

(2015) 08 KL CK 0099

In the High Court Of Kerala

Case No : W.A. No. 1109 of 2013 in O.P. 39132/2002 and W.A. No. 1288 of 2013

Vasanthi Mohan

APPELLANT

Vs

The Nedungadi Bank and Others

RESPONDENT

Date of Decision : 06-08-2015

Acts Referred:

Banking Regulation Act, 1949 — Section 45, 45(1), 45(2)
Constitution of India, 1950 — Article 14
Contract Act, 1872 — Section 23

Citation : (2015) LabIC 4444

Hon'ble Judges : Ashok Bhushan, C.J.;A.M. Shaffique, J

Bench : Division Bench

Advocate : P.B. Sahasranaman, K. Jagadeesh and T.S. Harikumar, for the Appellant; P. Radhakrishnan, Advocates for the Respondent

Judgement

Ashok Bhushan, C.J—These two Writ Appeals have been filed against the same judgment dated 2.3.2013 in O.P. No. 39132 of 2002. The parties in these appeals shall be described as referred to in the Original Petition. Both the parties being aggrieved by the judgment of the learned Single Judge, have come up in these two Writ Appeals. Brief facts which emerged from the pleadings of the parties are:

2. The petitioner entered into the service of the first respondent Nedungadi Bank as a clerk on 17.5.1982. The petitioner was promoted as officer in the year 1999. The petitioner was on leave on loss of pay from 18.4.2000 till 29.3.2001. The petitioner went on maternity leave on 16.7.2001. The petitioner did not rejoin duty after the maternity leave and again took leave on loss of pay till 19.1.2002. The petitioner sent leave application dated 20.1.2002. Exhibit P1 communication dated 11.3.2002 was sent to the petitioner by the Bank stating that the Bank is not in a position to grant further extraordinary leave as the petitioner has already been sanctioned 486 days extraordinary leave on medical ground. The petitioner was instructed to report for duty immediately, failing which the Bank will be constrained to take appropriate action. The petitioner was informed that the

period of absence will be treated as unauthorised absence. The petitioner, as per Exhibit P2 dated 9.4.2002, again requested for grant of leave to enable to recoup from the ailment. On 9.5.2002 by Exhibit P3 the Bank communicated to the petitioner that extraordinary leave cannot be sanctioned as informed earlier. The petitioner was advised to report for duty, failing which it shall be treated as misconduct and the matter be proceeded accordingly. The petitioner on 17.6.2002 by Exhibit P4 further prayed that she may be granted leave till 31.7.2002 by which date the petitioner is ready to resume duty. On 26.6.2002 by Exhibit P5 a memo was issued by the disciplinary authority informing the petitioner that the Bank infer that the petitioner do not desire to continue her employment in the Bank and she was asked to explain as to why her absence should not be construed as deserting employment. The petitioner was asked to submit explanation within 15 days. After receipt of Exhibit P5 memo, the petitioner wrote to the Deputy General Manager on 6.7.2002 informing that she hopes to join duty in the third week of July. Again a request was made for grant of extraordinary leave. On 22.7.2002 the petitioner sent another letter informing that due to certain problems she was forced to apply for voluntary retirement from service and she requested to permit her to retire under the voluntary retirement scheme, so that she could get eligible pension and other retirement benefits. The petitioner again informed the Bank as per Exhibit P8 letter that her request for voluntary retirement be considered. She also informed that she was at Doha, Qatar. The Bank, by Exhibit P9 letter dated 18.9.2002 informed that the petitioner having not attained the requisite qualifying service for opting for voluntary retirement, under the pension regulations her request cannot be considered. The Bank by letter dated 7.11.2002, exercising power given under Clause 41(a) of the Nedungadi Bank Ltd. Officers' Service Rules (hereinafter referred to as "the Rules"), terminated the services of the petitioner providing that the petitioner may collect the three months pay in lieu of notice from the Senior Manager, Palakkad main branch. The petitioner, after coming to know about the termination order, submitted an application to review the order dated 7.11.2002 and permit her to rejoin duty. The petitioner thereafter filed O.P. No. 39132 of 2002 praying for the following reliefs:

"i) To issue a writ of certiorari calling for the records leading to Exhibits P9 and P10 and quash the same.

ii) To issue a writ, direction or order in the nature of mandamus commanding the 2nd respondent to pass appropriate orders posting this petitioner on appropriate place and to give her all her emoluments to which she is entitled as if Exhibit P10 orders has not been issued.

iii) To issue a writ, direction or order in the nature of mandamus commanding the 2nd respondent to consider the application submitted by the petitioner claiming the benefits of the Voluntary Retirement Scheme within a time limit fixed by this Hon'ble Court and pass appropriate favourable orders therein.

iv) To issue a writ of certiorari calling for the records leading to Exhibit P13 order

and quash the same.

v) To award the costs of this litigation.

vi) Such other reliefs which this Hon"ble Court deems thinks fit and necessary in the circumstances of the case."

