

(1992) 11 KL CK 0001
In the High Court Of Kerala
Case No : A.S. No. 2 of 1992

N.P. Mathai

APPELLANT

Vs

The Federal Bank Ltd.

RESPONDENT

Date of Decision : 06-11-1992

Acts Referred:

Air India Employees Service Regulations, 2000 — Regulation 34, 48
Banking Regulation Act, 1949 — Section 10A, 12A, 15, 16, 20
Constitution of India, 1950 — Article 12, 14, 16, 19(1), 21
Contract Act, 1872 — Section 2, 23, 2A
Service Discipline and Appeal Rules, 1979 — Rule 1, 148(3), 149(3), 28, 34

Citation : (1992) 11 KL CK 0001

Hon'ble Judges : Varghese Kalliat, J; P.K. Balasubramanyan, J

Bench : Division Bench

Advocate : T.R.G. Wariyar and T.K. Ravi, for the Appellant; P.C. Chacko and Roy Chacko, for the Respondent

Judgement

Varghese Kalliat, J.—This appeal raises difficult and complex questions as to the right of an employer to terminate the services of a permanent employee without holding any enquiry in certain circumstances by giving reasonable notice or pay in lieu of notice. In regard to similar situation, there are good guidelines afforded by very considered judgments of the Supreme Court and this Court in respect of services under State or any instrumentality of the State. As regards private employments, the right hitherto recognised is stemmed from master and servant relationship or an employer employee relationship. Of course, as regards private employments, law has intervened and enacted certain statutes which have given substantial rights to certain employees coaling within the statutory framework of different statutes of the State and the Centre. There is a grey area where there is no statute which can be applied in regard to the procedure to be followed in the matter of termination of an employee" before his due date of retirement, even though he is a permanent employee and working in a well established concern, say for example, as in this case 4 scheduled bank where all the rights and liabilities of the employer and employee generate from the terms of the

contract of service.

2. In this context, in this case, a question which was very much spotlighted by counsel for the Appellant is that though there is a contract of service in the form of Officers Service Code of the Defendant/bank, the important and crucial term of the contract which is decisive for the resolution of the controversy involved in this case is an unenforceable term or a term which can be called a void term, since it is opposed to public policy. The action of termination of service of the Plaintiff challenged in the suit is taken under a provision of the contract of service, viz., Officers Service Code, Ext. A-6. The provision under Ext. A-6 under which action is taken is attacked as a void term. Further it was said that a meaningful interpretation of the crucial provision in Ext. A-6 read along with the other provisions in Ext. A-6 would satisfy the Court that the requirements under that provision also have not been complied with and the Court has got an obligation to see at least whether there is breach of contract, between the parties to the contract and on that score whether the Plaintiff/Appellant before us is entitled to damages.

3. What we have said is only a basis of the cosmorama on which very many complicated and complex ancillary questions have been raised and lengthy arguments have been advanced by counsel for the Appellant and Respondent. As illustrative we would say that it was argued that the principles laid down in regard to the provisions in a rule, regulation, bye-law or enactment providing for termination of services of a permanent employee of a State or an instrumentality of State on giving simply one month's notice or pay in lieu thereof without recording any reason therefore in the, order of termination is arbitrary, illegal, discriminatory and in violation of audi alteram partem rule and so constitutionally invalid and. void and that the same principle as laid down by the Supreme Court is applicable in regard to the services involved in this case.

4. It was pointed out that the declarations in the provisions contained in the fundamental rights chapter involve an obligation imposed not merely upon the "State" but upon all persons to respect the rights declared, unless the context indicates otherwise, reliance was placed on the decision reported in State of West Bengal v. Union of India 208 U.S. 412. It was highlighted that Part III of the Constitution builds a pattern of guarantee on the frame and fabric of basic human rights. The guarantee delimit the protection of those rights in their allotted field. They do not attempt to enunciate distinct right. The extent of protection against impairment of a fundamental right is determined not by the object of the legislation nor by the form of the action, but by its direct operation upon the individual's rights. It is contended that any person who is deprived of his right to livelihood except according to just and fair procedure established by law", can challenge the action as offending the right to life, conferred by Article 21. Counsel relied on the decisions of the Supreme Court in Rustom Cavasjee Cooper Vs. Union of India (UOI), , Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, . Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways,

Maligaon, Pandu, etc., , Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, , Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others, , Union of India and Another Vs. Tulsiram Patel and Others, , Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, ? and Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, . Of course, the above decisions are decisions which dealt with questions in relation to action taken by a State or an instrumentality. Keeping in mind this vital distinction, counsel for the Appellant submitted that a clause authorising the employer to terminate the services of an employee, whose contract, of service is for an indefinite period or till the age of retirement, by "serving only a reasonable notice of termination without any tangible reasons for termination violates the fundamental rights guaranteed under Articles 14, 19(1)(g) and 21 of the Constitution for Article 21 is violated when right to livelihood is taken away by termination of services of a person employed, for a definite period or till the age of retirement except for proved misconduct. It was pointed out that a contract of service is a special species of contract and will be governed by the Indian Contract Act, 1872. The Contract Act is an amending as well as a Consolidating Act. It may not be appropriate in all cases to import the common law of England relating to contract as a basis for deciding any question relating to contract of employment after 1950.

5. u/s 2(A) of the Indian Contract Act, 1872 an agreement (including an agreement of service). Becomes a contract only when it is enforceable by law. If such an agreement is not enforceable in law, Section 2(g) of the Contract Act attracts and renders it void. The question posed, before us is whether a clause in an agreement of service when it is for a definite period or till the age of retirement; providing for termination by giving notice would be enforceable. In this context, counsel wanted to press into service a fundamental point that any agreement would not be enforceable if it violates the brooding spirit of fundamental rights guaranteed by Articles 14, 19(1)(g) and 21 of the Constitution. Relying on Moti Ram Deka's Case A.I.R 1963 SC 124 counsel submitted that the right conferred on the servant to terminate his services after giving, due notice to the employer does not mean much in the present position, of unemployment in this country; but apart from it, the fact that a servant has been given a corresponding right to be retained by the employer and to terminate his Service giving notice or notice pay in lieu of notice is inconsistent with Article 311(2) of the Constitution and so such a rule is unconstitutional. Certainly the context in which this proposition was laid by the Supreme Court is to be borne in mind in applying that principle in the case at hand. Counsel submitted that the general pattern has to be taken note of with corresponding right given to the employee at the time of entering into a service by an employer in lieu of the right retained by the employer to terminate the services of the employee without assigning reason and only by giving one month's notice or two

months or three months notice as the case may be or in lieu of notice the pay for the required months has been held to be invalid. It is held so because of the large economic differences between the two contracting parties, viz., employer and employee. The fundamental postulate of every contract is depending upon the basic requirement of equal bargaining power of the contracting parties. If there is no, equal bargaining power, the contract is liable to be rendered unenforceable. It was pointed out that the I.L.O. Conventions accepted by India required all employers to frame standing orders. Counsel submitted that the demands of natural justice which form part of Article 14 of the Constitution has been raised to the status of public policy controlling Section 23 of the Indian Contract Act. Based on this principle, clauses in contract of employment which provide for removal from service on the will of the employer have been condemned as the Henry VIII clause. Counsel relied on the stringent observations of the Supreme Court in the matter of provisions for termination of service of employees only by issuing notice of termination or offering as compensation for giving notice pay in lieu of notice period, in *Smt. Dhanwanti Vs. D.D. Gupta*, Such a clause, it was submitted, is against the ethos of the Constitution of Socialist Democratic Republic of India. Counsel also relied on *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, . Counsel expanded his arguments that the master and servant relationship required to be tuned to the ethos of the constitutional provisions guaranteeing the fundamental rights under Articles 14, 19(1)(g) and 21 and also 311(2) of the Constitution. It was pointed out that the workers have a right to participate in the management. The employees are mainly responsible for the progress and promotion of the institution or the industry where they work. It is by the sweat of their brow they build the institution or the industry. They participate in the management for the development of the industry or the institution. Hence they acquire a right to participate in the anagement and that participation in the management postulates the principle that the management cannot exclude the power" to be heard in a decision to remove a permanent employee. It was also pointed out According to the Oxford Companion to Law, Henry VIII Clause is a clause, so named in disrespectful commemoration of Henry VIII's tendency to absolutism, occasionally found in legislation conferring delegated legislative power, giving the delegate power to amend the delegating Act, or, usually, any other Act, in order to bring the enabling Act into full operation, or otherwise by Order to remove any difficulty.

that if two provisions exist, (1) to remove from service to hold an enquiry on a charge of a misconduct and (2) without serving a charge-sheet or holding the enquiry, the first provision will be rendered otiose and will be reduced to a mere redundancy or myth. Such provisions in a contract of service where there is very wide gap and difference of bargaining power between the contracting parties will expose the employees who have not admittedly committed any misconduct to harsher treatment than those guilty of misconduct, who may enjoy greater protection than those who have committed no misconduct. Such terms of

agreement are violative of the provisions of Part III of the Constitution and so, when such a term comes before a Court of law for enforcement in private employment; it has to be given effect to unless and until it is not hit by Section 23 Of the Indian Contract Act. Counsel submitted that it is not the obligation of the Court to condone and to give effect to such terms of the contract which goes against the fundamental rights, guaranteed under the Constitution of India and the basic fundamental principles of contract law and the classic statements of law u/s 23 of the Contract Act by eminent Judges, if one of the parties to the contract, the employer arrogate uncontrolled powers opposed to public policy which are neither necessary nor germane for the supposed efficiency of service of the working of the bank's business... Ail uncontrolled distinction of power of choice either to terminate the service of an employee on the ground of misconduct after an enquiry or to terminate the services without resorting to the trouble of making an enquiry, under an apparently innocuous term of the contract by giving notice or notice pay is in the constitutional set up and the advanced theory in regard to master and servant relationship, where many nuances have been introduced by Courts of law in all countries and also by statutes made on the basis of conventions of I.L.O. accepted by Governments would make the provisions in the contract of employment subject to the peril of being rendered unenforceable on the touchstone of Section 23 of the Contract Act." 6. Before turning to the precise questions to be discussed, "we must set the scene by referring to the facts. We shall now advert to the relevant facts to resolve the several questions raised in this case. We feel that we need not give an elaborate factual format at this stage. We give only a short narration of facts which would be supplemented with the details of facts, when we deal with distinctly and separately the questions and issues involved in the case.

7. Appellant before us was the manager of the Trivandrum Statue branch of the Defendant-bank. He was drawing a monthly salary of Rs. 3,273, By communication dated 4th April 1978, invoking Clause 28 of the Officers' Service Code, Ext. A-6, the Chairman of the Defendant- bank informed the Appellant that the services of the Appellant are no more required. Along with the communication, a pay order for Rs. 2,923 being month's salary in lieu of one month's notice was also given.

8. The service particulars necessary for the present are as follows: He was recruited as an apprentice in the first Defendant-bank on 22nd September 1959. He was subsequently confirmed in clerical cadre from 1st January 1960. On 22nd March 1960, he was promoted as officer-in-charge and was functioning as first grade officer from 1961 onwards, till his services were terminated on 4th April 1978 while working as the Manager at Trivandrum Statue branch of the Defendant-bank. The case put forward in the foreground is that the termination order Ext. A-4 dated 4th April 1978 under Ext. A-6 is a penal action and that being a penal "action, which has not been preceded by an enquiry as contemplated by Ext. A-6 is invalid.

9. It was contended that the contract of service does not clothe the Defendant-bank with the right to terminate the services without sufficient justifying reasons and that the service of the Plaintiff is really one to endure till superman nation. It was pointed out that there was no provision in the agreement for retrenchment of the excess staff and that even if the retrenchment has to be effected the junior most officer had to be sent away and when the Appellant's services were terminated, he had put in more than 18. years service and was one of the senior most officers, All the attendant circumstances and the pattern of action preceded would point out that the termination order was nothing other than a punishment and that there was absolutely no justification for the punishment and the rules relating to enquiry and punishment were not complied with. It was further contended that the termination order is in violation of the rules of natural justice and therefore the same is null and void. Appellant submitted that the action of the Defendant bank is mala fide as it was done with ulterior motive. He has highlighted the ulterior motives of the Defendant in his plaint. Appellant has taken the technical plea that the services of the Appellant were terminated not by the board, but by the Chairman and that the board alone has got the power to terminate the services of an officer. Appellant sent a registered notice. It is dated 20th May 1978. Defendant replied, according to the Appellant, raising untenable contentions.

