cases of public law where the private person is challenging the conduct of a public authority or a public body or of anyone acting in the exercise of a public duty."

17. From the above enunciation, it is clear and apparent that Lord Denning's observations in O' Reilly's case (supra) did not find favour with the House of Lords in Walsh's case R. v. East Berkshire Health Authority (supra). The English Law after considering the above noted two decisions has been very succinctly dealt with in Foulkes' Administrative Law 6th Edition: wherein it has been stated:

In R. v. East Berkshire Health Authority, ex-parte Walsh was employed by the Authority. Ministerial regulations made under the National Health Services Act provided, that "where conditions of service...of any class of officers have been the subject of negotiations by a negotiating body and have been approved by the Secretary of State... the conditions of service of any officer belonging to that class shall include the conditions so approved". W belonged to a class, that of senior nursing officer, whose conditions had been so approved, and his conditions of service therefore included the conditions in question. His employment was terminated by an employee senior to him, the district nursing officer. He sought review, under Order 53, of his dismissal on the ground that there had been breaches of the rules of natural justice in the procedure leading to his dismissal. Had he chosen the correct procedure? Hodgson, J., accepting that there is no public law element in the "ordinary" master-servant relationship, thought that where the servant "holds office in a great public service", the public was properly concerned that he should be treated lawfully and fairly by his employer, and thus justified judicial review. The Court of Appeal disagreed. Mere employment by a

public authority does not inject

"any element of public law, nor the fact that the employer is an "officer or is in a higher grade". Was there anything here that took W's status out of "mere employment"? No. The effect of the ministerial regulations was that the authority's contracts with certain employees, including W, were required to be on certain terms. This did not take the relationship out of the ordinary master-servant relationship. Hodgson, J. had relied on *Vine v. National Dock Labour Board*, *Ridge v. Baldwin* and *Malloch v. Aberdeen Corporation*, in coming to his conclusion, but in those cases statute directly restricted the authority's freedom to dismiss and in such a case the employee could acquire public law rights in respect of the power of dismissal. W's complaint had merely been that he had been dismissed in breach of the conditions referred to. If his complaint had been of the legality of the delegation by the authority of its powers of dismissal, or if his condition of service had differed from those approved by the Secretary of State, the Order 53 procedure might have been appropriate. The gravamen of M/s complaint was rather that he had not been heard. The rules of natural justice can however be imported into a private contractual relationship and their import will not of itself bring with it a public law element into the relationship. Whether the employer is in breach of the rules of natural justice is one thing; whether the employee is entitled to a public law remedy is therefore another.

The question then arose; could the matter be allowed to proceed as if begun by writ: (This is possible under Order 53) No. The purpose of this "anti-technicality" rule is to preserve the position of an applicant who intends to seek the same relief in private law proceedings as he had initially sought by his application for judicial review, not to allow him to amend and claim a different relief. The only relief sought here was certiorari, a purely public law remedy. We could not therefore be allowed to switch to an ordinary action.

18. In *Graham Aldous and John Alder's "Application for Judicial Review"* -- the distinction between public law and private law has been stated to be as follows:

Notwithstanding the judicial activism referred to above, the traditional approach of English Law has been to avoid a general theory of public law in favour of ad hoc approach based on particular remedies and which envisages Governmental powers as exercised by numerous separate bodies, each with its own characteristics. On this basis, substantive number of judicial reviews has been applied to non-Governmental bodies, such as Universities and Trade Unions which are in a position to exercise power relating to matters of public concern. Conversely, Governmental agencies exercise proper powers through the private law mechanisms, such as contract, property and patronage as well as by means of statute. It is no longer possible to identify peculiarly Governmental functions since Government not only regulates and punishes but competes in the market

Nevertheless, the introduction of the Order 53 procedure has forced the courts to develop a separate concept of public law in order to decide what kinds of cases

are within the Order 53 jurisdiction.