3. Meanwhile the Central Government by order dated 2.11.2002 had issued a moratorium under Sub-section (2) of Section 45 of the Banking Regulation Act, 1949. The Reserve Bank of India has prepared a scheme for the amalgamation of the Nedungadi Bank Ltd. with the Punjab National Bank, which was published in the gazette. The Government of India, after considering suggestions and objections, issued an order dated 31.1.2003 sanctioning the scheme, namely, Nedungadi Bank Limited (Amalgamation with Punjab National Bank) Scheme, 2003. The Scheme came into effect with effect from 1.2.2003.

4. The Writ Petition was heard by the learned Single Judge and on 11.1.2012 the following interim order was passed:

"On a perusal if the pleadings of the parties, I am of the considered view that the petitioner has completed 20 years of service by the time the termination order was passed. Taking into consideration the totality of the circumstances, I direct the second respondent Bank to pass an appropriate order on Exhibits P7 and P11 and file an affidavit in this court by 30th of this month irrespective of the order of dismissal which is passed in this case."

5. In pursuance of the order dated 11.2.2012, the Personnel Administration Division of the Punjab National Bank has passed an order dated 30.1.2012 holding that since the petitioner had not completed the requisite qualifying service of minimum 20 years excluding absence/leave without pay, her application for voluntary retirement cannot be considered. The petitioner was permitted to challenge Exhibit P13 order dated 30.1.2012 in the Writ Petition. The petitioner's prayer for reviewing the order dated 7.11.2012 was also rejected by separate order dated 30.1.2012.

6. The learned Single Judge heard the parties and by judgment dated 2.4.2013 disposed of the Original Petition setting aside Exhibits P9, P10 and P13. The following is the operative portion of the judgment of the learned Single Judge:

"17. Considering the entire facts and circumstances of the case, I am of the view that the impugned orders in this original petition are liable to be quashed. I do so. Accordingly, Exhibits P9, P10 and P13 are quashed. Petitioner shall not be entitled to any financial benefit from the date of termination due to her unauthorised absence. However, petitioner shall get continuity of service and other notional service benefit. Respondent Bank is directed to give a suitable posting to the petitioner and the petitioner shall join duty as directed by the Bank. If the petitioner does not want to continue in service, she can apply for voluntary retirement. If such an application is received, the Bank will consider the same in accordance with law."

7. Aggrieved by the judgment of the learned Single Judge, the petitioner has come up in W.A. No. 1109 of 2013 praying that a direction be issued to the second respondent to disburse the salary and allowances which the appellant is entitled pursuant to setting aside of Exhibit P10. The Bank has filed W.A. No. 1288 of 2013 praying for setting aside the judgment of the learned Single Judge.

8. We have heard Sri. P.B. Sahasranaman, learned counsel for the petitioner/appellant, whereas Sri. P. Radhakrishnan has appeared for the Nedungadi Bank Ltd.

9. Sri. P.B. Sahasranaman, learned counsel for the writ petitioner contended that the termination order issued by the Bank dated 7.11.2012 was illegal. He submitted that the petitioner was a permanent employee, who could not have been terminated by giving three months pay in lieu of notice. He submitted that clause 41(a) of the Rules itself is arbitrary and void. He submitted that similar clauses of termination of permanent employees by three months notice has already been declared by the Supreme Court as void and inoperative. He submitted that the disciplinary proceedings ought to have been drawn against the petitioner on the ground of unauthorised absence and termination of the petitioner could not have been effected by order dated 7.11.2012 by giving three months notice. He further submitted that the first respondent Bank has no jurisdiction to pass termination order, since a moratorium order dated 2.11.2002 was already issued and all the employees of the Bank shall be deemed to have been absorbed in the transferee Bank, i.e., Punjab National Bank with effect from 2.11.2002. Hence, the first respondent has no jurisdiction to issue the termination order. He further submitted that termination order having been set aside, the petitioner was entitled for the consequential benefits, i.e., payment of salary. The learned Single Judge committed error in directing that no salary shall be paid to the petitioner.

10. Learned counsel appearing for the Bank submitted that the first respondent Bank had rightly terminated the petitioner's services. It is submitted that the petitioner was continuing on unauthorised leave and in spite of letters and memos issued to the petitioner, she failed to join duty in the Bank. Referring to Exhibit P8 it is contended that the petitioner herself has written to the Bank that she is unable to continue her service with the Bank. It is submitted that in fact the petitioner has deserted her service and she cannot claim that it was necessary to draw any proceedings for her termination. The exercise of power by the Bank under clause 41(a) was fully justified. Learned counsel for the Bank further submitted that the Bank had full jurisdiction to pass order dated 7.11.2002, since the amalgamation scheme has been notified on 31.1.2003 and on the date when amalgamation scheme was notified, the petitioner was no longer in service. It is submitted that during the moratorium period, the Bank had every jurisdiction to deal with the service matters of its employees and there was no prohibition by the order of moratorium issued on 2.11.2002. Learned counsel for the Bank submitted that the petitioner had not completed 20 years of

qualifying service. Before completing 20 years of service, she went on unauthorized leave and her extraordinary leave was also not eligible for adding in her qualifying service. He submitted that the decision rejecting the petitioner's application for voluntary retirement was perfectly justified.