10. Appellant wanted a declaration from the Court that he is continuing in service. He prayed for an injunction restraining the Defendant-bank from obstructing the functioning of the Appellant in office. Alternatively, Appellant claimed for damages by way of compensation for wrongful termination of the services. At the time of termination of services, he was 44 years old and the impugned order has deprived him of a career which he could have continued till he attains the age of 60 the age of superannuation. In the plaint, on the basis of certain statistics and calculation, Appellant has claimed an amount of Rs. 2,09,684 54. Suit was dismissed.

11. Before us, the relief of reinstatement was not pressed. The compensation claimed has been reduced and fixed at Rs. 1,57,584. Now the contentions raised by the Defendant.

12. The Defendant has taken the conventional contention that the suit is not maintainable. The main contention is that the Defendant has got the right to terminate the services of the Plaintiff under Rule 28 of Ext. A-6 and the termination is in accordance with the said rule. The payment made along with the termination order is valid as per the rules: The order of termination dated 4th April 1978, though signed by the Chairman of the bank, he has only conveyed the decision of the Board of Directors. The Directors have taken the decision to terminate the services of the Appellant by resolution No. 9299 dated 28th March 1978 produced and marked as Ext. B-18. Ext. B-18(a) is a copy of Ext. B-18. The stand taken by the Defendant is that the management lost their confidence in the Plaintiff and in their opinion, continuance of the service of the

Appellant was not desirable in the interests of the bank. It was contended that there is no violation of the terms of the contract of service or breach of the service contract between the Plaintiff and the Defendant-bank. It is submitted that the termination order is not a penal action as alleged by the Plaintiff. It has been highlighted that the disputed questions in the case have to be decided on the basic principle that the relationship between the Plaintiff and the Defendant-bank was only that of a master and servant, singularly and exclusively governed by the terms of the contract of service contained in the Officers' Service Code. It is contended that there is no substance in the submission made by the Plaintiff that the Plaintiff has got the right to continue in service during good behaviour and that, no charge need be framed or any other procedure or step was necessary as per the terms of the contract of service to terminate the service of the Plaintiff. The contract does not provide for disclosing to the Plaintiff as to how the Defendant arrived at the opinion that the service of the Plaintiff is undesirable and not necessary. The amount paid along with the termination order is correct and what is due to the Plaintiff as per the terms, of the contract has been given to the Plaintiff.

13. The allegation of the Plaintiff that the action was taken by the Defendant without bona fides and to remove the Plaintiff with a stumbling block the way of promotion and prospects of the Chairman's brother Shri K.P. Cherian is denied. It is also stated that Shri K.P. Cherian was ranked at all times above the Plaintiff and he was senior to the Plaintiff. It was contended that the Plaintiff is not entitled to the declaration claimed or the injunction prayed for on the facts of the case. It is specifically stated that- since the termination order did not involve any breach of contract of service, Plaintiff is not entitled to get any damages. The monetary claim the Plaintiff is entitled to only what is stipulated in Rule 28, which is one month's salary. It was, also contended that even assuming that there is any breach of contract, the Plaintiff is entitled to damages to the extent of one month's salary. The quantum of damages claimed by the Defendant is disputed. and it is further submitted that the Plaintiff was carrying on a partnership with his wife as a partner and was making a monthly salary of Rs. 3,000 which is also to be reckoned for the purpose of determining the damages.

14. The trial Court raised six issues: Out of the six issues, certainly the first issue is alive and relevant; it deals with the question whether the termination of the services of the Plaintiff by the Defendant was null and void or at least wrongful as claimed by the Plaintiff. We have to consider the sweep of this issue in the light of the submissions made by counsel for Appellant on the various ramifications of this issue. Issue Nos. 2 and 3 relate to declaration, injunction and ramifications claimed by the Plaintiff. Those issues are not very relevant now. It is not possible for this Court to declare that the Plaintiff is now in service and counsel did not press for this relief. Similarly, it is not possible for this Court to grant an injunction restraining the Defendant-bank from preventing the Plaintiff to work in the bank and to hold that the Plaintiff is entitled to be reinstated in Defendant's services. Those issues were not pressed before us. Issue No: 4 related to the

Plaintiff's entitlement to damages and its quantum. An additional issue is framed as to whether the Defendant-bank has got the right to terminate the service of the Plaintiff at its will and pleasure. After considering the issues, the Court below found that the termination of the services of the Plaintiff is valid and that the Plaintiff is not entitled to any relief. The suit was dismissed.

15. Counsel for the Appellant submitted that the Court below has not considered the question involved in the case in the light of the progressive nuances made in the master and servant relationship to advance the security of tenure of service of employees of the State and instrumentalities of the State in various decisions of the Supreme Court, which though rendered, have made a serious dent in the Orthodox View of master and servant relationship, which has given the whip hand of hire and fire applying the Henry VIII Clause. Counsel for the Appellant very much relied on several decisions of the Supreme Court dealing with the subject and concerning the termination of service of an employee of a Government or a State or an instrumentality of a State within the meaning of Article 12 of the Constitution. Counsel particularly relied on certain observations in Delhi Transport Corporation case and Smt. Dhanwanti Vs. D.D. Gupta,

16. Counsel also referred to a host of decisions all of course, relating to termination or provision for termination of service similar to Rule 28 of Ext. A-6, in regard to Government servants or servants of a State or an instrumentality of a Government under Article 12 of the Constitution. Counsel raised the point that the particular provision of Rule 28 of Ext. A-6, which is accepted as the service contract between the Plaintiff and the Defendant is an unenforceable term since it is opposed to the provisions contained in Section 23 of the Contract Act. This contention was taken only before us.

17. Counsel in this context" submitted that while dealing with the validity of the provisions similar to Rule 28 of Ext. A-6 in statutes or rules governing the service conditions of Government, servants or servants of State or instrumentalities of State, the Supreme Court had occasion to declare the provisions invalid or unenforceable, relying on Articles 14, 16 and 311 of the Constitution and Section 23 of the Contract Act as an unconscionable term in a contract, of employment considering the unequal bargaining power of the employer and employee. (Certainly manifesting a very activist decision making process, to meet the ends of justice in the changed social set up and taking into account the ethos of constitutional principles and the brooding all pervasive spirit of the very preamble of the constitution).

18. Counsel rightly submitted that being a question relating" to public policy u/s 23 of the Contract Act, and what is claimed is that this Court should decide the case holding that the term of the contract relied on by the Defendant is being a term opposed to public policy, such a contention can be taken even if it has not been raised at the first instance when all the facts necessary to decide the question are before the Court Certainly, this question has to be considered in this case.

19. Counsel submitted that assuming that Rule 28 is an enforceable term of the contract of service the rule contemplates certain requirements, circumstances and facts to exist for the operation of that rule and in this case, on an examination of the evidence it is possible to hold that the requirements, facts and circumstances necessary to put in action- Rule 28 of Ext. A-6 are not in existence. Counsel submitted that an objective decision process is involved in Rule 28 and so, the Defendant is liable to satisfy the Court by placing relevant and sufficient materials by adducing evidence that the facts, disclosed in the case justified an action under Rule 28 of Ext. A-6. As a supplemental argument in regard to this point, counsel submitted that since the hire and fire rule has practically vanished in master and servant relationship or employer employee relationship even in the case of the operation of Rule 28, an objective assessment of the requirement of Rule 28 of Ext. A-6 is necessary and in this case it has not been done or at any rate it has not been established before the Court. We are bound to discuss this point.

20. Thirdly, it was contended that though Ext. A-4 termination order is said to be not punitive, it is really punitive and the Court has got always the power to lift the veil and see the real nature of the order and if the Court is satisfied that the action taken is punitive even on the basis of the contract of service relied on by the Defendant the Plaintiff can legitimately claim for a proper enquiry of his case conforming to the natural justice principles as provided in Ext. A-6 itself. Obviously in this case it has not been done. Necessarily this Court is bound to examine this aspect also.

21. Counsel for Respondent submitted that the Supreme Court has not considered the validity of any similar provision singularly based on Section 23 of the Contract Act. Counsel agreed that of course in certain cases Section 23 of the Contract Act also has been mentioned while faulting certain provisions similar to but not identical to Rule 28 of Ext. A-6. He emphasised the fact that the Supreme Court has never declared a provision similar to or nearly similar to Rule 28 as void or unenforceable on the basis of Section 23 of the Contract Act. Counsel submitted that the provision contained, in Rule 28 can never be considered as a "hire and fire rule" or in the nature of Henry VIII Clause. It was submitted that the characterisation of Rule 28 as a hire and fire rule is an exercise of legal extravagance and not meritorious.

22. Counsel next submitted that Rule 28 is valid and it cannot be faulted u/s 23 of the Contract Act and further that the rule only contemplates certain primary requirements which are absolutely in the realm of the subjective satisfaction of the management and it is intended for the best interest of the Defendant/bank. The Court cannot compel the management, to satisfy the Court objectively the existence of the conditions under Rule 28 though the Respondent has discharged that burden also; by producing the relevant" records and the past history and conduct of the service of the Plaintiff before the Court.

23. Counsel for the Respondent refuted the submission that the action taken by

issuing Ext. A-4 order is, penal in character. The action envisaged in Rule 28 is a measure for securing and safeguarding the best interest of the bank without causing any injury to the employee who happens to come under the operation of Rule 28. Counsel further submitted that the lifting of the veil theory is not" applicable in this case and the Court is not bound to exercise such a jurisdiction and that" even if the veil is removed and the facts are examined, namely the. Relevant facts preceding the issuance of Ext. A-4 it would certainly disclose that the action under Ext. A-4 is not taken, as a punitive measure. Counsel submitted that considering the facts disclosed before the Court by the oral and documentary evidence adduced, it is possible for the Courts to discern that the conduct of the Plaintiff richly deserved the action taken under Ext. A-4 which was only to secure, the interest of the bank and not to cause any injury in the future career of the Plaintiff or for covered motive to impose a punishment to the Appellant Plaintiff.

24. Counsel for the Respondent further submitted that the principles of canons of natural justice like audi alteram partem and other procedures of natural justice cannot be imported in the matter of enforcing a contract, The questions of natural justice fairness and fair treatment and audi alteram partem rules are all in the realm of decision making process by, a decision maker and not applicable to termination of a contract by one of the parties to the contract, who himself holding that there is breach of contract by the other contracting party Counsel submitted that the Plaintiffs claim can be based only on a breach of Contract and in that context Plaintiff cannot say that there is breach of contract, since the party" who has taken action under the terms the contract did not act fairly or did not conform to the rules of natural justice. Counsel submitted that even if a party has acted fairly and conformed to the rules of natural justice and if he has committed breach of contract, the other contracting party will have a cause of action. So, the only question the Court can look into is as to whether there is a breach of contract in the action taken by one of the contracting parties, viz., the bank in issuing Ext. A-4 order of termination. Counsel submitted that Ext. A-6 is binding on the Plaintiff, since it is not disputed that the dispute in this case has to be decided on the basis of Ext. A-6 admitted to be the contract between the parties.

25. It was strongly controverted that Rule 28 does contemplated any penal action and that Ext. A-4 order issued under Ext. A-6 has any penal consequences and it is not penal in character. A closer examination after lifting" the veil as suggested by counsel for the Appellant if adopted by the Court, then also it is possible for the Court to hold that the action is perfectly justifiable and that it cannot be" characterised as a penal action.

26. Counsel for the Respondent did not seriously controvert that the quantum of damages claimed is excessive though he emphasised that the Plaintiff has no entitlement to get any damages on the basis of the claim of the Plaintiff.

27. Before discussing the points raised by counsel for the Appellant and which

have been controverted and defended by Respondent, we feel that we are obliged to advert to the evidence in the case. In adverting to the evidence in the case, we feel that primarily we have to examine the relevant facts preceded before the issuance of Ext. A-4. This we do so, since we feel that those facts have got a bearing on all the questions raised before us. We also feel that it will help us to know the content of" Rule 28 of Ext. A-6 in action. It will also be helpful to decide the question whether Rule 28 the attacked term of the contract is opposed to public policy or not. In short, when we decide whether Rule 28 is opposed to public policy we are doing it not in a vacuum but only after understanding the operation of Rule 28 at least in one case, seeing the rule in action.