The main factor which determines whether a matter is one of public law or private law is the formal source of power, if a power derives wholly from the contract as opposed to statute it is not a public law power and therefore Order 53 procedure cannot apply. On the other hand, where a body exercises contractual powers which are partially regulated by statute, the matter depends on the statutory intervention. Thus, a wholly statutory power seems ipso/facto to be a public law power. There are also Governmental powers which are neither statutory nor contractual. There are the real prerogative powers and there are also powers which exist solely by virtue of solely generated Governmental practices concerning matters, such as telephonic surveillance and passport control, where no legal recognised rights exist and therefore no need for the Government to derive its powers from any formal source. The contractual power test is concerned only with the source of particular power and not with the general status of the body exercising the power. Thus, in the absence of statutory regulation, a contract entered into by a statutory authority for public purpose is apparently a private law matter.

19. Cane's book on Interpretation to Administrative Law (1986) seems to suggest the introduction of functional criterion. It has been stated:

The fact that some of the activities and functions of the Government agencies are subject to the rules of private law shows that we cannot, contrary to the tentative definition of public law, suggested earlier would therefore answer this question solely in terms whether we are dealing with Governmental agencies. In order to give full account of the scope of public law, it is necessary to add to the institutional criterion; a functional criterion -- is it performing of public or Governmental functions.

20. Having thus dealt with the English approach on the public and private law field, let us now turn on to our law in the matter.

21. The distinction between private and public law field has in fact been recognised for more than three decades in India. In the case of Satish Chandra Anand Vs. The Union of India (UOI), the supreme Court observed:

There was no compulsion on the petitioner to enter into the contract he did. He was as free under the law as any other person to accept or reject the offer which was made to him. Having accepted, he still has opened to him all the rights and remedies available to the other persons similarly situated to enforce any right under his contract which even denied to him assuming there are any, and to pursue in the ordinary courts of the land such remedy for a breach as are open to him to exactly the same incident as other persons similarly situated. He has not been discriminated against and he has not been denied the protections of any laws which others similarly situated could claim. The remedy of a writ misconceived.

22. Two subsequent decisions of the Supreme Court, viz., the case of Parshotam Lal Dhingra Vs. Union of India (UOI), and the case of Roshan Lal Tandon Vs. Union of India (UOI), support the distinction between contract and work and status of office.

23. In Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others, the Supreme Court observed:

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.

24. It is on this backdrop the decision in case Sukhdev Singh v. Bhagatram 1975-I-LLJ-399 ought also to be noted. In that decision, Mathew, J. observed at pp. 424-425:

The difficulty of separating vital Government functions from non-Government functions has created further difficulties. Is the distinction between Governmental and non-Governmental functions, which plagued the courts, a rational one? The contract is between Governmental activities which are private and private activities which are Governmental. Without the adoption of a radical laissez faire philosophy and the definition of State functions as they were current in the days of Herbert Spencer it is impossible to sort out proper from improper functions. Besides the so-called traditional functions, the modern State operated a multitude of public enterprises. Mr. Justice Holmes said, the Constitution does not enact Herbert Spencer's social statics. This applies equally to the definition of State function for legal purposes.

25. The celebrated decision of Radhakrishna Agarwal and Others Vs. State of Bihar and Others, negated the submission that whenever a State or its agent deals with the citizen either when making a transaction or after making it in exercise of powers under the terms of contract between the parties, there is a dealing between State and the citizen which involves performance of certain legal and public duties. The Supreme Court as a matter of fact categorically stated that the same cannot be a sound principle of law. In the last noted decision the Supreme Court observed:

When a contract is sought to be terminable by the officers of the State purporting to act under the terms of an agreement between the parties, such action is not taken in purported exercise of a statutory power at all.

26. After however the decision of Radhakrishna Agarwal (supra), and Sukhdev Singh (supra), this concept of State action has received a much broader interpretation in the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, . The decision of the S. Court though based on the minority view, expressed in Kathrin Jackson's case, has some significance. The Supreme Court observed:

The analogy of the concept of State action as developed in the United States may

not, however, be altogether out of place, while considering this question. The decisions of the Courts in the United States seem to suggest that a private agency, if supported by an extraordinary assistance given by the State, may be subject to the same Constitutional limitations on the State.