11. Learned counsel for the parties have placed reliance on various judgments of the Apex Court and other High Courts, which shall be referred to while considering the submissions of learned counsel for the parties in detail. From the submissions of learned counsel for the parties and the pleadings on record, the following are the issues which arise for consideration in these Writ Appeals:

"I. Whether the first respondent Bank had jurisdiction to issue termination order dated 7.11.2002 due to the reason that the moratorium has already been declared with effect from 2.11.2002 by the Central Government?

II. Whether it was obligatory for the Bank to initiate proceedings for misconduct against the petitioner in view of the stand of the Bank that the petitioner was unauthorisedly absent and failed to join duty in spite of letters and memos?

III. Whether in view of the facts of the case, the petitioner has deserted her employment?

IV. Whether the termination order dated 7.11.2002 issued in exercise of power under Clause 41(a) of the Rules is a valid termination order?

V. Whether the decision of the Bank rejecting the application of the petitioner seeking voluntary retirement on the ground that the petitioner has not completed 20 years of qualifying service is valid?

VI. What relief the petitioner may be entitled to?"

12. From the judgment of the learned Single Judge it is clear that the only ground on which the learned Single Judge has allowed the Writ Petition and set aside Exhibits P9, P10 and P13 orders is that the Government of India has declared moratorium on the Bank on 2.11.2002 and the second respondent Punjab National Bank had taken over the Bank and the petitioner being an employee on 7.11.2002 is entitled to get all the benefits as if she was in service on 7.11.2002. The reason which appears to have projected to the learned Single Judge for setting aside the termination order is that the first respondent Bank had been taken over by the second respondent, i.e., Punjab National Bank, hence, petitioner's services could not have been terminated. The learned Single Judge accepted the submission of learned counsel for the petitioner that the first respondent Bank has no jurisdiction to terminate the services of the petitioner on 7.11.2002.

13. The first issue is as to whether the first respondent Bank has jurisdiction to pass order dated 7.11.2002 or it was only the second respondent Punjab National Bank which could have passed the order. The first respondent Bank is a Scheduled Bank. On a request made by the Reserve Bank of India, the Central

Government has issued the order of moratorium under Section 45(2) on 2.11.2002. The Reserve Bank of India has prepared a draft scheme of amalgamation of Nedungadi Bank with the Punjab National Bank, which has published a notification dated 31.1.2003 issued by the Government of India in exercise of power under Sub-section (7) of Section 45, which has been brought on record as Exhibit R2(1). Before we proceed to look into the notification, it is necessary to refer to Section 45 of the Banking Regulation Act, 1949. Section 45(1), (2), (3) and (7) are as follows:

"45. Power of Reserve Bank to apply to Central Government for suspension of business of a banking company and to prepare scheme of reconstitution or amalgamation.- (1) Notwithstanding anything contained in the foregoing provisions of this Part or in any other law or any agreement or other instrument for the time being in force, where it appears to the Reserve Bank that there is good reason so to do, the Reserve Bank may apply to the Central Government for an order of moratorium in respect of a banking company.

(2) The Central Government, after considering the application made by the Reserve Bank under sub-section (1), may make an order of moratorium staying the commencement or continuance of all actions and proceedings against the company for a fixed period of time on such terms and conditions as it thinks fit and proper and may from time to time extend the period so however that the total period of moratorium shall not exceed six months.

(3) Except as otherwise provided by any directions given by the Central Government in the order made by it under sub-section (2) or at any time thereafter, the banking company shall not, during the period of moratorium, make any payment to any depositors or discharge any liabilities or obligations to any other creditors.

xx xx xx

(7) The scheme shall thereafter be placed before the Central Government for its sanction and the Central Government may sanction the scheme without any modification or with such modifications as it may consider necessary; and the scheme as sanctioned by the Central Government shall come into force on such date as the Central Government may specify in this behalf:

Provided that different dates may be specified for different provisions of the scheme."

14. Sub-section (2) of Section 45, which empowers the Central Government to issue an order of moratorium on an application made by the Reserve Bank of India, clearly provides for staying the commencement or continuance of all actions and proceedings against the company for a fixed period of time. Sub-section (3) of Section 45 provides that the banking company shall not, during the period of moratorium, make any payment to any depositors or discharge any liabilities or obligations to any other creditors. The consequence of moratorium

thus has been clearly indicated in Sub-sections (2) and (3) of Section 45. What is the meaning and consequence of moratorium under Section 45(2) has been considered in detail by a Division Bench of Bombay High Court in Shiv Kumar Tulsian and another Vs. Union of India and others, (1990) 68 CompCas 720 . In the above case the Central Government has issued an order of moratorium. The shareholders of the Banking Company had filed the Writ Petition challenging the moratorium order as well as challenging the constitutional validity of Section 45 of the Banking Regulation Act. In the above context, considering the word "moratorium", the following has been laid down:

"The word "moratorium" has not been defined in the Act. In Words and Phrases, permanent edition, volume 27-A, page 210, the word "moratorium" has been defined as a term designating suspension of all or of certain legal remedies against debtors, sometimes authorized by law during financial distress. It further explains the word "moratorium" as a period of permissible or obligatory delay; specifically a period during which an obligor has a legal right to delay meeting an obligation. In Jowitt's Dictionary of English Law, second edition, page 1201, "moratorium" is defined as an authorised postponement of payment of debts.