28. Ext. A-1 dated 22nd September 1959 is an order by the Managing Director of the bank informing the Plaintiff that the bank has accepted the application of the Plaintiff and admitted him as an apprentice for a period of six months, on a monthly stipend of Rs. 55 without giving any guarantee for the appointment, meaning thereby no guarantee for continuance. The appointment of the Plaintiff was confirmed in the clerical cadre with effect from 1st January ,1960 and transferred him to a new branch at Munnar as Accountant. This is evidenced by Ext. A-2. Ext. A-3 is the service record of the Plaintiff. From the service record, it is seen that the Plaintiff is a law graduate and has undergone training in Bankers Training College, Bombay, passed Part I of C.A.I.I.B., exam, and has undergone training at B.T.C., Bombay-personnel and organisation, passed Part II of C.A.I.I.B., passed Diploma in Business Management with distinction. Ext A-3x gives the service particulars from the date of his appointment till 8th April 1971.

29. Ext. A-4 is the order of termination. We quote the relevant part of the order: "As your services are no more required, your service in the bank is terminated with " immediate". Along with Ext. A-4, the pay order issued is Ext. A-5. Ext. A-6 is the copy of the Officers" Service Code of the Defendant/bank. Ext. A-7 is the unsigned copy of the suit notice sent by Plaintiff"s counsel to the Chairman of the Defendant/bank and Ext. A-8 is the reply to Ext. A-7 notice. Exts. A-1 to A-8 except A-4 .may not give any clinching material to resolve the questions raised in this case.

30. Ext. A-9 is an important document. It is the printed copy of the General Secretary"s report, balan-

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In spite of the several appeals made by the Association, the management has ruthlessly terminated the services of one of our able and efficient officers on an alleged flaw or omission without caring whether by that action the bank has lost the chances of recovery of the amount involved, and/or of meeting out suitable punishment, to the offender. This was the first omission on the part of the terminated officer. The first offender is given the maximum punishment as a spite against the organised voice of the officers. The anomaly is glaring when we

notice that the selfsame management rewards habitual offenders. We have every reason to believe that one of our officers who during his very short period of independent charge of branch, due to his administrative inefficiency, had landed the bank in the whirlpool of a" series of litigations! loss of money and loss of business. When given Anr. short chance of independent charge after several years has again been instrumental and responsible for a number of advances involving several lakhs of rupees now being commented by our internal auditors as doubtful of recovery. The punishment awarded for the repetition of offences and chances of loss is an assignment involving higher responsibility. When these two model punishments are considered, we cannot for a moment expect to have a fair, impartial and uniform application of punitive action

* * * * * 31. In the background of the above quote, the Chairman wanted some explanation. In Ext. A-10, the Chairman has said that he was not in a position to understand who was referred to in the report and that he called one Mr. C.O. Thomas one of the executive committee- members and collected some informations. Further it is said that the manuscript for printing the report was sent by the Plaintiff. The Chairman wanted the Plaintiff to substantiate, the allegations in the report particularly what has been quoted in Ext. A-10 and also to give the source of information contained in the quote. Further, the Chairman said thus: "Assuming, but not admitting, the published allegations are true, disclosure of the same is breach of secrecy. They also act, prejudicial to-the interest of the bank and hence gross misconduct. Such publication also tantamounts to undermine the confidence in the bank in the eyes of the public". The Chairmaji wanted explanation of the Plaintiff's conduct within a week from the date of that letter. Further it is stated that if no reply is received, it will be presumed that the Plaintiff has admitted the gross misconduct and the Defendant/bank will be proceeding accordingly. Ext. A-10 memo was replied by Ext. A-11. In the reply, Plaintiff said that the Federal Bank Officers' Association has instructed him to submit the explanation he has given in Ext A-11. It is said that the report is a document circulated among the members of the Association only, and that the Association consists of the officers of the Federal Bank only and the general internal affairs of the bank are known to the Association and that the Association or its members had no intention to undermine the prestige of the bank while preparing the report. In reply to what is quoted in Ext. A-11 Plaintiff said thus: "The referred portion of the report was intended only to show the anomaly in the matter of punishment and promotion". Further the Plaintiff said that the Chairman ,has viewed the matter in a different way. According to counsel for the Appellant, the friction or rankle between the management and the Plaintiff was set fire to when Ext. A-10 was sent to the Plaintiff and the Plaintiff sent Ext. A-11 to the Defendant.

32. Ext. A-12 is Anr. memo sent by the Chairman of the Defendant/bank to the Plaintiff. In this memo, the Chairman has referred to the earlier memo Ext. A-10 and said that the Plaintiff has been given an opportunity to give his explanation a that the Plaintiff has not availed of that opportunity even though he has sent a

reply on 3rd May 1977. which according to the Chairman, did not contain any explanation of the conduct alleged against the Plaintiff. By Ext. A-12, the Chairman gave Anr. , chance to the Plaintiff to give his explanation. Seven days time was given to give a detailed explanation. In this letter also the Chairman said that if no explanation is received, it will be presumed that the Plaintiff has admitted the gross misconduct and the bank will proceed on that basis. Ext. A-12 is replied by Ext A-13. Plaintiff in his reply in regard to the report which was subjected to by the Chairman said that it was drafted on the basis of the discussions held at the committee meeting of the Federal Bank Of ijoer?s Association and that the, report therefore reflects the views of the committee and not the individual view of the person who has drafted it. Further he said that the draft was approved by the executive committee and was later accepted by the gene body and so the contents of the report can be treated only as the views of the Association as a body. He further said that the report was circulated only among the members of the Association and so he has no individual responsibility in regard to paragraph 12 of the report, Plaintiff said that the contents of paragraph 12 of the report was to, indicate that there was no uniform policy for the management in the matter of clearing with erring employees and that the report did not disclose any specific transaction, and no name was mentioned. No information, regarding specific transaction of customers were divulged and that the report was circulated among the members who Pare all officers of the bank and who were also -aware of all the facts stated, therein. Plaintiff justified the contents of paragraph 12 by stating that the facts well known to the members were mentioned in paragraph 12 only to support the conclusions drawn therein and so paragraph 12 of the report thus is allot a case of disclosure of information. He f explained thus; ?Ventilation of grievance of an organisation of officers regarding the double standard in the matter of punishment and promotion cannot be equated to committing of acts prejudicial to the interest of the bank by individual employees nor it be said that it as to undermining the confidence of public in the bank?. Ext. A-14 is the reply to Ext. A-15. The Chairman said that the explanation Ext. A43 of the Plaintiff was not at all satisfactory and that the matter was referred to the board for consideration in its meeting dated 28th July 1977.

33. Ext. B-16 is the minutes of the board"s meeting held on 28th July 1977, From Ext. B-16, it is clear that" the Chairman placed the explanations received from the Plaintiff and Sri N.M. Mathai, the then Secretary of the Association. It seems that the memos were served on both the Plaintiff and Sri N.M. Mathai on 16th May 1977. The memo served to the Plaintiff is Ext. A-12. -In the resolution, it is recorded that the explanations are not satisfactory and noted that "however, at least the Courtesy to add the following... I with all my humility believe that I was loyal and sincere to my institution during the past 16 years of service and I promise you, Sir, I will serve the institution, with the same spirit and enthusiasm". In regard to Sri N.M. Mathai, it was resolved that further action against him be dropped with a warning against repetition of the same in future.

In regard to the Plaintiff, the board took a decision that the Chairman should place a detailed report regarding the past conduct of the Plaintiff.

34. We may refer to Ext. A-15 also in this regard. It is a representation dated 16th August 1977 by the then General Secretary with reference to the explanations asked for from the Plaintiff and Sri N.M. Mathai. The Secretary has requested the management on-behalf of the executive committee of the Federal Bank Officer's Association to stop all proceedings against the Plaintiff and Sri N.M. Mathai Mathai The Federal Bank Ltd.?Varghese Kalliath, J. Further it was said that if at all any action to be taken, it should at least be against all the then executive committee members. Taking of action against any one or two members of the committee can only" be viewed as victimisation and requested the management to desist from such a course. Though by the resolution dated 28th July 1977 the Board directed the Chairman to make a report about the past conduct of the Plaintiff, on 1st September 1977 the Chairman sent a letter to the Plaintiff stating that the explanation of the Plaintiff has been recorded. But the Chairman, in response to Board's resolution dated 28th July 1977, submitted a report, Ext. B-17, regarding the past conduct of the Plaintiff. The Chairman has catalogued certain misdemeanor arid conducts not befitting to the office of the Plaintiff. He catalogued all such instances and circumstances" into consideration, and said the he (Chairman) has lost his confidence in the usefulness and utility of the Plaintiff. But the Chairman then said that he is not recommending any immediate drastic action against the Plaintiff especially because he is on the look out for jobs elsewhere. Further it is stated in Ext, B-17 that the Plaintiff has sent an application to the Cabinet Secretariate (Department of personnel and A.R.), New Delhi for employment in foreign countries and that the Plaintiff has requested by his letter dated 21st July 1977 to take up the assignment of an arbitrator for the settlement of disputes arising out of work, done by some of the contractors of the Kerala State Electricity Board. Further the Chairman said that even though it is not proper to allow a Manager to accept an assignment like that of an arbitrator, however, it was allowed by the board as a special case on the recommendation of the Chairman. The report of the Chairman was considered by the Board and the Board was of opinion that" "the continuance of the service of Sri N.M. Mathai will not be in the, interest of the Bank. Still, it is resolved that in view of the recommendation of the Chairman, no drastic action may be taken against him immediately, however, the Chairman may move any suitable action against him in due course".

35. After Ext. B-17, though chronologically Ext. B-53 dated 21st January 1978 has to be discussed, we shall now advert to Ext. B-18 before discussing the evidence supplied by Ext. B-53. Ext. B-18 is a crucial document. "It is a resolution of the Defendant/bank in the matter of action to be taken against the Plaintiff. In Ext. B-18, it is stated that the Chairman has placed before the board a report wherein he has stated that in his earlier report about the Plaintiff (reference is to Ext. B-17) the Chairman has stated that he has lost his confidence in the usefulness and utility of Shri N.M. Mathai. Further it is stated

that his conduct subsequent- to the said resolution has convinced him that his continuance in the service of the bank is highly detrimental to the interest of the bank. Ext .B-18 states that throughout the Plaintiff was indifferent in the matter of developing the business of the. branch and that he did not make any efforts towards mobilisation of deposits; A serious, allegation is made that the Plaintiff played an important part in the publication of the news item about the Bank in the Blitz dated 21st January 1978 (Ext. A-53). According to the Chairman, he was responsible to a good extent for causing the "recent" withdrawals from some branches of the bank and that he was all along trying to foster groupies among the officers of the bank. It is also said that the Plaintiff has caused distribution of an anonymous letter maligning the top executives of the bank. Finally the Chairman recommended immediate termination of the Plaintiff. The board considered the report of the Chairman in all its aspects at length and resolved that the services of the Plaintiff should be terminated with one month's pay in lieu of notice. This resulted in. issuing Ext. A-4 which has given the cause of action for the suit.

36. We feel that the documentary evidence Exts. A-10, A-11, A-12, A-13, A-14, B-16, B-17, A-16 and B-18 have to be discussed coactively and concurrently in view of their continuity. By Ext. A-12 the Chairman has said that the Plaintiff's explanation Ext. A-11 to the memo Ext. A-10, dated 13th October 1977 does not contain any explanation and that if no further explanation is received, it will be presumed that the Plaintiff has admitted the gross misconduct and the bank will proceed on that basis. By Ext. A-13, Ext. A-12 was replied. The Chairman said that Ext. A-13 explanation is not satisfactory and the matter is referred to the board for consideration. Thereafter Ext. B-16 resolution was adopted by-the bank which we have already referred to. In Ext. B-16, the Chairman was directed to place before the board a detailed report Regarding the past conduct of the Plaintiff. Thereafter, in response to the resolution passed (Ext. B-16), the Chairman, presented before the board a report which contained 10 important out of tune and malapropos instances in the conduct of the Plaintiff during the period beginning from 23rd November 1961 till the date of making the report by the Chairman. It was presented in the board meeting held on 11th August 1977. But even though 10 instances were mentioned there and the board said that the continuance of the Plaintiff will not be in the interest of the bank, it resolved that no drastic action is necessary immediately and made it clear that the Chairman may move any suitable action against the Plaintiff in due course. This is Ext. B-17. The Chairman, after Ext. B-17, sent a letter Ext. A-16. It is dated 1st September 1977 wherein he has said that the explanation of the Plaintiff is recorded. Thereafter, it is seen that Ext. B-18 resolution was passed by the bank, resolving that the services of the Plaintiff "should be terminated with one month's pay-in lieu of notice. We have discussed these exhibits to show that the action taken by the bank can legitimately be considered as a continuation of bank's case of serious misconduct on the part of the Plaintiff, revealed from Ext. A-12.