27. The Supreme Court further observed *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, :

There is also another factor which may be regarded as having a bearing on this issue and it is, whether the operation of the Corporation is an important public function. It has been held in the United States in a number of cases that the concept of private action must yield to a conception of State action where the public functions are being performed-Vide Arthur S. Milliar:

The Constitutional law of the "Security State" (10 Stanford Law Review 620 at p. 664). It was pointed out by Douglas, J. in *Evans v. Newton* (382 US 296: 15 L. Ed. (2d) 373) that, "when private individuals or groups are endowed by the State with powers or functions Governmental in nature, they become agencies or instrumentalities of the State". Of course, with the growth of the welfare State, it is very difficult to define what functions are Governmental and what are not, because, as pointed out by Villmer, L.J., in *Pfizer v. Ministry of Health*, (1964) 1 Ch 614, "there has been, since mid-Victorian times, "a revolution in political thought and a totally different conception prevails today as to what is and what is not within the functions of Government. Douglas, J., also observed to the same effect in *New York v. United States* 326 US 572 "A State's project is as much a legitimate Governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit" Cf. *Helvering v. Gerhardt* 304 US 405, 426, 427. A State may deem it as essential to its economy that it owns and operates a railroad, a mill or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of State activities may today be deemed indispensable. It may be noted that besides the so-called traditional functions, the modern State operates a multitude of public enterprises and discharges a host of other public functions. If the functions of the Corporation are of public importance and closely related to Governmental functions, it would be a relevant factor in classifying the Corporation as an instrumentality or agency of Government. This is precisely what was pointed out by Mathew, J., in *Sukhdev v. Bhagatram* (supra), where the learned Judge said that "Institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the functions performed Government agencies. Activities which are too fundamental to the society are by definition too important not to be considered Government functions.

28. In *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, , the Supreme Court, however, sounded a different note. The Supreme Court observed that if the action of the State is related to contractual obligation or obligations arising out of the tort, the Court may not ordinarily examine it, unless the action

has some public law character attached to it. The Supreme Court further observed that, broadly speaking, the Court will interfere in actions of State if they pertain to the public law domain and refrain from examining them, if they pertain to the private law field. The Supreme Court, however, itself experienced difficulty in demarcating the frontier between the public-law domain and the private law field.

29. At this juncture, however, the Supreme Court's statement of law in Escort's case (supra) ought also to be noted:

When the State or an instrumentality of the State ventures into the corporate work and purchase the shares of a company, it assumes to itself the ordinary role of a shareholder and dons the robes of a shareholder with all the rights available to such a shareholder.

30. In Escort's case (supra) the Supreme Court in paragraph 101 observed:

It was, however, urged by the learned Counsel for the company that the Life Insurance Corporation was an instrumentality of the State and was, therefore, debarred by Article 14 from acting arbitrarily. It was, therefore, under an obligation to state to the court its reasons for the resolution once a rule Nisi was issued to it. If it failed to disclose its reason to the court, the court would presume that it had no valid reasons to give and its action was, therefore, arbitrary. The learned Counsel relied on the decisions of court in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, . The learned Attorney-General, on the other hand, contended that actions of the State or an instrumentality of the State which do not properly belong to the field of public law, but belong to the field of private law, are not liable to be subjected to judicial review. He relied on *O'Reilly v. Mackman*, *Davy v. Spelthorne*, *I Congress deal Partido*, *R. v. East Berkshire Health Authority* and *Radhakrishna Agarwal v. State of Bihar*. While we do find considerable force in the contention of the learned Attorney-General it may not be necessary for us to enter into any lengthy discussion of the topic, as we shall presently see...