It is, therefore, clear that "moratorium" implies postponement of obligations of the debtor to pay his creditor. In the context of a bank, "moratorium", therefore, means postponement of payment or postponement of a legal proceeding for recovery of amounts by the depositors or creditors. Obviously, moratorium is a very harsh and stringent action which can be resorted to only in exceptional cases and if the emergency so demands. Such an emergency may arise in different ways depending on the facts of each case. A clear case for moratorium would arise when there is an actual or likely run on the bank by the depositors or the creditors of the bank. A near or imminent possibility of a run on the bank can arise where a bank is on the brink of insolvency meaning thereby that the assets at any given point of time fall short of the liability. This situation may arise as a result of utter mismanagement of the affairs of the bank and indiscriminate advances made which either are not immediately recoverable or irrecoverable. Such loans are styled as sticky loans. Some of them may be irrecoverable and some are recoverable, but not immediately. In the case of banks, "moratorium" is undisputedly a measure which has to be adopted in rare cases and as a temporary measure to prevent the depositors and creditors of the bank from seeking realisation of their dues. When such a situation arises, there is always a possibility of some friends or relations being favoured by the management and some others may not even be in a position to realise their dues from the bank. Now, in such situations calling for a moratorium, it would be necessary to bear in mind the role of the reserve Bank of India under the said Act. The predominant object that permeates through the various provisions giving various powers to the Reserve Bank under the said Act is the protection of the depositors and creditors....."

The Sub-sections (2) and (3) of Section 45 and the word "moratorium" as

explained in the above case clearly provide that moratorium is postponement of obligations of the debtor to pay his creditor. Moratorium means postponement of payment or postponement of a legal proceeding for recovery of amounts by the depositors or creditors. An order of moratorium, thus, in no manner effect the disciplinary control of the Bank on its employees, nor the order of moratorium takes away the disciplinary control of the Banking Company from the date of moratorium. As noted above, the scheme was notified only on 31.1.2003 and the employees of the Bank became the employees of the Punjab National Bank only after the notification of the scheme. Learned counsel for the petitioner has referred to clause 8 of Chapter V of the notification dated 31.1.2003 and submitted that by virtue of the said notification, the petitioner is an employee of the transferee Bank with effect from 2.11.2002. It is relevant to quote Clause 8 of the notification, which is to the following effect:

"8. Continuation of services of the employees: (1) All the employees of transferor bank shall continue in service and be deemed to have been appointed in the transferee bank at the same remuneration and on the same terms and conditions of service, as were applicable to such employees immediately before the close of business on the 2nd November, 2002:

Provided that the employees of the transferor bank, who have by notice in writing given to the transferor or the transferee bank at any time before the expiry of one month next following the prescribed date on which the scheme has been sanctioned by the Central Government, intimated their intention of not becoming employees of the transferee bank, shall be entitled to the payment of such compensation, if any, under the provisions of the Industrial Disputes Act, 1947 (14 of 1947) and such pension gratuity, provident fund and other retirement benefits as may be ordinarily admissible under the rules of authorisations of the transferor bank as in force immediately before the close of business on the 2nd November, 2002.

(2) The transferee bank shall, in respect of the employees of the transferor bank who are deemed to have been appointed as employees of the transferee bank, be deemed also to have taken over the liability for them of retrenchment compensation in the event of their being retrenched while in the service of the transferee bank on the basis that their service have been continuous and have not been interrupted by their transfer to the transferee bank.

(3) The transferee bank shall, on the expiry of a period not longer than three years from the prescribed date on which the scheme is sanctioned pay or grant to the employees of the transferor bank whose services are continued in the transferee bank under sub-paragraph (1), except such of the employees who cease to be in service under the proviso to sub-paragraph (1), the same remuneration and the same terms and conditions of service as are applicable to the employees of corresponding rank or status of the transferee bank subject to the qualifications and experience of the said employees of the transferor bank being the same as or equivalent to those of such other employees of the

transferee bank:

Provided that if any doubt or difference arises as to whether the qualifications or experience of any of the said employees are the same as or equivalent to the qualifications and experience of the other employees of corresponding rank or status of the transferee bank or as to the procedure or principles to be adopted for the fixation of the pay of the employees in the scales of pay of transferee bank, the doubt or difference shall be referred to the Reserve Bank of India whose decision thereon shall be final.

(4) The trustees or administrators of any provident fund and gratuity fund constituted for the employees of the transferor bank, or as the case may be, the transferor bank, shall on or as soon as possible after the prescribed date transfer to the trustee of the employees' provident fund and gratuity fund constituted for the transferee bank or otherwise as the transferee bank may direct, all the moneys and investments held in trust for the benefit of the employees of the transferor bank.

Provided that such latter trustees shall not be liable for any deficiency in the value of investments, or in respect of any act, neglect or default done before the date of commencement of the scheme."