37. Now we feel that it is time for us to consider the terms of the contract Ext. A-6. Ext. A-6 is the Federal Bank Officers' Service Code. It is a consolidated code of service conditions of the officers of the Defendant/Federal Bank. As we said earlier, we are proceeding on the basis that this code has to be treated as the contract of service between the Plaintiff and the Defendant/bank. Clauses in this code are really the terms of the contract. We are mainly concerned about Chapter VII of Ext. A-6. Clause 26(a) provides as a condition that every officer shall retire, from the service of the bank on completing 55 years of age. Of course, we are told that this 55 years of age has been increased to 60 years of age. We are not very much concerned about it. Clause 27 provides a privilege and right to an officer to resign from the service of the bank by giving one month's notice in writing to the bank or paying the bank one month's salary in lieu of such notice. But it has been made clear that this clause will be subject to any agreement which the officer has entered into with the management. Then comes the crucial clause under which action has been taken, we feel that it has to be reproduced:

28. The management may terminate the service of any officer by giving him one month's notice in writing or one month's salary in lieu of such notice, if, in the opinion of the management continuation in service of such officer is not desirable in the interest of the bank and/or if the officer continuously fails to show results.

In this clause, the bank retains a very high power to terminate the services of an officer as against the right given under Clause 26(a) to an officer to continue in service till he attains the age of 55. Of course, it is made clear that this power can be exercised only if in the opinion of the management continuation in service of such officer is not desirable in the interest of the bank. It is further provided that the services can be terminated if the first condition is satisfied and/or if the officer continuously fails to show results. Clause 29 is not very relevant for resolving the controversy in this case. Clause 30 has some impact in testing the validity of Clause 28 applying Section 23 of the Contract Act. Clause 30 provides that any officer who is dismissed or whose services are terminated under the provisions viz. the provisions contained in Clauses 28 and 29, may be paid gratuity by the management at its discretion. Clause 29 says that any officer found guilty of any offence involving moral turpitude by any Court or law or adjudged insolvent by any Court of law or insane or against whom an arrest warrant has been issued by any civil Court or arrested or detained under any provision of law for the time being in force may be dismissed by the management from the service of the bank or compulsorily retired from the service. The second part of Clause 29 provides that an officer who has been prosecuted by the State for any offence under the Indian Penal Code or any special laws may in the discretion of the management be discharged from service or compulsorily retired from service whether he is adjudged guilty or not by the criminal Court. It has to be noted that the termination of service under Clause 28 is equated to the dismissal under Clause 29 in the matter of payment of gratuity by the management.

38. 28 Chapter VIII of "Ext. A-6 deals with discipline and disciplinary action. Clause 41(a) provides that every officer found guilty of any misconduct or offence may be awarded punishments detailed as i to vi and in Clause 41(b) for the purpose of the code certain acts are enumerated as misconduct. In Clause 41(xx), it is provided that apart from the named acts "which should be construed as misconduct the management retains the power to determine any other act or acts as misconduct. Clause 41(c) is important. There it is stated that the officer who is alleged to have committed any misconduct shall be given an opportunity to explain his conduct specifying the time before which such explanation should be submitted and a detailed procedure is prescribed for institution of an enquiry in appropriated cases. Power of suspension if the management deems fit is also provided. When the disciplinary action is taken the officer gets a right to submit a Review petition or appeal to the board within 30 days of the receipt of original order by him. However, it is made clear that in the case of misconduct the officer can be proceeded with only on a detailed enquiry and the officer gets all opportunities to establish that he is not guilty of the conduct alleged against him. We are emphasising this fact since it was urged that the action taken against the Plaintiff is an action really not under Clause 28, but an action based on an alleged misconduct.

39. In this context, it is pertinent to note that Ext. A-12, which is one of the documents that can be included in that package of documents which culminated on Ext. A-4, makes it clear that the bank wanted to proceed against the Plaintiff for "gross misconduct". We would further discuss this aspect of the matter when we consider the question Whether the Plaintiff can claim that Ext. A-4 is illegal, since in all intends and purposes the bank wanted to punish the Plaintiff for his misconduct, but the bank .has resorted to an enervated" defenceless procedure placing the Plaintiff on his beam ends by terminating his services by giving him one month's pay in lieu of notice indicating that the action is taken under Clause 28 of Ext. A-6.

40. We now proceed to consider the larger issue as to whether Clause 28 is a valid clause and whether it can be a valid term of contract of service being not opposed to public policy. When we approach the question relating to a contract it is always necessary to bear in-mind the distinction between a "rule of law" and a rule of construction. It is said that English Law in its long life has generated this dichotomy. The rule in-Shelley"s Case abrogated in 1925 after three centuries of controversy is the classical example of this dichotomy. Its memory is happily embalmed in a judgment of sustained irony delivered by Lord Mac Naghten in Van Grutten v. Foxwell (1897) A.C. 658 (vide Cheshire Fifoot and Furmoston"s Law of Contract Eleventh Edition.) A rule of law is to be applied whether or not it defeats the intention of the parties. A rule of construction exists to give effect to that intention. Within the sphere of contract the doctrine of public policy operates as a rule of law: a contract which offends it is void despite the wishes of the parties.

41. Public policy as understood in common law has been translated into a statutory frame as Section 23 of the Contract Act in Indian Law. Public policy is not a static one. It reflects the mores and fundamental assumptions of the community, the content of the rules should vary from country to country and from era to era. There is high authority for the activist view that in matters of public policy the Courts should adopt a broader approach than they usually do to the use of precedents-see *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* (1894) A. C. 535 at 553 (Lord Watson). Flexibility in the matter of public policy may demonstrate in two ways; one by abrogating or closing down of existing heads of public policy and two, by opening of new heads. An existing head of public policy may find redundant. A Court may find that such a public policy is opposed to general public interest, or opposed to the fundamental law of the country. Then the Court is free to say that public policy which was accepted by precedents need not be followed. This can be illustrated by referring to the fact that in the nineteenth century it was stated that Christianity, was part of the law of England and that accordingly a contract to hire a hall for a meeting to promote atheism was contrary to public policy-see *Cowan v. Milbourn* (1867 L.R. 2 Exch. 230. But fifty years later this view was decisively rejected-see *Bowman v. Secular Society* (1917) A.C. 406. Even with regard to the question whether the Courts still retain freedom to recognise new heads of public policy there is controversy. Of course in India there exist clear exposition of law on this aspect of the matter made by the apex Court. We do not think that it is still a controversial point whether-the" Courts have the freedom to recognise new heads of public policy In England it has been said that there is no such freedom-see *Janson v. Drieforitein Consolidated Mines* (1902) A.C. 484, *Geismar v. Sun Alliance and London Insurance Ltd.* (1978) Q.B. 383 ;(1977) 3 All. E.R. 570. Lord Thankerton Said that the task of the Judge in this, area wag "to expound and not to expand"-see *Fender v. St. John Mildmay?*(1938) A.C.1 : (1937) 3 All. E.R. 402, *Brooks v. Burns Philip Trustee Co. Ltd.* (1969) A.L.R. 32 The proposition to expound and not to expand" is found to be artificial, since it is possible to find developments within the existing heads and it is difficult to assert that new circumstances cannot arise which do not fall readily into any of the recognised heads. In fact, in England also "Courts have responded to this" challenge in the past by the development of new heads and it is thought that they will, in exceptional circumstances, do so again"-see *D. v. NSPCC* (20) *Riddick v. Thames Board Mills Ltd.* (1978) A C 171 *Initial Services Ltd. v. Pietterill* (1961) 2 All E R 33.

42. In (1977) 3 All ER 67 (*Riddick v. Thames Board Mill Ltd.*) Lord Denning MR observed thus:

(b) If the Defendants as employers were to be treated, on the basis of the doctrine of Respondent superior, as being responsible for any act committed by one of their employees in the Courts of his employment, whether or not the act was authorised, the Defendants could nonetheless escape liability because public policy required that any confidential memorandum made by one employee about

Anr. should be exempt from the doctrine of Respondent superior, even if the memorandum had been made maliciously.

Lord Denning's certain statements in *Treseder Griffin v. Co-operative Insurance Society Ltd.* (1961) 2 All E R 33 is significant. That case concerned the effect of a clause in a long lease which provided for the payment yearly during the said term either in gold sterling or bank of England notes to the equivalent value in gold sterling the rent of 1900 pounds by equal quarterly payments. The main point at issue was one of construction. But Lord Denning observed that it is disturbing to find a creditor inserting a gold clause in a domestic transaction. I am not altogether sure that it is "lawful." This case was considered in *Multiservice, Bookbinding Ltd. and Ors. v. Marden* (1978) 2 All ER 489 Browne-Wilkinson, J. observed that "Lord Denning prefaces the material passage by the words, "I am not altogether sure that it is lawful". These are not words of decision but of doubt" and found that Lord Denning's observation that the gold clause in a domestic transaction is perilously near the rule of public policy which renders the term void is only obiter and need not be followed and refused to follow the obiter dictum of Lord Denning. As a final observation," it" is possible to state as to the way in which the English Courts determined the contents of public policy thus: "Apart from reliance on previous precedents, this is done by a priori deduction from broad general principles. It is not the practice in English Courts for the parties to lead sociological or economic evidence as to whether particular practices are harmful and it is doubtful to what extent such evidence would be regarded as relevant if were adduced,-see *Texaco Ltd. v. Malberry Filling Station* (1972) 1 All. L.R. 13 and Brandeis Brief in American Law: *Muller v. Oregon* 208 U.S. 412

43. We think that we have to advert to Section 23 of the Contract Act now. Marginal note of that section is "What consideration and objects are lawful and what not". We shall quote the entire section:

23. What consideration and objects are lawful, and what not. The, consideration of object of an agreement is lawful, unless:

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injuries to the person or property of Anr. ; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of ail agreement is said t6 be unlawful. Every agreement, of which the object of consideration is unlawful, is void.

Of course, the object of the agreement or consideration is lawful unless it is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law or is fraudulent and in that context it has been said that such an agreement is lawful only if it is not immoral or .opposed to public policy.

In construing this provision, there are number of decisions which have plainly and clearly voiced the view that though the Courts ought. to be very anxious in deciding a question of public policy, the Courts are bound to take note of the developments of public opinion and morality and the doctrine must be applied with necessary variation and each case has to be decided on its facts.

44. In a very exhaustive Division Bench judgment of Andhra Pradesh High Court reported in *Ratanchand Hirachand Vs. Askar Nawaz Jung and Others*, , Chinnappa Reddy, J. as he then was, considered the position whether the heads of public policy should be added by the Courts and held, it can reject the arguments that new heads of public policy should not be evolved, since it involves risk of unruliness and uncertainty. The Court held, that in a modern progressive society with fast changing social values and Concepts new heads of public policy need be evolved, whenever necessary. The learned Judge said that "law cannot afford to remain static. It has of necessity, to keep, pace with the progress of society and judges are under an obligation to evolve new techniques or adopt-old techniques to meet the new conditions and concepts". The Court further held that even where the parties have waived the objection, the Judge coming to notice it should hold the agreement void. It is apposite to note that as early as in 1923 the Madras High Court has taken the view that the question of public policy can be taken first time in arguments though not pleaded- vide *E.A. Janu Sait Vs. N. Ramaswami Naidu*, .

45. Chinnappa Reddy, J. as he then was, in the above case *Ratanchand Hirachand Vs. Askar Nawaz Jung and Others*,) quoted what Subba Rao, J. said in *Cherulal Parakh v. Mahadeo Das* A.I.R 1956 SC 781. We may repeat that quote here:

The doctrine of public policy may be summarised thus: Public policy or the policy of the law is an illusive concept; if has been described as untrustworthy guide", "variable equality", "uncertain one", "unruly horse" etc., the primary duty of a Court of law is" to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is harmful thing" but the doctrine is extended not only to harmful cases but also to harmful tendencies this doctrine of public policy is only a breach of common law, and, just like any other breach of common law. It is governed by precedents the principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them to different situations it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional, circumstances of a changing world, it is advisable in the interests of stability of society not to make any attempt to discover new heads in these days.