While we do not for a moment doubt that every action of the State or an instrumentality of the State must be informed by reason and that, in appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution, we do not construe Article 14 as a charter for judicial review of State actions and to call upon the State to account for its actions in its manifold activities by stating reasons for such actions." 31. In the recent decision of the Supreme Court in the case of *M.C. Mehta and another Vs. Union of India and others*, the Supreme Court observed:

We were, during the course of arguments, addressed at great length by Counsel on both sides on the American doctrine of State action. The learned Counsel elaborately traced the evolution of this doctrine in its parent country. We are aware that in America since the Fourteenth Amendment is available only against

the State, the courts, in order to thwart racial discrimination by private parties, devised the theory of State action under which it was held that wherever private activity was aided, facilitated or supported by the State in a significant measure, such activity took the colour of State action and was subject to the constitutional limitations of the Fourteenth Amendment. The historical context in which the doctrine of State action evolved in the United States is irrelevant for our purpose especially since we have Article 15(2) in our Constitution. But it is the principle behind the doctrine of State aid, control and regulation so impregnating a private activity as to give it the colour of State action that is of interest to us and that also to the limited extent to which it can be Indianized and harmoniously blended with our Constitutional jurisprudence. That we in no way consider ourselves bound by American exposition of constitutional law is well-demonstrated by the fact that in *Ramana Dayaram Shetty (supra)*, this Court preferred the minority opinion of Douglas, J. in *Jackson v. Metropolitan Edison Co.* 42 L. Ed. (2d) 477 as against the majority opinion of Rehnquist, J. And again in *Air India v. Nergesh Mirza* 1983 (1) SCR 438 this Court whilst preferring the minority view in *General Electric Co. Martha v. Gilbert*, 50 L. Ed. (2d) 343 said that the provisions of the American Constitution cannot always be applied to Indian conditions or to the provisions of our Constitution and whilst some of the principles adumbrated by the American decisions may provide a useful guide, close adherence to those principles while applying them to the provisions of our Constitution is not to be favoured, because the social conditions in our country are different. The learned Counsel for Shriram stressed the inappropriateness of the doctrine of State action in the Indian context because, according to him, once an authority is brought within the purview of Article 12, it is State for all intents and purposes and the functional dichotomy in America where certain activities of the same authority may be characterised as State action and others as private action cannot be applied here in India. But so far as this argument is concerned, we must demur to it and point out that it is not correct to say that in India once a corporation is deemed to be "authority" it would be subject to the constitutional limitation of fundamental rights in the performance of all its functions and that the appellation of "authority" would stick to such corporation, irrespective of the functional context.

32. On this background, the decision of the Supreme Court in the case of *Central Inland Water Transport Corporation Limited v. Broja Nath Ganguly* reported in 1986 1 LLJ 171 and the decision in *O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others*, ought also to be noted. As a matter of fact though the *Escort's* case (*supra*) was decided at an earlier point of time, but the same was not noticed by the Supreme Court in the case of *Central Inland Water Transport Corporation*. In *Central Inland Water Transport Corporation's* case the Supreme Court observed *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, :

It was, however, submitted on behalf of the appellants that this was a contract entered into by the Corporation like any other contract entered into by it in the

course of its trading activities and the court, therefore, ought not to interfere with it. It is not possible for us to equate employees with goods which can be bought and sold. It is equally not possible for us to equate a contract of employment with a mercantile transaction between two businessmen and much less to do so when the contract of employment is between a powerful employer and a weak employee.

It was also submitted on behalf of the appellants that Rule 9(i) was supported by mutuality inasmuch as it conferred an equal right upon both the parties, for under it just as the employer could terminate the employee's service by giving him three months' notice or by paying him three months' basic pay and dearness allowance in lieu thereof, the employee could leave the service by giving three months notice and when he failed to give such notice, the Corporation could deduct an equivalent amount from whatever may be payable to him. It is true that there is mutuality in Rule 9(i)--the same mutuality as in a contract between the lion and the lamb that both will be free to roam about in the jungle and each will be at liberty to devour the other. When one considers the unequal position of the Corporation and its employees, the argument of mutuality becomes laughable.