15. The above clause 8 of the notification does not indicate that the employees are deemed to be employees of the transferee Bank from 2.11.2002. What is intended by Clause 8 is that all the employees of the transferor Bank shall continue in service and be deemed to have been appointed in the transferee Bank at the same remuneration and on the same terms and conditions of service, as were applicable to such employees immediately before the close of business on 2.11.2002. Thus, the date 2.11.2002 has been referred to as a date for purpose of condition of service of the employees. Clause 8 cannot be read to mean that the employees are deemed to be employees of the transferee Bank with effect from 2.11.2002. The submission raised by learned counsel for the petitioner that the petitioner shall be deemed to have become employee of the Punjab National Bank on 2.11.2002, thus, does not stand. Admittedly, the notification of the Scheme was made on 31.1.2003 which was implemented with effect from 1.2.2003 as has been clearly stated in the counter affidavit filed by the Bank. Thus, the submission of learned counsel for the petitioner that the first respondent Bank had no jurisdiction to terminate the services of the petitioner cannot be accepted. The learned Single Judge, thus, erred in holding that the petitioner became employee of the transferee Bank with effect from 2.11.2002.

16. Learned counsel for the Bank has placed reliance on the judgments of the Apex Court in Bank of Baroda Vs. Rajender Pal Soni, (1996) 3 AD 281 : AIR 1996 SC 3077 : (1996) 1 BC 550 : (1997) 88 CompCas 141 : (1996) 3 JT 368 : (1996) 2 LLJ 99 : (1996) 2 SCALE 858 : (1996) 7 SCC 696 : (1996) 2 SCR 837 : (1996) 2 UJ 41 . The Bank's case was fully covered by the aforesaid judgment. In the above case, Clause 10 of the scheme was similar to clause 8 of the

notification dated 31.3.2003. Clause 10 was quoted in paragraph 3 of the judgment, which is quoted as below:

"3. It is not necessary to preface the antecedent enquiry conducted against the respondent for misconduct by the Traders Bank which was amalgamated with the appellant-Bank. Suffice it to state that on 25.06.1986 the respondent's service was sought to be terminated by issuance of an order on offering three months' pay in lieu of the requisite notice. Instead, the respondent on even date had tendered his resignation (Ext. P5) to Traders Bank; transferor-Bank of the appellant had accepted the resignation on 02.07.1986. Consequently, the respondent had returned the cheque of salary offered to him in lieu of notice on the even date. Under Section 45 of the Banking Regulation Act, 1949 (for short, the "Act"), the scheme of amalgamation of transferor-Bank with the appellant Bank, with effect from 20.11.1987 (Ext. P8) was initiated. The Central Government had accepted the amalgamation under sub-section (7) of Section 45 of the Act with effect from the appointed date viz. 13.05.1988. A scheme in that behalf was approved by the Central Government. Clause 10 of the scheme provides as under:

"All the employees of the transferor-Bank shall continue in service and be deemed to have been appointed by the transferee-Bank at the same remuneration and on the same terms and conditions of service as were applicable to such employees immediately before the close of business on 20.11.1987."

17. In the above case also the scheme of amalgamation was issued with effect from 28.11.1987 and the appellant was not in the service of the Bank on the aforesaid date. Since he has submitted his resignation, and the same had been accepted by the Bank on 2.7.1986. The Supreme Court held that the transferee Bank was not liable for any arrears of salary, since on the date when the scheme amalgamation was imposed, the respondent was not an employee of the transferee Bank. In the said case the following was laid down by the Supreme Court in paragraph 6:

"6. Even in this appeal the only question is: whether the appellant is liable to take over the services of the appellant? If that finding is recorded in favour of the respondent, necessarily the suit of the respondent would stand maintainable. Section 45 of the Act envisages the power of the Reserve Bank to apply to the Central Government for suspension of the business of a Banking Company and prepare a scheme for reconstitution or amalgamation. Admittedly, the Traders Bank was amalgamated with the appellant-Bank by exercise of the power under sub-section (1) read with Sub-section (2) of Section 45 of the Act. The sanction in that behalf has been accorded by the Central Government in the scheme under sub-section (7). As seen, clause (10) of the scheme envisages that employees existing as on 20.11.1987 in the transferor-Bank, viz., the Traders Bank so taken over, shall become employees of the appellant-Bank. Admittedly, the respondent was not in service as on that date..."

18. We, thus, are of the view that the first respondent Bank was fully competent to issue termination order and the moratorium dated 2.11.2002 in no manner took away the right of the first respondent Bank to deal with the service matters of its employees. Issue No. I is answered accordingly.

19. Issue Nos. II and III being interconnected are taken together. From the facts brought on record, it is clear that the Bank had granted extraordinary leave to the petitioner only till 19.1.2002. On 20.4.2002 the petitioner had made an application for grant of extraordinary leave. The leave application dated 20.1.2002 was rejected by the Bank by letter dated 11.3.2002, which has been produced by the petitioner as Exhibit P1. The petitioner, although thereafter has also been writing for grant of extraordinary leave on medical ground, no leave was sanctioned after 20.1.2002. The Bank has treated the petitioner as unauthorised absentee. Memo dated 26.5.2002 was issued to the petitioner, which is produced as Exhibit P5, which reads as follows:

"As per the officers" service rules applicable to you, the duration of extraordinary leave shall not exceed 3 months on any one occasion and 12 months during the entire service. It has been brought to notice that you had been sanctioned extra-ordinary leave aggregating 486 days as on 19.01.2002. Your request for further extension of leave was not acceded to and you had been instructed vide ROP/10368/2001-02 dated 11.3.2002 to report for duty immediately. Violating the above instruction, you continued to absent yourself from duty. You were given another chance to report for duty, vide ROP/1080/2002-03 dated 9.5.2002. knowing that you are not entitled to further leave and in violation of the specific instructions of your higher authorities, you did not report for duty, nor did you submit anything in reply thereto.