Quoting what is said above, His Lordship said that it will be noticed that the

Supreme Court did not altogether ban the evolution of a new head of public policy and said what we have already said to the effect that in a changing society, where concepts and social values are taking new dimensions the law should not remain static. In *Nagle v. Fielden* (2Q)633. Danckwerts L.J. said thus: "The law relating to public policy cannot remain immutable. It must change with the passage of time. The wind of change blows, up to it". Professor Winfield described public policy as "a principle of judicial legislation or interpretation founded on the current needs of the community". It is clear that Winfield thought that public policy was necessarily Variable and that its very variability was its surest foundation. In an essay on "Public Policy in the English Common Law" (42 *Harvard Law Review* P. 76), it is said that: "Public Policy is necessarily variable. It may be variable not only from one century to another, not only from one generation to another, but even in the same generation. Further it may vary not merely with respect to the particular topics which may be included in it, but also with respect to the rules relating to any" one particular topic...A This variability of public policy is the corner stone in the edifice of the doctrine, and not a missile to be flung at it. Public Policy would be almost useless without it.

46. The limitation put on the rule of public policy evolving new heads of public policy or restraining the Court from evolving public policy attuned to the social changes was based on the concept of freedom of contract which was found to be fundamental in the day when *laissez faire* ruled the roost. This is seen from what is stated by Lord Jessel M. R. in 1875: "You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract". But, *Laissez faire* had its day and its corner stone, "Freedom of contract" has now ceased to have the idealistic attraction it swayed in the 19th century. Certainly we are more concerned and the Courts are bound to take note of the constitutional provisions which aim at a socialistic society where Social Justice, egalitarian principles and evolution of a welfare state take the pride of place; the message of the Constitution is the social and economic interest of the community and "to fix certain social and economic goals for-immediate attainment by bringing about a non-violent, social revolution. Through such a social revolution the constitution seeks to fulfill the basic needs of the common man and to change the structure of the society". In Article 43A, the State is directed to take steps by suitable legislation to secure the participation of workers in the management of undertakings, establishments or other organizations engaged in any industry.

47. In this context, it is interesting to note meaningful statement of A.C. Guest in his interpretation to Anson's Law of Contract-23rd edition. He says thus "Today the position is seen in a very different light, Freedom of contract is a real social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury done to the economic interests of the community at large. In the more complicated social and industrial conditions of a collectivist society it has ceased to have idealistic attraction. That is once realised that economic equality often does not exist in any real sense, and that individual

interests have to be made to subserve those of the community. Hence there has been a fundamental change both in our social outlook and in the policy of the legislature towards it and the law today interferes at numerous points with the freedom of the parties to make what contract they like. We have to state that Lord Jessel M. R.'s concept of limiting 'public policy' on the foundation of 'Freedom of Contract' must be considered to be archaic it has been said so by English Courts. We are not forgetting the wise aphorism of Lord Atkin and Starke, J. that public policy should not depend upon 'the idiosyncratic inferences of a few judicial minds and moral indignation must not be mistaken for public-policy see *Fender St. John Mild May* (1938) A.C. 1 and *Jenkins v. Smith* 1 V.R. 267. The trite aphorism of Lord Atkin and Starke J. did not deter morally indignant judicial minds from searching for new heads of public policy which satisfy the test of advancement of the highest public good. As far back as 1853 in *Egerton v. Earl. Brownlow* (1853) 4 H.L.C. 1, Lord Chief Baron Pollock said: "My Lords, it may be that Judges, are not better able to discern what is for public good than other experienced and enlightened members of the community but it is no reason for their refusing to entertain the question, and declining to decide upon it. Is it, or is it not, a part of our common law that in a new and unprecedented case where the mere caprice of a testator is to be weighed against the public good, the public, good should prevail? In my judgment it is Lord Chief Baron Pollock's opinion was echoed by Viscount Haldane in *Rodriguez Speyer Brothers* 13. Viscount Haldane made it clear That in deciding upon questions of public policy Judges should be guided by the opinions of men of the world as distinguished from opinion based on legal learning. But it has to be remembered what Winfield said that "It is not to be expected that men of the law are to be supposed as expert witnesses in the trial of every action raising a question of public policy. It is the Judges themselves, assisted by the bar who here represented the highest common factor of public sentiment and intelligence?."

48. Public policy has very often been described as "an unruly horse" and this description is capable of putting a boof and scare on judicial minds from leading the stallion into new pastures. We may quote again Professor Winfield:

That animal has proved to be a rather obtrusive not to say blundering steed in the law reports. It would have been more effective if we had not heard so much of it. It has gone reverberating down the history of our law some Judges appear to have thought it more like a tiger and have refused to mount it at all....

In 59 *Law Quarterly Review* p. 298 Dr. F.A. Mann observed: "Public policy may be an unruly horse. But this does not mean that on the proper occasion a Judge must not take his courage in his hands and mount the steed". In the same way Lord Denning in *Enter by Town Football Club v. F.A. Limited* (1970) 3 W.L.R. 1021 said: I know that never three hundred years ago Hobart, C.J. said, "the public policy is an unruly horse". It has often been repeated since. So unruly is the horse, it is said per Lord Denning J. in *Richardson v. Mellis* 1924 2 Bing 229 at p. 252 that no Judge should try to mount it lest it run away with him. I disagree. With a

good man in the, saddle the unruly horse can be kept in controls It can, jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice, as was done in *Nagle v. Fielden* 1996 2 W.L.R.1027

49. In considering a question of waiver in a rent control legislation, Mathew, J. said in *Murlidhar v. State of U.P.* that "There can be- no doubt that the provision has been enacted for protecting one set of men from Anr. set of men, the one from their situation and condition are liable to be oppressed and imposed upon. Necessitous men are not free men". His Lordship was dealing with landlord and tenants and called tenants necessitous men. We feel that we would be justified in the present day social and economic setting of our country in calling in the context of a contract between employer and employee, the employee a necessitous man. Mathew, J. in the same decision observed that "In the Nineteenth Century the doctrines of laissez faire capitalism were accepted as part of the natural order of things and the doctrine was reinforced by the idea of the early utilitarian that to achieve Social justice, it would suffice to produce formal equality before the law. These views were reflected in contemporary legal thought by the idea that freedom of contract was the supreme article of public policy, a notion which ignored utterly those cases where there was no genuine equality of bargaining power as for example between master and servant or between landlord and tenant-see Dennis Lloyd, "Public Policy" (1953), pp. 137-137.

50. The expression public policy" has an entirely different meaning from "policy of the law" and one much more extensive. True, there had been occasions for House of Lords itself using the term "public policy" apparently as synonymous with the policy of law or the policy on a statute- see *Hollinshead v. Hazleton*, 1916): A.C. 428. But it is so used without the least intention to repudiate or disregard the distinction so plainly drawn in *Egerton v. Brownloty* 1 4H.L.C. I at page 105. The Supreme Court had occasion to say that the, conception of public policy is not only now quite distinct from that of the policy of law but has in fact always been so except in some exceptional instances...."

51. In AIR 1974 1924, Mathew, J. said that there is no lack of judicial authority for the view that the categories of heads of public policy are not closed and that there remains a broad field within which Courts can, apply a variable notion of policy as a principle of judicial legislation or interpretation founded on the current needs of the community. His Lordship said emphatically that public policy does not remain static in any given, community." It may vary from generation to generation and even in the same generation. Public policy would "be almost useless if it were to remain in fixed moulds for all time. In choosing the constituents for the purpose of discovering what public policy is at any given moment necessarily Judges are not hide-bound by precedent. The Judges must look beyond the narrow field of past precedents. Of course, it may pose a question in "which direction the Judge must cast his gaze". In this process the Judges will be put to the difficulty of searching beyond the statutory

jurisprudence and presidential jurisprudence. But they must consult not their own personal standards or predilections but those of the dominant opinion at a given moment or what has been termed customary morality. When it is found that public policy is variable and when it depends on the welfare of the community at any given time how are the Courts to ascertain it? "The judges are more to be trusted as interpreters of the law than as expounders of public policy. However, there is no alternative under our system but to vest this power with judges. The difficulty of discovering what public policy is at any given moment certainly does not absolve the judges from the duty of doing so". The Judges are not free to make a sort of referendum or hear evidence or conduct a general inquiry as in the prevailing moral concept. Such an expanded extra-judicial trial is wholly outside the procedural tradition of our Courts where the tendency is to "trust the Judge to be a typical representative of his day Mid generation". Our law deems on the implied insight of the judge on such matters. It is the judges themselves, assisted by the bar, who here represent the highest common factor of public sentiment and intelligence?see Percy H. Winfield, "Public Policy in English Common Law", 42 Harvard Law Rev. 76 and also, Dennis Lloyd "Public Policy". No one can guarantee or give an assurance that Judges will interpret the mores pf their day move wisely and truly than other men. But such a power has to be lodged somewhere and under our Constitution and laws, it has Seen lodged in the judges and if they have to fulfil their function as judges, it could hardly be lodged elsewhere-see Cardozo, "The Nature of Judicial Process".

52. When we are considering the question of public policy in deciding whether Clause 28 of Ext. A-6 Federal Bank Officers" Service Code-we are certainly remembering the metaphor of Justice Burroughs that public policy is an unruly horse. But we say that we are not thinking like some Judges appear to have thought it more like a tiger which made them refuse to mount it at all, perhaps because they feared the fate of the young lady of Riga. "We also do not think that it is like Balsams ass which would carry its rider nowhere.

53. Certain recent English cases would convince us that the Courts in that country have begun to recognize the possibility of an unconstitutional bargain which would be brought about by economic duress even between parties who may not in economic terms be situate differently-see. Occidental Worldwide Investment Coron.v. Skibs A/S Avanti (1976) 1 Lloyd"s Rep. 293, North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd. (1979) QB 705, Pao On v. Lau Yin. Long 1980 A.C. 614 and Universe Tankships of Monrovia v. International Transport Workers Federation (1981) I.C.R. 129 Reversed in (1982) 2 W.L.R. 803. Chitty on Contracts, twenty-fifth edition gives a commentation of these cases.

54. We may also refer to the jurisprudential concept of modern origin which has made a great impact on the Mathai v. The Federal Bank Ltd.-Varghese Kalliath, J. frame of contracts theory, viz. theory of "distributive, justice". In Lingappa Pochanna Appelwar v. State of Maharashtra 1985 S.C. 389 , Supreme Court had

occasion to consider this question while considering the Maharashtra Restoration of Land to Scheduled Tribes Act, 1974. Of course it was a statutory provision. But it points out that for achieving distributive justice, the legislature thought of cribbing and taking away the freedom of parties to a contract when the parties are not economically of the same standard. It has to be remembered that our Constitution has a message to give when it proclaimed that it intends to give to all citizens of India Justice, social, economic and political. Further when the Constitution said in Clause (1) of Article 38 of the Constitution that the State has to strive to promote the welfare of the people by securing and protecting as effectively as it may, the social order in which social, economic and political justice shall inform all the institutions of the national life. This message has greater relevance in finding the mores of the society. When the Court is faced with a question of evolving a new head of public policy certainly larger freedom is seen in the matter of deciding what is public policy and in that context the approach made by the Supreme Court referred to has real significance. The expression "public policy" or "opposed to public policy" or "contrary to public policy" are incapable of precise definition. Public policy, however, cannot be cribbed in narrow premises. It is not the policy of a particular Government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good "or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the Courts and similarly where there has been a well-recognized head of public policy, the Courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy-see Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, ; Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, .

55. Counsel for the Appellant submitted that Clause 28 of Ext. A-6 is a clause parallel to Henry VIII Clause or a naked hire and fire rule. If Clause 28 is incorporated in a rule, it is possible to attack it as an unconstitutional rule under Article 14 of the constitution and in that context it can be considered as an Henry VIII Clause. This submission was made on the basis of what has been said by the Supreme Court in West Bengal State Electricity Board and Others Vs. Desh Bandhu Ghosh and Others, where a similar provision was found to be like Henry VIII Clause, "a naked "hire and fire" rule, the time for banishing which altogether from employer-employee relationship is fast approaching. Its only parallel is to be found in the Henry VIII Clause so familiar to administrative lawyers".