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

33. As regards the decision of the Supreme Court in *Radhakrishna Agarwal (supra)*, the Court observed *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, .

We fail to see the relevance that decision has to the case before us. Employees of a large organisation form a separate and distinct class and we are unable to equate a contract of employment in a stereotype form entered into by "the State" with each of such employees with the "lease" executed in *Radhakrishna Agarwal* case. Further, the contract or the lease between the parties in that case was a legally valid contract. In that case what the appellants were doing was to complain of a breach of contract committed by the State of Bihar acting through its officers. The contesting respondents are not complaining of any breach of contract but their contention is that Rule 9(i) which is a term of their contract of employment is void. They are not complaining that the action of termination of their service is in breach of Rule 9(i). Their complaint is not merely with respect to the State action taken under

Rule 9(i) but also with respect to the action of the State in entering into a

contract of employment with them which contains such a clause or rather forcing upon them a contract of employment containing such a clause. As we have held earlier. Rule 9(i) is void even under the ordinary law of contracts.

34. The Supreme Court in Escort's case (supra) categorically recorded that they are not expressing any opinion in regard to the private and public law field excepting, however, with an indication that Article 14 cannot be construed as a charter for judicial review of State action. In Central Inland's case (supra) also the scope of private and public law field was neither considered, nor even referred to by the Supreme Court.

35. Be that as it may, after the decision in Central Inland's case (supra), can it be said that a Judge in the High Court would be within his jurisdiction to deal with the matter in a manner contrary to the decision of the Supreme Court in the case of Central Inland Water Transport Corporation. It is on this issue also strenuous submissions have been made by both the parties. While it is true that Central Inland's case was decided by a two-Judge Bench and that of the Escort's case (supra) by five-Judge Bench, it was contended that the two-Judges of the Supreme Court in Central Inland's case (supra) held on two broad counts. Firstly, it has been held that Central Inland's case (supra) is an authority within the meaning of Article 12 of the Constitution and, therefore, amenable to the writ jurisdiction for enforcement of rights under Chapter 3 of the Constitution and secondly, questions which have been dealt with is whether their terms of an employment being an unconscionable term was void. It was further submitted that from a close perusal of the judgment, the distinction between public law and private aspect in regard to any action of an authority or a State does not appear to have been dealt with. On the other hand, the Constitutional Bench of five Judges in Escort's case (supra) clearly recognised the distinction between actions pertaining to the private law domain. Judicial activism may or may not be supported. But does that mean and imply that a later decision of the Supreme Court, may be by a two-Judge Bench, can or ought to be discarded by reason of the fact that the Supreme Court on an earlier occasion has sounded a different note whilst dealing with a different issue? In my view, the answer ought to be in the negative. It is for the Supreme Court to review the decision of the Central Inland and not for the Judge sitting singly in the High court to comment thereon or to by pass the same. A Judge of the High Court is bound to follow the decision of the Supreme Court and there is no escape from it. This is in spite of the fact that the High Court may have different views and different opinions on that score. The contention of the respondents that while it is true that the Law Courts ought not to restrict itself to the old Draconian Concept of Law and the Law must keep pace with the changed structure of the society, changed circumstances in the country and its economy but that by itself does not mean and imply that the Law Courts would give a go-by to the procedural aspect absolutely. Technicality ought not to outweigh the course of justice but that also does not clothe Law Courts to go much beyond its way and grant relief. If there is another mode of enforcement of right, would it be justifiable and fair to allow petitioners under

Article 226 of the Constitution and thereby open a flood gate of litigation? The Civil Courts have ample jurisdiction to go into the matter of master and servant as it has been done prior to the International Airport Authority's case (supra). Satish Chandra Agarwal (supra) and Purushotham Lal Dhingra cannot be said to be bad law even alter the decision in the Central Inland's case (supra). Does that mean that justice was not administered or there was any scope of restricting the concept of justice? In the event of there being a proper course open, would it be fair on the part of the Law Courts to decry the well-established principles of law?