In the circumstances, it is to be inferred that you do not desire to continue your employment in the bank. You are therefore called upon to explain why your absence should not be construed as amounting to deserting employment and further proceedings initiated thereon. Your explanation should reach the undersigned within 15 days of the date of this letter, failing which it will be deemed that you do not have anything to say in the matter and the same will be dealt with accordingly."

20. After receipt of the memo, the petitioner reiterated the request for grant of extraordinary leave. The petitioner further stated that she hopes to join in third week of July. The petitioner did not join duty in July and sent a letter dated 22.7.2002 seeking voluntary retirement. The petitioner had already written Exhibit P8 letter 19.8.2002 on which much reliance has been placed by the learned counsel for the Bank. In Exhibit P8 letter it has been stated as follows:

"During my stay of one month at Palakkad I had fallen sick due to hard breathing chest pain and giddiness and I had to resort to medication. Recently on 16th night I felt sick and as my husband had to return on 17th he insisted me to proceed along with him as there is nobody to take care of me and our one year

old child. On 17th I have reached here at Doha.

Due to my illness I am unable to stay alone at native place without my husband's helping hand and I feel extremely sorry that I am unable to continue my services with the Bank.

I was awaiting favorable action for my request for V.R.S. But as my husband was leaving I had to come along with him. My ill health and the family.

The Medical Certificate follows."

21. In the said letter the petitioner again stated that she is awaiting favourable action on her request for voluntary retirement. The said letter cannot be read as letter deserting or abandoning the services. The petitioner only expressed her inability for not being able to continue her service in the Bank and the reason as to why the petitioner reiterated her request for consideration of voluntary retirement. The petitioner's application for voluntary retirement was rejected on 18.9.2002. The petitioner's case is that she received intimation only in the last week of October that her application for voluntary retirement cannot be considered, as she had not completed the requisite period of service. The petitioner's case is that she filed Exhibit P11, where she made a request to review the order dated 7.11.2002.

22. Service Rules have been framed by the Bank, namely, Nedungadi Bank Ltd. Officers' Service Rules, which were in force with effect from 1.8.1978. Absence without leave or overstaying the sanctioned leave is included in the definition of "misconduct" under clause 35. Sub-clause (viii) of clause 35 of the Rules provides as follows:

"viii) Absence without leave or overstaying the sanctioned leave without sufficient grounds or proper or sufficient grounds or proper or satisfactory explanation or absence from the employee's appointed place of work without permission;"

23. Clause 36 provides for punishment. Clause 38 provides for procedure for awarding punishment. Sub-Clause (iii), (iv), (v), (vi), (vii) and (viii) of Clause 38 are relevant for the present case, which are quoted as follows:

"38. Procedure for awarding punishments.

Xx xx xx

(iii) An employee against whom disciplinary action is proposed or likely to be taken shall be given a charge sheet clearly setting forth the circumstances appearing against him. The employee charged shall be given a reasonable time (nor less than 48 hours) to submit his written explanation;

(iv) If no reply is received in respect of the charge sheet within the stipulated time, the competent authority may proceed on the basis that the employee has no explanation to offer and take such further steps as it deems proper and

necessary;

(v) Action as provided in sub-rule (iv) above may also be taken if the employee admits the charge in writing: Provided, however, that when the punishment contemplated is removal or dismissal, the competent authority may order an enquiry as contemplated hereinafter;

(vi) If the written explanation is considered not satisfactory, the competent authority shall proceed as follows:-

a) If the punishment contemplated is a minor punishment and in his opinion no enquiry is necessary, pass an order after taking into consideration the extent and gravity of the misconduct, previous record of the person charged and any extenuating or aggravating circumstances;

b) If the punishment contemplated is not a minor punishment, order an enquiry;

(vii) When an enquiry is ordered, the competent authority shall nominate an enquiry officer. If such enquiry officer is an employee of the Bank, he shall be in a grade or status higher than that of the employee charged;

(viii) The employee charged shall be informed in writing of the date and time when the enquiry will be held, sufficient time being given to him to produce any evidence that he may wish to tender in his defence;"

24. Clause 41 of the Rules, relying on which, the order of termination dated 7.11.2002 has been issued, provides as follows:

"41. Termination.

The services of an employee may be terminated by the competent authority without assigning any reason as under:

a) of a permanent employee by giving him three months" notice in writing or pay in lieu thereof;

b) of an employee on probation by giving him one months" notice in writing or pay in lieu thereof;

c) of a temporary employee by giving him 24 hours" notice or pay in lieu thereof.

Explanation.

For the purpose of this Rule, the term "pay" shall include all emoluments which would be admissible if he were on privilege leave."

25. The termination under clause 41 is not termination on any punishment, which has been made clear by clause 36(ii). Clause 36(ii) is quoted as under:

"36. Punishments.