56. In Brojo Math's case, the Supreme Court was considering Rule 9(i) of the Central Inland water Transport Corporation Ltd. Service Discipline and Appeal Rules (1979). It reads thus:

9. Termination of employment for Acts other than Misdemeanour

(i) The employment of a permanent employee shall be subject to termination on three months' notice on either side. The notice shall be in writing on either side. The company may pay the equivalent of three months' basic pay and dearness allowance, if any, in lieu of notice or may deduct a like amount when the employee has failed to give due notice.

This rule was also equated to the impugned Regulation in the case reported in West Bengal State Electricity Board and Others Vs. Desh Bandhu Ghosh and Others, . The rule that was challenged in this case was Rule 34 which reads thus:

In case of a permanent employee, his services may be terminated by serving three months' notice or on payment of salary the corresponding period in lieu thereof.

57. The Supreme Court speaking through Justice Madon in Brojo Math case said that 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 (i) of Rule 9, It can pick up Anr. employee and apply to him Clause of Rule 9. It can pick up yet Anr. employee and apply to him sub Clause (iv) of Clause (b) of Rule 36 read with Rule 38 and to yet Anr. 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. Finally the Court said that "A clause such as Rule 9(i) in a contract of employment affecting large sections of the public is harmful and injury- put so the public interest for it tends to create a sense of insecurity in the minds of those to whom it applies and consequently it is against public good. Such a clause, therefore, is opposed to public policy and being opposed to public policy, it is void u/s 23 of the Indian Contract Act" (Emphasis added). Counsel relying on the above observations submitted the Clause 28" of Ext. A-6 can be indiscriminately exercised against a particular employee in a case of misconduct in preference to the disciplinary action provided in the same contract service where the employee will get a fair opportunity to justify his conduct or to defend the case against him.

58: In the matter of violating a term of contract each case has to be considered on the basis of the contract governing the relationship between the Plaintiff and the Defendant and when the Court wants to declare that the contract or the term of the contract is unenforceable since the contract term is opposed to public policy the comparative positions of the parties to the contract also are relevant.

59. In this context, it was urged that the Defendant bank is a corporation incorporated under the Companies Act and particularly it is a banking corporation which has got a very important role to be played in structuring the economic advancement of the country. Banking is subject of "prime importance and though a private bank is not considered to be a State within the meaning of Article 12 when considering a question of employer-employee relationship under a contract

of service, the bank's superior position as a party to the contract in re its employees has got great significance. It was pointed out that the functions discharged by banks are of prime importance to the society. Governmental control over the bank is seen in a very pervasive and deep manner. Banks enjoy a monopoly character. The Reserve Bank exercises great control at the same time gives massive aid in relation to their functioning (The provisions of the Banking Regulation Act, 1949 as amended from time to time were referred to while elaborating the aspect of deep and pervasive Governmental control over the banks). It was emphasised that every facet of its activity beginning from the birth of all banking institution (incorporation) and till its statutory death with winding up, are regulated- by- the statutory provisions of the Companies Act and the Banking Regulation Act. It is not possible for anybody or bodies of individuals could start a bank as a business house. A licensee is required for conducting banking business and such a license is issued only on the satisfaction of rigorous and detailed legal formalities. When once a license is issued the bank joins the "privileged oligarchy of financiers" and in that sense enjoy a monopoly. There are very many restrictions in relation to the functioning of the bank. These restrictions are singular and exclusive to the banks not applicable to the other commercial institutions. The business activities that could be undertaken by a bank are circumscribed by statutory provisions. Even in the matter of selection of directors for the administration of the bank, there are statutory prohibitions. There cannot be common directors in the business activities. In "giving loans the Reserve Bank can impose restrictions. The interest rates for the banks are stipulated by the Reserve Bank. The control over advances as exercised by the Reserve Bank are indeed rigorous. A bank cannot Open branches as and when it likes. It requires permission of the Reserve Bank Further in the matter of maintenance of percentage of assets, the making of monthly returns, the conduct of audit, and the like there are rules governing the matter issued by the Reserve Bank. The appointment, of auditors and chief executive of "the bank are controlled in some manner by the Reserve Bank. The consent of the Reserve Bank is necessary in the matter of appointment of auditors and the chief executive of the bank. The Reserve Bank reserves wide power of inspection. The Reserve Bank can from time to time issue directions in relation to the exercise of powers and of the functioning of the bank. The Officers have to send report about the functioning of the bank to the Reserve Bank. The Reserve Bank reserves its power to appoint additional directors. A reference to Sections 6, 10A, 12A, 15, 16, 20 to 24, 27, 30, 35, 35A, 36A, 36AB and other allied provisions of the banking regulation is sufficient to justify what we have said about the control of the" bank under the statutory provisions. The "Defendant bank is a large monetary organisation with hundreds of branches.

60. Counsel, submits that the Defendant/bank cannot be treated as an ordinary employer though the Defendant/bank cannot be considered as a State since Courts have held that private banks cannot be considered as a State under Article 12 of the Constitution. These aspects have been highlighted only for the

purpose of emphasizing the large and extensive disparity of bargaining power between a bank and its employees as the contracting parties.

61. It was contended" that Clause 28 of Ext. "A-6 has" to be considered as a clause similar Rule 9(i) of the Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules, considered in Brojo Math's case and regulation- 34 of the West Bengal State Electricity Board and Others Vs. Desh Bandhu Ghosh and Others, . Counsel also referred to the case reported in Delhi Transport Corporation v. D.T.C. Mazdoor Congress and Ors. where the provision that was considered in Rule 9(b) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulation, 1952 which reads thus:

9. Termination of service- (a) Except as otherwise specified in the appointment of orders, the services of an employee of the authority may be terminated without any notice or pay in lieu of notice.

(i) * * * (ii) * * * (iii) * * * (iv) * * * (b) Where the termination is made due to reduction of Establishment or in circumstances other than those mentioned, at"(a) above one month notice or pay in lieu thereof will be given to all categories of employees.

Counsel submitted that the above provision also was found to be invalid u/s 23 of the Contract Act and considered to be a clause which can be characterised as a hire and fire rule or Henry VIII Rule.

62. Counsel referred us to the decision reported in Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, . In paragraph 121 of the above decision Mathew, J. has quoted a passage from the decision in (1922) 2 Ch. 490, Lord Stendale M.R. said:

The power of the Court to make declarations, when it is a question of determining the rights of two parties to a contract, is now almost unlimited, or limited only by the discretion of the Court.

Mathew, J. said-further that the discretion which should guide the Court must be in tune with the modern conditions of life and that if a job is regarded as analogous to property it. Ought to be recognised that a main is entitled to a particular job just as the Courts of equity acknowledged his right to a particular piece of property. Where a public authority is concerned, this can be implemented by a declaration. In the case of private employment English law has devised no suitable remedy. That tats if possible is shown by the example of other countries and His" Lordship has referred to Wedderburn:

The Worker and the Law", P. 89 onwards. In fealing with the question of law relating to master and- servant. His Lordship said that once it is accepted that a man"s job is like his property of "which he can be deprived of for specific reasons, this remedy becomes the primary one though it will need to be

reinforced where private individuals are being sued. The law of master and servant has not kept pace with the modern conditions and the mandate of equality embodied in the Constitution. The law still attached to the servant, a status of inferiority and subjection to his master. Though fundamental reforms can orally emanate from the legislature, the principles fashioned by public law if applied to master servant relationship can bring about a change in law to accord with the social conditions of the 20th century see generally "Public Law Principles Applicable to Dismissal from Employment.

63. We may now refer to the provision 5(a) in Chapter II in the Code, Ext. A-6. This provision has to be read along with- Clause 26(a) "Every officer appointed, shall be initially on probation for a period of one year or such extended or reduced period at the discretion of the management. A probationary officer until confirm his in writing shall be deemed to be on probation". Clause 5(b) provides that "Every officer on successful completion of the probationary period shall be confirmed in the case of officers applicable to him...."

64. We have already "referred to the two important decisions Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, . which shed considerable light in the matter of faulting the crucial Clause 28 of Ext. A-6 on the application the theory of public policy.

65. We shall now advert to the submission made .by counsel for the Respondent defending the plea that Clause 28 of Ext. A-6 is not an unenforceable term of the contract. The learned Counsel Shri Chacko submitted that Clause 28 of Ext. A-6 is unlike the statutory provisions which can be faulted under Articles 14, 16 and Article 19(1)(g) or Article 311 of the Constitution. A purely private contract though relating to service conditions can never be faulted otherwise than invoking the principles of master and servant. Learned Counsel relied very much on the decision reported in M.L. Kamra Vs. The Chairman-cum-Managing Director, New India Assurance Co. Ltd. and another, This case was decided after D.T.C. case and the judgment was rendered by K. Ramaswamy, J. who was also a party to decide D.T.C. case. A similar rule which was considered in M.L. Kamra Vs. The Chairman-cum-Managing Director, New India Assurance Co. Ltd. and another, . In this case Rule 5 _of Orissa Insurance Co-operative Society Ltd. Service Rules was challenged , as unconstitutional and void offending Article 14 of the " Constitution. Appellant in the case while- working as Divisional Manager in the Orissa Insurance Co-operative Society, the general insurance business was nationalized and its management was taken over by the Central Government under General Insurance (Emergency Provisions) Ordinance, 1971 and s. vested in the custodian of the New India Assurance Company the management of Orissa Insurance Co-operative Society Ltd. The services of the Appellant in that case stood transferred and vested with the custodian. Under the Act, the Board of Directors was empowered to terminate the service of the officer/employee of the company-. Appellant was kept under suspension from August 9, 1973 pending investigation into a charge of embezzlement.

Explanation was called for on October 16, 1973. In response thereto, Appellant submitted his reply 1 December, 1974. While dropping the proceeding; the Appellant was served with termination order, dated April 17, 1975 issued by the Respondent. Appellant challenged it in a writ petition in Delhi High Court, which was dismissed by a learned Single Judge and was confirmed by a Division Bench in Letters Patent Appeal. That was the case decided by the Supreme Court. Rule 5 of the Insurance Co-operative Society's Service Rules empowers termination of service and provided that an employee whether, permanent or temporary shall, not leave or discontinue his service in the society without first giving 30 days notice in writing of his intention to do so, to the principal officer. Failure to do so will entail forfeiture of the pay of the month; In the event of the society not having any further need of any employee's service where the permanent or temporary, which shall be decided to the board; the principal officer shall give, 30 days' notice in writing for termination of his service rule in lieu thereof pay such employee a sum equivalent to his one month pay including the allowance upto the termination of the period of notice by way of compensation provided that nothing in the rules shall affect the rights of the society to dismiss an employee under Rule 8. for misconduct etc. without any notice or salary in lieu of notice, in the manner prescribed in the Rules. An employee shall ordinarily retire from the society's service on completion of his 5th year unless the board reserves to continue him in office for such period as may be determined from time to time, if it was contended that taking aid of Rule 5 and without conducting an enquiry giving an opportunity, the Appellant's service was terminated by tendering one month's salary in lieu of notice and of a direction to pay all the allowance upto that date including the period of his suspension is an arbitrary action and that the Rule itself is bad. But it to be noted that the Court did not go into the question. It observed that. It is not necessary to go into the grounds taken in the High Court assailing the invalidity of the termination order as they are not pressed before us. Ramaswamy, J. Observed- (by: C Ramakrishna, the learned senior counsel for the Appellant placing reliance on the ratio of the majority view in D.T.C. v. D.T.C. Ma Congress contended that Rule 5 is ultra vires Article 14 of the Constitution. Shyamala Pappu, the learned senior counsel for the respondent contended that unlike, Rule 9 in D.T.C. case Rule 5 provides guidelines. The Board of Directors have to take a decision, whether the need to continue the employee's service subsists which would be based on the relevant material. It was contended that there would be objective consideration before taking a decision, not only regarding the need to continue the post but also the services of the officer or the employee. The Court found that though the rule does not provide for prior notice, post-decisional opportunity would be read into the rule, and if so read, the rule is not ultra vires Article 14 and also found that the ratio in D.T.C. case has no application. Rule 9 of the Rules of Delhi Transport Corporation Service Regulation gives naked power to terminate the services of a permanent employee by giving one month's notice or pay in lieu thereof. - The Court further found that it is a settled law that there is a presumption of constitutionality of the rule. In this case it has to be remembered that the

question regarding the unenforceability of the rule on the basis that the rule is opposed to public policy was to at all raised. It is also to be noted that in the last paragraph the Court observed that. "the Board of Management did not abolish the post but put an end to the service, of the Appellant. Obviously due to loss of confidence his honesty and integrity became suspect and his continuance in service was felt inexpedient and not in the interest of the business of the Respondents. But Rule 8 was available for taking action for misconduct but, was not availed. Therefore, the impugned order terminating the services of the Appellant is ill. What would be the consequence?" (emphasis added). After observing as above, the Court "further said that normally the Appellant is entitled to. reinstatement but the Court directed that to meet the ends of justice a direction to the respondent to pay an amount of Rs. 1,00,000 as compensation instead of reinstatement and further continuance in service would suffice in this case. In short, the termination though which on the ground that the Rule 1 was upheld indirectly by allowing the Appellant, who challenged the rule complexisation of Rs. 1,00,000 instead of reinstatement. But we do not think that this decision (2)S. C. 36 in any way extenuate or weaken the ratio of the decision in D.T.C. case, particularly the ratio in that decision grounded on Section 23 of the Contract Act.