36. The Respondents further submitted that it is the concept of justice and the long established principles of law ought to be dealt with in a close and harmonious way so that the concept of justice can live up to this expectation. Can it be said that the Civil Courts which have been able to give from time immemorial relief to dismissed employees all on a sudden would turn a deaf ear or would be incapable of doing justice between the parties? If justice has been administered in a particular manner for centuries, let that be allowed to continue and activism on that score may not strictly be in consonance with the concept of justice on the basis of the long established principles of law.

37. I, however, leave the matter at this stage and refrain myself from answering the same, but as noted above, the decision of the Supreme Court is the law of the land and by reason of the decision in Central Inland's case (supra), it is not for this Court to observe contra but to follow the same and it is for the Supreme Court to review its own decision as and when future occasion arises.

38. Having considered the law on the subject, let us now turn to the other factual aspect of the matter. But before so doing, judicial decency prompts the Court to record its appreciation for the assistance of the learned Solicitor-General of India in regard to this issue just discussed.

39. Incidentally it is also be recorded that Dr. Banerjee appearing for the Bridge & Roof Co. did not agitate the issue as regards Article 12 of the Constitution. As such, I am not called upon to go into the issue.

40. On the factual aspect it appears that on 30th August, 1974 the Government of India by a Notification (Gazette of India, Extraordinary Pt. I Section 1) constituted a Public Enterprises Selection Board with functions including appointments to Board level posts. The Bureau of Public Enterprises under the Ministry of Finance acts as a coordinator and Evaluation Agency for Public Sector Undertakings and functions including personnel policies relating to Public Undertakings. As appears from correspondence the Bureau of Public Enterprises and Public Enterprises Selection Board have laid down certain guidelines in regard to the top posts in Public Sector Enterprises. The guidelines being:

I) Policy should be framed in such a way so

as to allow exercise of option to for permanent absorption in a top level post for

a period of five years or till the age of superannuation, whichever is earlier.

And

II) The Bureau of Public Enterprises or the concerned Ministry should review the performance of the appointee after one year before continuing the service of a top Executive for the remaining part of his appointment.

41. Can it, therefore, be said that the petitioner's belief that he would be holding the post as was offered for a period of five years was unwarranted? On the face of the correspondence exchanged between the petitioner and the Appointing Authority-the belief, in my view, cannot be termed to be unwarranted or unreasonable, more so, by reason of the language used in the correspondence, viz. "initially for a period of two years". The Presidential assent and other correspondence unmistakably goes to suggest that the petitioner's appointment was initially for a period of two years which cannot but mean to begin with and it cannot by any stretch be said to be a two-year period certain. By the letter dated 31st August, 1982, the petitioner in no uncertain terms pointed out that permanent absorption of the petitioner should be according to the terms of the Bureau of Public Enterprises or Public Enterprises Selection Board guidelines which regulates the procedure and policies in the matter of appointment to top posts in the Public Enterprises. The approval of the appointment of the petitioner as Director (Finance) of the Company dated 10th November, 1982 also contains that the petitioner's case should be reviewed by the Government at the end of the first year of appointment of the petitioner, which is in line with the guidelines of the Bureau of Public Enterprises. The petitioner was asked to exercise his option as regards the permanent absorption and after the exercise for option for permanent absorption, it is only natural to consider that the petitioner would be occupying the post until the petitioner attains the age of superannuation. The correspondence and the confidential notes also suggest that he ought to be kept upto 31st July, 1987 being the date of his retirement. As a matter of fact, the Secretary, Ministry of Petroleum in his note dated 18th June, 1985 recorded:

As against the observation of Chairman-Managing Director, Bridge & Roof Co., Dr. Chowdhury, that Shri Majumder is unable to adjust himself to the requirements of hard work, imaginative financial planning and strict monitoring of site cost essential for the proper performance", the Secretary stated:- "My predecessor who reviewed the remarks of Dr. Chowdhury did not agree with the Reporting Officer and felt that Shri Majumder has been adequate for the post held by him. When the question of extending of tenure of Shri Majumder came before B.E.S.B., the Board felt that in view of the conflicting reports given by the CMD, Bridge & Roof Co. and my predecessor, the tenure of Shri Majumder may be extended upto 30th June, 1985 and that during this period, I should assess the performance of Shri Majumder to consider whether he is suitable for further extension.