Xx xx

(ii) Termination of service of an employee under Rule 41 or an employee appointed under contract in accordance with or on the expiry of such contract, or a probationer during or after his probation on grounds of unsuitability shall not be deemed to be removal from service or dismissal within the meaning of this rule;"

26. Termination of the petitioner had been made under clause 41, which was not termination as punishment. The Bank's case as stated in the counter affidavit is that the termination of the petitioner was not as a measure of punishment.

27. From the facts on record it is clear that in the event the Bank was proceeding to award punishment, drawing of enquiry was necessary, since the Bank has already communicated to the petitioner that the petitioner is on unauthorised absence.

28. From the sequence of events and correspondence on record, it cannot be said that the petitioner has deserted her service. Exhibit P8, on which much reliance has been placed by learned counsel for the Bank clearly mentioned that the petitioner is awaiting favourable action on her request for voluntary retirement. The application of the petitioner for voluntary retirement was rejected only on 18.9.2002 and there is nothing on record to indicate that after 18.9.2002 the petitioner has expressed her inability to join or to continue in service. The petitioner's case to the contrary is that after coming to know about the rejection of her application for voluntary retirement, she informed that she is ready to join. In the above view of the matter, Issues II and III are decided accordingly.

29. Now Issue No. IV, whether the termination order dated 7.11.2002 issued in exercise of power under Clause 41(a) of the Rules is a valid termination order? Clause 41 empowers the Bank to terminate the services of even a permanent employee by giving three months notice. Similar provisions in Service Rules came up for consideration before the Apex Court in large number of cases. The Apex Court has already laid down that such clause is arbitrary and violative of Article 14 of the Constitution of India. The judgment of the Supreme Court in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, AIR 1986 SC 1571 : (1986) 3 CompLJ 1 : (1986) LabIC 1312 : (1986) 2 LLJ 171 : (1986) 1 SCALE 799 : (1986) 3 SCC 156 : (1986) 2 SCR 278 : (1986) 2 SLJ 320 was one of such cases, where similar clause, Rule 9(i) was under consideration. The Apex Court held the clause to be void and arbitrary. Paragraph 98 and 101 of the said judgment are relevant, which is quoted as under:

"98. Rule 9(i) confers upon the Corporation the power to terminate the service of a permanent employee by giving him three months" notice in writing or in lieu thereof to pay him the equivalent of three months" basic pay and dearness allowance. A similar regulation framed by the West Bengal State Electricity Board was described by this Court in West Bengal State Electricity Board and Others Vs.

Desh Bandhu Ghosh and Others, AIR 1985 SC 722 : (1985) 50 FLR 456 : (1985) 1 LLJ 373 : (1985) 1 SCALE 297 : (1985) 3 SCC 116 : (1985) 2 SCR 1014 : (1985) 1 SLJ 318 : (1985) 17 UJ 671 as:

"...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."

As all lawyers may not be familiar with administrative law, we may as well explain that "the Henry VIII clause" is a provision occasionally found in legislation conferring delegated legislative power, giving the delegate the power to amend the delegating Act in order to bring that Act into full operation or otherwise by Order to remove any difficulty, and at times giving power to modify the provisions of other Acts also. The Committee on Ministers' Powers in its report submitted in 1932 (Cmd. 4060) pointed out that such a provision had been nicknamed the Henry VIII clause" because "that King is regarded popularly as the impersonation of executive autocracy". The Committee's Report (at page 61) criticised these clauses as a temptation to slipshod work in the preparation of bills and recommended that such provisions should be used only where they were justified before Parliament on compelling grounds. Legislation enacted by Parliament in the United Kingdom after 1932 does not show that this recommendation had any particular effect."

xx xx

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

instrumentalities constitute the largest employer in the country. A clause such as Rule 9(i) in a contract of employment affecting large sections of the public is harmful and injurious to the public interest for it tends to create a sense of insecurity in the minds of those to whom it applies and consequently it is against public good. Such a clause, therefore, is opposed to public policy and being opposed to public policy, it is void under section 23 of the Indian Contract Act."

30. Learned counsel for the petitioner has placed reliance on a judgment of the Allahabad High Court in *Dal Chand Agarwal Vs. Divisional Manager, Bank of Maharashtra, Poona and another*, (1998) 3 AWC 1680 : (1998) 3 UPLBEC 1665 : (1998) 3 UPLBEC 1656 . In paragraph 9 of the judgment the following was laid down:

"(9) In all these cases, referred to above, the Supreme Court repeatedly held that those Rules which provide for termination of the service of permanent employee are those Rules which provide for termination of the service of permanent employee are hit by Article 14 of the constitution inasmuch as they conferred arbitrary power on the authorities concerned with the result that the services of permanent employees can be terminated without any justification and with ulterior motive. Secondly, there is no line of demarcation, guidance when the disciplinary authority can terminate the services only by giving three months" notice while in the case of some of the employees it can take disciplinary proceedings and thereafter dismiss the employees from service."