66. Counsel referred us to Union of India (UOI) Vs. Col. J.N. Sinha and Another, . In this case, Rule-56(j) of the fundamental rules was challenged as unconstitutional. Following the decision Reported in T.G. Shivacharana Singh v. State of Mysore the Supreme Court held that the rule is valid. Rule 56(j) of the fundamental rules reads thus:

Notwithstanding anything contained in this Rule the appropriate authority shall, if it is of the opinion that it is in the public interest so to do have the absolute right to retire any Government servant by giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice.

In paragraph 6 of the judgment the Supreme Court observed that the validity of fundamental Rule 56(K) was not questioned before the High Court nor before the Supreme Court, and that its validity is not open to question in view of the decision of the Supreme Court in T.G. Shivacharana Singh and Others Vs. The State of Mysore, . In fact, the decision was rendered on the principle that a Government servant serving under the Union of India holds his office at the pleasure of the President as provided in Article 310 of the Constitution and . that the pleasure doctrine is subject to the rules or law made under Article 309 as well as to the conditions prescribed under Article 311. It was held that rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. The Court referred to the decision reported in A.K. Kraipak and Others Vs. Union of India (UOI) and Others, and further observed that "the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law- validly "made. In other words they do not supplant the law but

supplement it". Counsel pointed out that in this decision, the Supreme Court has observed that there is no denying the fact that in all organisations, and more so in Government organisations, there is good deal of dead wood. It is in public interest to chop of the same. Fundamental Rule 56(k) holds the balance between "the rights of the individual Government servant and the interests of the public. While a minimum service is guaranteed to the Government servant, the Government is give power to energies its machinery and make it move efficient by compulsorily retiring those who in its opinion should not be there in public interest. This decision also do not consider the question of public policy involved in a provision for. terminating the services of a permanent employee by-giving a reasonable notice or in lieu of notice the pay required for the period of notice; In D.T. Cs. case all these aspects have been thoroughly considered and the modern concepts of master and servant relationship was also taken into account. The observation of Mathew, J. referred to earlier also has been taken note of.

67. Counsel also referred us to T.P. Daver Vs. Lodge Victoria No. 363, S.C. Belgaum, . We do not think that this decision will help him to Meet the point raised on the basis of Section 23 of the Contract Act, This is a case related to expulsion of a member from Masonic lodge. The Court said that a member of a masonic lodge is bound to abide by the Rules(c) of the lodge and if the rules provide for expulsion, he shall be expelled only in the mailer provided by the rules. Of course, the Court observed that the lodge is bound to act strictly according to the rules; whether a, particular rule is mandatory or directory, falls to be decided in each case, having regard to ?he well settled rules of construction in that regard. But also held that the jurisdiction of a civil Court is limited; it cannot sit as a Court of appeal from decisions of suit a body; it can set aside the order of such a body, if the said body acts without, jurisdiction or does not act in faith or acts in violation of the principles of natural justice. We are now concerned about the relationship between master and servant go by a contract and the validity of the contract.

68. We have to bear in mind the distinction between the service under a State or instrumentalities of the State. In Union of India and Another Vs. Tulsiram Patel and Others, where the constitutionality of the provisions of Article 311 of the Constitution, particularly the second proviso to Clause (2) of the- said Article came up for consideration, the Supreme Court referred to the decision reported in Roskan Lal Tandon V. Union of India AIR 1967 S.C. 1968 wherein" it was held- that though the origin of a Government service is contractual yet when once appointed to his post or office, the Government servant acquires a status and his rights and obligations are no longer determined by the consent of both the parties. but by statute or statutory rules which may be framed and altered unilaterally- by the Government. Plainly saying there is a total change of the legal position. Though a Government servant has accepted the service perhaps with the constituents of a contract, it turns out to be a matter of Conferring a status to the party than a contractual relationship. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law

and not by mere agreement of the parties. That is why for the Government service and service under a State or instrumentalities of a State the Courts have found tip difficulty in applying Article 14 and the control of Article 311 of the Constitution. Further the Courts have held that Article 311(2) embodies the principles of natural justice, including audi alteram partem rule.

69. The case of private employment is totally different. We were not able to see any decision which takes the view that in private employment also the principles of natural justice and allied principles like avoidance of arbitrariness attached to a right emerging from the status of being in Government service or service of a State or instrumentalities of a State applies. We have only what we have already referred to the observations of Mathew, J. in Sukhdev Singh v. Bhagatram Singh Raghuvanshi 1975 1 S. C. C. 421? where His Lordship has made the significant observation that: "The governing power wherever located must be subject to the fundamental constitutional limitations".

70. The Supreme Court had occasion to consider the question of wrongful dismissal in the light of Article 21 of the Constitution. The right to life includes right to livelihood. It was said that the right to livelihood therefore cannot hang on to the fancies of individuals in authority. In public employment certainly it is not a bounty from them who controls the management and as such it cannot depend for its survival at the mercy of the management. It has been declared by the Supreme Court that: "income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them". "Both the society and the individual employees, therefore, have an anxious interest in service conditions being well defined and explicit to the extent possible. The arbitrary rules, such as the one under discussion, which are also sometimes described as Henry VIII Rules, can have No. place in any service conditions. The above said proposition was found to be supported by a large number of decisions of the Supreme Court Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, ; Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, ;, The Manager, Government Branch Press and Another Vs. D.B. Belliappa, ; Managing Director, Uttar Pradesh Warehousing Corporation and Another Vs. Vijay Narayan Vajpayee, ., A.L. Katra v. Project and Equipment Corporation of India Ltd. (1981) II L.L.J. 459 Wirkmen v. Hindustan Steel Ltd (West Benlal State Electricity Board v. Desh Bandhu Gljosh. (1985) 3S 116, Olga T?llis v. Bombay ?Municipal Corporation (1985) S?S.C.C 545 , Union of India v. Tulsiram Patel (19 398, Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, ;(O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others, (N.C. Daiwadi v. State of Gujarat (1987) 3 S.C.C: 611 (M.K. Aggrawal v. Gurgaon Gramin Bank (1987 Supp C C 649 and Daily Rated Casual employed under P and T Department through Bhartiya Dak Tar Mazdoor Manch v. Union of India (1988) S C C 122.

71. Now, we may advert to the D.T.G.'s Case where regulation, 9 by of Delhi Road Transport Authority (Condition Appointment and Service) Regulations, 1952 was held to be illegal not only on the ground that it is violative of Article 14 of the Constitution and opposed to nature, justice principles, and opposed to public policy u/s 23 of the Contract Act. Of course it was also found that adequate guidelines which could have saved the provision are also absent in the impugned provision. The minority- judgment of Sabyasachi Mukharji, C.J., saved the provision by applying the rule of reading down. the reading down mechanism is not available when construing a provision in a contract. The Court cannot read into a term of the contract something which is explicitly absent, for the purpose of giving effect to the impugned term of the contract to save it from the vice of being opposed to public policy.

72. Of course, it was contended that for the proper administration of the organization, there should be a power resource to terminate the service of an employee, who cannot secure the confidence and trust of the management and that Clause 28 of Ext. A has to be construed keeping in mind this vital aspect also. The same argument was advanced in a large number of cases before the Supreme Court when similar provisions were attacked in service conditions. We do not want to give all decision of the Supreme Court in detail. One of the earliest decisions is *Moti Ram Delca v. General Manager, N.E.F. Railways* AIR 164 SC. 606 in that case Rule 148(3) of the Rail Establishment Code was challenged. Rule 148(3) provided that "The service of other (non-pensionable) railway servants shall be liable to termination on notice on either side for the periods shown below. Such notice is not however required in cases of dismissal or removal as a disciplinary measure after compulsory with the provisions of Clause (2) of Article 311 of the Constitution, retirement on attaining the age of superannuation and termination of service due to mental or physical incapacity." The challenge was found unsustainable by the Assam High Court, but by a majority, the Supreme Court held that the Rules 148(3) and 149(3) are invalid in as much as they are inconsistent with the provisions of Article 311(2) as they purport removal from service of permanent servants without compliance with the procedure prescribed by Article 311(2). It was also held that Rule 148(3) contravenes Article 14 as it does not give any guidance for exercise of the discretion by the authority concerned and hence it is invalid. In *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, though the Court found that the order was administrative in character, but even an administrative order which involves civil consequences must be made Duly after complying with natural justice after informing the person concerned the case of the State against him/her and the evidence in support thereof. It was found that no such steps were admittedly taken. The High Court, was right in setting aside the order of the State, determining the date of birth of the employee.

73. In *Union of India v. Col. J.N. Sinha*, (1970 2 S.C. 458) an order u/s 56(j) of the fundamental rules was challenged. High Court held that there was violation of the principles of natural justice. In appeal, the Supreme Court held that

whether the exercise of a power conferred should be made- in accordance with any of the principles of natural justice of not depends upon the express words of the provision conferring the power, the nature, of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power. It was held that fundamental Rule 56(j) does not in terms require that any opportunity should be given to the concerned servant to show cause against the compulsory retirement.

74. Again in the case of termination of service under regulation 48 of the Air India Employees' Service Regulations, the Supreme Court in *Air-India Corporation, Bombay Vs. V.A. Rebellow and Another*, found that the tribunal is bound to look into the substance of the order if the tribunal comes to the conclusion that though in form the order amounts to termination simpliciter but in reality cloaks a dismissal for misconduct, it will be open to it to set aside the orders as a colourable exercise of power by the management. The same principles have already been reiterated observing that: "The position of the Industrial workman is different from that of a Government servant because- an Industrial employer cannot "hire and fire" workmen on the basis of an unfettered right under the contract of employment, that right now being subject to Industrial adjudication; and there is also on the other hand no provision of the Constitution like Article 310 and 311 requiring consideration in the case of industrial workmen". In *Re below case regulation 48* which provided that service of an employee may be terminated without assigning any reason and the employer is not bound to disclose why he does not want, to continue in service the employee concerned, the Court observed that: "It can be conceded that an employer must always have some reason for terminating the service of his employee. Such reason apart from misconduct may, inter alia, be want of full satisfaction with his overall suitability in the job assigned to the employee concerned. The fact that the employer is not fully satisfied with the overall result of the performance of his duties by his employee does not necessarily imply misconduct on his part". The above quote is very much relied on-by the Respondent to say that Clause 28 of Ext . A-6 is a clause which is absolutely necessary for the smooth management of the bank.