With sustained efforts on his part it has become possible to complete annual

accounts of the company at a much quicker pace than was being done in the past.

The Company appears to be doing well in respect of the fund management.

Coming from Indian Revenue Service, Shri Majumder has adjusted very well in the field of financial management in an Engineering Company.

My impression is that looking at the size of this company and experience of Shri Majumder, he should be able to discharge the responsibility of Director (Financial) in the Bridge & Roof Co. quite well and according to the requirements. Shri Majumder had been a Commissioner of Income Tax at Calcutta and joined the Bridge & Roof Co. on permanent absorption basis from 1st April, 1983. He still has approximately two years service to his credit and his tenure may be extended upto 31st July 1987, the date of his retirement.

42. Subsequent thereto, however, on 26th June, 1985, the Secretary, Public Enterprises Selection Board intimated the Secretary, Ministry of Petroleum, the following:

In view of your positive recommendation, the tenure of Shri K.K. Majumder as Director (Finance) may be extended from 1st April 1985 to 31st July 1987 (the date of his superannuation).

After closely watching their work during the last three months, the Public Enterprise Selection Board in their meeting held on 21st June 1985 recommended that these proposals may be processed further for obtaining the approval of the ACC.

Copies of the orders when issued may kindly 1 be sent to me for information of the PESB.

43. It is to be noted that the recommendation for extension of the tenure of the petitioner of the concerned Ministry as well as the Public Enterprises was effected as appears from the letter dated 30th September, 1983. It is also pertinent to note that on the representation of the petitioner dated 11th July, 1984 the petitioner was informed that the request of the petitioner for his reversion to his parent department (Income Tax) could not be acceded to. Subsequently, on 2nd March, 1984, the petitioner's term was extended by a further period of one year, i.e., 1984-85. This extension, the petitioner submitted and in my view rightly, clearly indicates that the petitioner would be absorbed on permanent basis for a period of five years or till the date of superannuation whichever is earlier.

44. On this backdrop the letter dated 20th September, 1985 addressed to the petitioner has to be considered. Since strenuous submissions have been made as to the aspect of fairness and the conduct of the respondents, the relevant extracts of the same are set out here-under:

In accordance with instructions received from the Ministry of Petroleum, I am relieving you of your duties as Director (Finance) of this company with immediate

effect.

Please hand over charge personally to me this forenoon and make out a brief note on important matters of the company that you did not personally handle upto the time of receipt of this letter. Official papers and documents in your personal custody may also be handed back to me this forenoon.

The company car being used by you in terms of your entitlement as Director (Finance) of this company is hereby withdrawn but may be used for your travel to your residence or any other place of your choice in Calcutta during this day and should thereafter be released immediately with instruction and the driver to return to Howrah Works with the car.

45. Mr. Pal appearing for the petitioner strenuously contended that as the records reveal, there was in fact a decision by the concerned Ministry as well as the Public Enterprises Selection Board and the question of issuance of the above, noted letter does not arise. The attitude of the respondent authority in the matter of issuance of the letter was also strongly commented upon. Mr. Pal submitted that the Director of a company ought not to be dealt with in the manner as the petitioner has been dealt with. I find some justification in Mr. Pal's criticism as regards the conduct of the respondent-authority.