31. The submission of the petitioner that clause 41 of the Rules has to be held to be arbitrary has to be accepted. The petitioner being a permanent employee and the Bank having already issued a memo, in the event the Bank wanted to take any proceedings against the petitioner, proper proceedings was required to be drawn in accordance with clause 38 as noted above. Termination with three months notice is clearly unsustainable. The order of termination dated 7.11.2002, thus, cannot be sustained, although for the reasons as given above. We, thus, hold that the termination order dated 7.11.2002 invoking clause 41(a) is arbitrary and violative of Article 14 of the Constitution of India. Issue No. IV is answered accordingly.

32. Issue No. V is regarding rejection of application for voluntary retirement. The qualifying service for voluntary retirement is 20 years. Paragraph 4 of the order dated 30.1.2012, by which the Punjab National Bank has considered the application of the petitioner for voluntary retirement under orders of this Court, gives the details of the case. It is useful to extract paragraph 4 of Exhibit P13 order dated 30.1.2012, which is as under:

"4. Without prejudice to the objections raised by the bank in the counter affidavit and having due regard to the Hon'ble High Court, I have considered the various submissions made by Smt. Vasanthy Mohan in application dated 22.7.2002 and I find as under:-

i. Regulation 2(u) of the eNBL Pension Regulations 1995 states as under:-

"qualifying service" means the service rendered while on duty or otherwise which shall be taken into account for the purpose of pension under these regulations;"

ii. Regulation 17 of the Erst. NBL Pension Regulations 1995 states as under:-

"Counting of periods spent on leave:

All leave during service in the bank for which leave salary is payable shall count as qualifying service:

Provided that extraordinary leave on loss of pay shall not count as qualifying service except when the sanctioning authority has directed that such leave not exceeding twelve months during the entire service, may count as service for all purposes including pension."

iii. Vide Ex P1 has been brought on record that she had been sanctioned 486 days extraordinary leave on medical grounds which is much more than the period of 365 allowed under the regulations. Moreover, perusal of Ex P2, P6, P7 and P8 would show that none of her requests for granting of leave was supported by any medical certificate or report in support of her supposed medical exigencies requiring leave and there is no record of her submitting any medical records in support thereof despite her own promise in this regard, as evidenced by Ex P6 and Ex P8. In the circumstances, nothing is brought on record warranting a consideration of the decision already taken on Ex P7 and communicated to her via letter dated 18.9.2002 by Erst. NBL i.e., Ex P9.

Since she did not complete requisite qualifying service of minimum of 20 years excluding absence/leave without pay in terms of the provisions of eNBL Pension Regulations, 1995, hence her application for voluntary retirement cannot be considered."

33. The petitioner had joined the service of the Bank on 17.5.1982. Upto 19.1.2002 the petitioner was sanctioned extraordinary leave for 483 days and after 20.1.2002, the petitioner had not been sanctioned any leave and her application for leave was rejected and communicated to her. The petitioner did not complete 20 years of qualifying service and we do not find any error in Exhibit P13 order dated 30.1.2012, by which the petitioner's application for voluntary retirement was rejected. The petitioner had not completed 20 years of qualifying service to make her eligible for acceptance of voluntary retirement. Thus the decision of the Bank rejecting the petitioner's application for voluntary retirement was justified. The Issue No. V is answered accordingly.

34. In view of the foregoing discussion, we arrive at the following conclusions:

"i) The first respondent Bank had ample jurisdiction to issue the order dated 7.11.2002 with regard to petitioner's termination. The order of moratorium dated 2.11.2002 in no manner took away the right of the Bank to deal with the service matters of its employees.

ii) Invoking of clause 41(a) of the Nedungadi Bank Officers' Service Rules in

terminating the petitioner's services was arbitrary and violative of Article 14 of the Constitution.

iii) The Bank in the event wanted to proceed with the disciplinary enquiry against the petitioner on the ground of unauthorised absence, it was obligatory for the Bank to draw disciplinary proceedings under clause 36/38 of the Rules.

iv) The petitioner cannot be said to have deserted her services.

v) In W.A. No. 1109 of 2013 the petitioner has prayed for payment of salary consequent to Exhibit P10 termination order. As noted above, although we have found Exhibit P10 order of termination as invalid, the petitioner being absent from the Bank, without sanction of leave, and the Bank having already issued a memo dated 26.6.2002, Exhibit P5, the Bank is at liberty to proceed further against the petitioner, if it so decides. We do not find any error in the judgment of the learned Single Judge holding that the petitioner shall not be entitled to any financial benefit from the date of her termination due to her unauthorised absence."

We, thus, do not find any merit in W.A. No. 1109 of 2013, which is accordingly dismissed. W.A. No. 1288 of 2013 is partly allowed. The judgment of the learned Single Judge is modified and O.P. No. 39132 of 2002 is disposed of with the following directions:

"I) Exhibit P10 order dated 7.11.2002 is set aside.

II) The petitioner shall not be entitled for any financial benefit consequent to setting aside of the termination order, she being absent from the Bank without sanction of leave.

III) The second respondent, i.e., Punjab National Bank shall be at liberty to proceed with the disciplinary proceedings against the petitioner in accordance with law, if it so decides.

IV) The benefits to which the petitioner may be entitled, if any, shall be subject to the decision to be taken by the Bank hereinafter."

Both the Writ Appeals are decided accordingly.

The parties shall bear their own costs.