75. The Supreme Court in *D.T.C. case* observed that " it is well settled that even if there is no specific provision in a statute or rules made there under for showing cause against action proposed to be taken against an individual, which affects the rights of that individual the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. In *Manohar P. Kharkhar and another Vs. Raghuraj and another*, (Bombay High Court) held that the action taken by the Chairman and Managing Director of Air India Corporation terminating the service of an officer on the ground that the Corporation lost confidence in their ability and suitability to hold such important posts of heads of department which were reasonable for maintenance of the aircrafts, safety of the aircrafts and safety of the passengers carried therein and, the orders of

termination were based on the note of the Chairman. It was contended that loss of confidence was the result of the negligence and failure to discharge their duty culminating in, the admitted, sabotage in the case of Makalu, an aircraft for the flight of WIP. The "order was challenged as arbitrary and capricious and that regulation 48 was violative of Article 14 of the Constitution as it contained no guidelines for choosing between employees and employees, occasion to occasion for the contemplated action. There it was said, that inefficiency by itself did not amount to misconduct in its generic sense. Further it was held that the power conferred under regulation 48 to terminate the services of permanent employees on 30 days' notice without assigning any reason is not violative of Article 14 of the Constitution In D.T.C. Case B.C. Ray, J. said that the decision however has not duly considered the ratio of the decisions made by the Supreme Court in L. Michael v. Johnston Pumps India Ltd. Air India Corporation v. V.A. Rebellow (1975) S.C.C. 574 and the case of Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation,

76. In S.S. Muley v. J.R.D. Tata (1979) 2 S.L.R. 438 regulation 48 was found to be discriminatory by the High Court and held that regulation 48 is void as it gives unrestricted and unguided power on the authority concerned to terminate the services of a permanent employee by issuing a notice or pay in lieu thereof without giving any opportunity of hearing to the employee concerned and thereby violating the principles of natural justice and also Article 14 of the Constitution. In West Bengal State Electricity Board v. Desh Bandku Ghosh (1979) 2 S.L.R. 438) Section 34 of the board's regulation giving power to terminate the services of employees by serving three months' notice or payment of salary for the corresponding period in lieu thereof was found to be arbitrary in nature and patently discriminatory. The Supreme Court struck down the first paragraph of regulation 34 and quashed the order of termination of services passed under that provision. In the case of Workmen v. Hindustan Steel Ltd standing order 32 providing power in the General Manager to terminate the service of an employee if satisfied for reasons recorded in writing that it was in expedient or against the order of security to employ the workman, the workman could be removed or dismissed from service without following the procedure laid down in standing Order 31. It was held that there was no justification for dispensing with the enquiry.

77. We have no doubt that in today's complex world where very powerful corporations with their vast infrastructure- rural organisations and economic power and control there can be myriad situations which would result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. We do not want to enumerate such cases fully or as illustrations. But we feel that the Court is bound to judge each case on its own facts and circumstances. We make it clear that we are deciding this point on the facts of this case and the contract of service of the employees and the employer

of this particular institution, viz., the bank and its employee, the Plaintiff. We are of opinion that the bargaining power of the parties to the contract in this case is highly disproportionate.

In *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, , K. Ramaswamy, J. observed that: Court as a Court of constitutional conscience enjoined and is jealously to project and uphold new values in establishing the egalitarian social order. As a Court of constitutional functionary exercising equity jurisdiction, this Court would relieve the weaker parties from unconstitutional contractual obligations unjust, unfair, oppressive and unconscionable rules (emphasis added) or conditions when the citizen is really unable to meet on equal terms with the State. It is to find whether the citizen, when entering into contracts of service, was in distress need or compelling circumstances to enter into contract on dotted lines or whether the citizen was in a position of either to take it or leave it and if it finds to be so,, this "Court would not shirk to avoid the contract by appropriate declaration. Therefore, though certainty is an important value in normal commercial contract law, it is not an absolute and immutable one but is subject to change in the changing social conditions", (emphasis added). In *Smt. Dhanwanti Vs. D.D. Gupta*, : *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*,

78. Madon, J. also expressed identical views after an elaborate survey of the development of law in the Supreme Court of United States of America and the House of Lords in England and in the continental countries. We do not want to burden this judgment which is already elliptical by repeating the discussion on this point in *Smt. Dhanwanti Vs. D.D. Gupta*, : *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, . The Supreme Court's observations that though certainty is an important value in normal commercial contract law, it is not an absolute and immutable one but is subject- to change in the changing social conditions, have got pragmatic significance in this case. We say so, since in the absence of specific head of public policy which covers a case, .then the Court must in consonance with public conscience and in keeping with public good and public interest invent new public policy and declare such practice or rules that are derogatory to the Constitution to be opposed to public policy-see *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, The rules which stem from public policy must of necessity be laid to further the progress of the society in particular when social change is to bring about an egalitarian social order through rule of law. In *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, , it has been made clear: In deciding a case which may not be covered by authority Courts have before them the beacon light of the trinity of the Constitution i.e. Preamble, Part III and Part IV of the Constitution and the play of the legal light and shade must lead on the path of justice, social, economic and political. Lacking precedent, the Court can always be guided by that light and the guidance thus shed by the trinity of our Constitution".

79. Again, Ramaswamy, J. in D.T.Cs. easily said: "The law of contract, like the legal system itself, involves a balance between competing sets of values. Freedom of contract emphasises the need of stability, certainty and predicate ability. But important as its values are, they are not absolute, and there comes a point where they face a serious challenge". Against them must be set the values of protecting the weak, oppressed and the thoughtless (sic powerless) from imposition and oppression. The "standard form" contract is the rule. He must either accept the terms of this contract in to or go without. Since, however, it is not feasible to deprive oneself of such necessary services. In view of this fact, it is quite clear that freedom of contract is now largely an illusion". In Smt. Dhanwanti Vs. D.D. Gupta, : Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , the Supreme Court held that Rule 9(i) of the Central Inland Water Transport Corporation Ltd. (Service Discipline and Appeals) Rules, 1979 is void u/s 23 of the Indian Contract Act, 1872, since it is opposed to public policy and it is also ultra vires of Article 14 of the Constitution of India to the extent that it confers upon the corporation the right to terminate the employment of a permanent employee by giving him three month's notice in writing or by paying him the equivalent of three months' basic pay and dearness allowance in lieu of such notice. It is significant to note that the rule was found to be opposed to public policy. Here, what we are concerned is not a rule, but a term of a service contract, viz., Clause 28 of Ext. A-6. In paragraph 206 of Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, , the Supreme Court said that regulation 9(b) is in pari materia with Rule 9(i) of the Central Inland Water Transport Corporation Ltd. (Service, Discipline and Appeal) Rules, 1979 and it is void u/s 23 of the Contract Act as being opposed to public policy. We close our discussion here and we hold following Smt. Dhanwanti Vs. D.D. Gupta, : Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, and Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, , that Clause 28 of Ext. A-6 is unenforceable and any action taken under that clause is invalid, since the clause being opposed to public policy.

80. Now, we may consider Anr. aspect of the case. Assuming that Clause 28 of Ext. A-6 is a valid term of the contract and action can be taken after satisfying the conditions required in Clause 28 whether the action taken in the case at hand can be justified, since the action taken is not an action within the preview of the disciplinary action. We say so because for disciplinary action, there is clear provision in Ext. A-6 which enjoins certain requirements and formalities to be complied with before terminating the services of the Plaintiff. We feel that we can investigate the true intend and purpose behind the action of termination of services and the cause for it by applying the theory of lifting the veil. In this context, we do not want to refer again the facts preceded the final action of termination of services of the Plaintiff and the correspondence between the Plaintiff and the Defendant/bank. It is to be noted that Ext. B-18 is a continuation of Ext. B-17 because in Ext. B-17 the bank took a resolution that

the continuance of the services of the Plaintiff will not be in the interest of the bank, but resolved in view of the recommendation of the Chairman that no drastic action may be taken against the Plaintiff immediately and further said that the Chairman may move any suitable action against him in due course. From Ext. B-17, it is possible to say that the Chairman has catalogued 10 items of misdemeanor on the part of the Plaintiff. In facts, preceding Ext. B-17 there were correspondence, Exts. A-10, A-11, A-12, A-13, A-14. In Ext. A-12 dated 16th May 1977, the Chairman has made it clear that if no explanation is received, it will be presumed that the Plaintiff has admitted "the gross misconduct" and the bank will proceed on that basis. In an earlier paragraph, the gross misconduct is explained and said that those facts "constituted gross misconduct". Of course this has been replied and the Chairman has said that the reply has been referred to board's consideration and ultimately Ext. B-17 was passed by the board. In Ext. B-18, the earlier report of the Chairman, Ext. B-17 is referred to. Then the Chairman said that throughout the Plaintiff was indifferent in the matter of developing the business of the branch and that he did not make any efforts towards mobilization of deposits and that he played an important part in the publication of the news item regarding the bank in the Blitz dated 21st January, 1978. Further it is stated that the Plaintiff was responsible to a good extent for causing the recent withdrawals from some branches of the bank and that he was all along trying to foster groupies among the officers of the bank and further he was responsible for distribution of an anonymous letter maligning the "top executives of the bank. Stating so, he recommended immediate termination of the Plaintiff service and as a result of this, Ext. A-4 termination order has been passed.

81. On a careful analysis of the correspondence and the events preceded Ext. A-4 we are of opinion that the Plaintiff's services were terminated for his alleged misconduct and Ext. A-4 has been passed to avoid an enquiry which the bank is bound to under its own code, Ext. A-6.

82. Counsel for the Appellant submitted that all the allegations made both in Ext. B-17 and Ext. B-18 are unfounded and no attempt has been made by the bank to prove those allegations. We do not want to go into those allegations and its proof since the bank has no case that the bank is bound to prove those allegations of misconduct before" the Court in answer to the claim made by the Plaintiff. But we are of opinion that Ext. A-4 is an action taken under the colorable exercise of the power under Clause 28 of Ext. A-6 avoiding a proper enquiry and in this view also, the action is unsustainable.

83. Counsel for the Appellant further contended that no materials have been placed before the Court to satisfy the requirements under Clause 28 of Ext. A-6. We do not want to discuss this aspect at length, but we are of opinion that the case has not been established insofar as no competent person of the bank was examined to satisfy the Court that the action is justified because of the existence of the requirements under Clause 28 of Ext. A-6.

84. Counsel submitted that in regard to Ext. B-17 report obviously no action has been taken, but it has been deferred and in Ext. A-16 dated 1st September 1979, which is after Ext. B-17 dated 11th August 1977, the Chairman has only said that the explanation is recorded. But we have seen that in Ext. B-17, the board made an opinion that the continuance of the service of the Plaintiff will not be in the interest of the bank. In Ext. B-18, some more allegations have been made. In fact, five more allegations are seen made in Ext. B-18. The first allegation is that no effort has been made to mobilise the deposit. The second allegation is that the Plaintiff has played an important part in the Blitz dated 21st January 1978. The third point that has been made is that the Plaintiff is responsible to a good extent for causing the "recent withdrawals" from some branches of the bank. The fourth point raised against the Plaintiff is that he was all along trying to foster groupies among the officers of the bank and the fifth point is that the Plaintiff caused the distribution of an anonymous letter maligning the top executives of the bank. Admittedly, no documents were produced to establish these charges.

85. D.W.I. is the only witness examined. The Chairman has not been examined in this case. Of course there is an explanation that he was not well. We may say that on a careful analysis of the evidence placed before the Court, the allegations made against the Plaintiff have not been substantiated and the bank has no case that they are bound to substantiate it before the Court. We are of opinion that the bank has got an obligation to substantiate the allegations at least for the purpose of satisfying the requirements under Clause 28 of Ext. A-6. We feel that a mere subjective satisfaction not supported by evidence regarding the requirements for taking action under Clause 28 is insufficient. Further it has to be noted that before the Court even that subjective satisfaction of the Chairman or the board is also not spoken to by the Chairman or at least by a member of the Board which took the decision to terminate the services of the Plaintiff under Clause 28 of Ext. A-6.

86. The Court below has not considered the case in the manner in which we have now discussed and considered this appeal and we feel that the case ought to have been considered by the Court below in the manner in which we have now done in this case. Our final conclusions in this appeal are as follows:

(i) Clause 28 of Ext. A-6 Code is a "hire and fire rule" term considering the nature of the contract and the disparate and disproportionate bargaining power of the parties to Ext. A-6 contract in this case and so it is opposed to public policy and unenforceable and the action taken under Clause 28 of Ext. A-6 is unsustainable.

(ii) On the facts and circumstances disclosed from the correspondence and the evidence though the action (Ext. A-4) is ostensibly under Clause 28 of Ext. A-6, we hold that in reality, it is a disciplinary action and the conditions and formalities required under the Code Ext. A-6 for taking disciplinary action have not been complied with in this case and so the action is unsustainable.

(iii) No evidence has been let in before the Court to substantiate that facts existed for satisfying; the requirements of Clause 28 of the contract of service, Ext. A-6.

(iv) Since the action is unsustainable, the appeal has to be allowed and the Plaintiff is entitled to the damages claimed in this appeal.

In the result, we allow the appeal and set aside the judgment and decree of the Court below and decree the suit directing the Defendant - to pay an amount of Rs. 1,57,584 with interest at 9 percent per annum from the date of decree till realisation of the amount.