46. An Income Tax Officer after having been selected by the Public Enterprise Selection Board with the concurrence of the Ministry of Petroleum and having served another Public Enterprise ought not to be dealt with in the manner as the petitioner has been dealt with. Better treatment was only expected and some opportunity. It is inconceivable that in the present day state of affairs, Draconian concept would be introduced and a person not less than the Financial Director would be asked to hand over charge after he attends office in the usual course on a particular date. This is not only, in my view, unwarranted but contrary to all recognised principles of law. The concept of "silver" and "gold collar" employee, if to be taken into account, the petitioner turns out to be a "diamond collar" employee. Is it in consonance with the rights, privileges and ethics far apart the question of decorum and decency, considering that the Financial Director would be dealt with in such a manner as he has been? I am afraid, the entire gamut effort seems to be not only an ingenious device to get rid of the person concerned, but a totally arbitrary attitude which the Law Courts cannot stand by as a mere passive spectator. Law Courts exist to remedy the wrong and if the Law Courts do not rise to the occasion, faith and belief in the judiciary would crumble down. Law Courts exist to remedy the wrong and to do so is a plain exercise of judicial power and it ought not to shirk of its responsibility in the matter. The agency appointing the petitioner strongly recommends the extension upto the date of the superannuation of the petitioner. The concerned Ministry is also of the same view. Under what circumstances then this ignominious letter was sent to the petitioner? Some force was acting behind the scene obviously which cannot be termed to be a force in consonance with law, justice and equity. It is at this juncture that Mr. Pal's comment as to fairness in a Government

action ought to be dealt with. In a Socialistic country like ours Draconian concept of law or attitude ought not to be allowed to exist. The laws in regard to the termination of service have taken a definite turn in the recent years in this country. The primitive idea of master and servant does not any longer hold good. On the contrary, the Constitutional protection under Articles 14 and 16 ought to be engrafted in a situation like this. Arbitrary action is an anti-thesis to law, and as such, cannot be allowed to be perpetrated and the Law Courts exist to set right the wrong inflicted on the basis of such an arbitrary decision.

47. In that view of the matter, the order of termination of the petitioner's service from the Bridge& Roof Co. is set aside and quashed.

48. It was submitted that after the decision of the Supreme Court in the case of O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others, , question of reinstatement of the petitioner in spite of everything does not and cannot arise. The decision of O.P. Bhandari's case (supra), however, does not have any manner of application in the facts and circumstances of this case. The petitioner is to retire from his service on 31st July, 1987. On the date of pronouncement of this order, the petitioner, however, will have only barely two weeks left for his retirement. As such, the reasoning in O.P. Bhandari's case (supra) is not attracted and the decision is clearly distinguishable on facts.

49. In that view of the matter, the writ petition succeeds. The office order dated 20th September, 1985 being Annexure "L" to the petition is set aside and quashed and the respondents are directed to reinstate the petitioner with immediate effect. The petitioner is deemed to be in continuous employment since 20th September, 1985 till today and would be entitled to all privileges and perquisites that were available to the petitioner immediately before issuance of the letter dated 20th September, 1985. Since the official vehicle was taken away from the petitioner, on and from 20th September, 1985 the petitioner would also be entitled to a sum of Rs. 2000/- per month on account of car allowance in lieu of the official vehicle until the superannuation. In terms of an earlier order of this Court, the petitioner was paid the salary. In the event the petitioner was entitled to have some other allowances or benefits, the same be also made available to the petitioner,

50. There shall, however, be no orders as to costs.

51. Dr. Banerjee and Mrs. Bhattacharjee pray for stay of operation of this order on the assumption that being a Director of Finance of the company, one cannot rule out the possibility of the petitioner taking some decisions contrary to the policy decisions of the company. The apprehension, however, cannot be said to be unreasonable. Mr. Dutta's client being the petitioner and who is present in Court has given an undertaking before this Court that he would only attend the office tomorrow and day after tomorrow as also on the last day, viz... 31st July, 1987 and will go on leave for the rest of the period. The petitioner has given an undertaking to this Court that no decision whatsoever, either policy or concerning

the financial position of the company, would be taken by him independently of the other directors during these three days when he would attend the office.

In that view of the matter, I am not inclined to grant any stay of operation of this order and the undertaking of the petitioner is however recorded herein.