K. I. Shephard and Others

Vs

Union of India and Others

Writ Petition Nos. 177, 711, 808, 841 and 1050 of 1987

(E. S. Venkataramiah, M. M. Dutt JJ)

18.09.1987

JUDGMENT

RANGANATH MISRA, J. -

1. These writ petitions under article 32 of the Constitutional and appeals by special leave against the judgment of the Division Bench of the Kerala High Court in writ appeals have a common set of facts as also of law for consideration. These matters have been heard together and are disposal of by this common judgment.

2. Hindustan Commercial Bank ("Hindustan", for short), The Bank of Cochin Ltd. (hereafter referred to as "Cochin Bank") and Lakshmi Commercial Bank ("Lakshmi" for short), were private banks. Action was initiated under section 45 of the Banking Regulation Act, 1949 ("Act", for short) for amalgamation of these three banks with Punjab National Bank, Canara Bank and State Bank of India respectively in terms of separate schemes drawn under that provision of the Act. Amalgamation has been made. Pursuant to the schemes, 28 employees of Hindustan, 21 employees of Cochin Bank and 76 employees of Lakshmi were excluded from employment and their services were not taken over by the respective transferee banks. Some of these excluded employees of the Cochin Bank went before the Kerala High Court for relief under article 226 of the Constitution. A learned single Judge gave them partial relief but on an appeal to the Division Bench. By the transferee bank concerned the writ petitions have been dismissed. The civil appeals are against the decision the of the Division Bench. The writ petitions directly filed before this Court are by some of the excluded employees of Hindustan and Lakshmi respectively.

3. Though employees of the other two banks had not challenged the vires of section 45 of the Act, on behalf of Lakshmi, such a challenge has been made. Since the grounds of attack on this score did not impress us at all, we do not propose to refer to that aspect of the submissions involving interpretation of article 31-A, Article 16 and article 21. It has often been said by this Court that courts should not enter into constitutional issues and attempt interpretation of its provisions unless it is really necessary for disposal of the dispute. In our opinion, this group of cases can be disposed of without reference to the question of vires of some part of section 45 of the Act being examined. Counsel on behalf of the excluded employees have broadly contended that the draft schemes did not include name of any employees intended to be excluded; no opportunity of being heard was afforded to them before exclusion was ordered under the schemes and the authorities concerned have not acted fairly; they deny the allegation that any of them was responsible for fictitious, improper or non-business like advances of loan to parties thereby bringing conditions near about bankruptcy for the appropriate banking companies; many other employees against whom there were definite charges already pending enquiry or even orders of dismissal had been proposed have been

taken over and retained in the service of the transferee banking while these excluded employees without justification have been called upon to face this unfortunate situation.

4. The transferee banks, the Reserve Bank of India (hereafter referred to as "RBI" for short) and the Union of India have appeared and filed affidavits in opposition. The Union of India has contended that the scheme in respect of each of the banks that has got amalgamated had been approved by it as required under the Act and since finality was attached to such schemes, the challenge was not open against the schemes particularly in view of the provisions contained in article 31-A of the Constitution. On behalf of the Reserve Bank of India, several contentions were raised by way of opposition and, shortly stated, these submission are :

> (1) Law does not require that the draft scheme should contain the names of the employees to be excluded;
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> (2) the incorporation of the names finalised on the basis of scrutiny of the records before the schemes were placed before the RBI was sufficient compliance of the requirements of the law;
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> (3) the provisions of the Act did not confer any right on the employees of being heard;
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> (4) the scheme-making process was legislative in character and, therefore, did not come within the ambit of natural justice. Alternatively, the action not being judicial or quasi-judicial and at the most being administrative or executive was also not open to challenge on allegations of violation of rules of natural justice;
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> (5) moratorium under the statutory provisions could not be beyond six months and in view of the fact that the entire operation had to be finalised within a brief time frame, the requirement of an enquiry by notice to all the officers intended to be excluded could not have been intended to be implanted into the provisions of section 45; and
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> (6) provisions of compensation has been made for those who were excluded from the respective schemes. Each of the transferee banks generally adopted the stand taken by RBI.

5. Before we proceed to examine the tenability of the several contention and counter-contentions advanced at the hearing, it is appropriate that we refer to the relevant provisions of the Act. The entire law applicable to the facts of these cases is to be found in Part III of the Act and in particular in section 45. As far as relevant, that section provides :

> (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.
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> (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) * * *##

(4) During the period of moratorium, if the Reserve Bank is satisfied that -

(a) in the public interest; or

(b) in the interests of the depositors; or

(c) in order to secure the proper management of the banking company; or

(d) in the interests of the banking system of the country as a whole, -

it is necessary so to do, the Reserve Bank may prepare a scheme -

(i) for the reconstruction of the banking company, or

(ii) for the amalgamation of the banking company with any other banking institution (in this section referred to as ' the transferee bank').

(5) The scheme aforesaid may contain provisions for all or any of the following matters, namely : - ....

#(a) to (h) * * *##

(i) the continuance of the services of all the employees of the banking company (excepting such of them as not being workmen within the meaning of the Industrial Disputes Act, 1947, are specifically mentioned in the scheme) in the banking company itself on its reconstruction or, as the case may be, in the transferee bank at the same remuneration and on the same terms and conditions of service, within they were getting or, as the case may be, by which they were being governed, immediately before the date of the order of moratorium : ....

#Provided * * *##

(j) notwithstanding anything contained in clause (i) where any of the employees of the banking company not being workmen within the meaning of the Industrial Disputes Act, 1947, are specifically mentioned in the scheme under clause (i), or where any employees of the banking company have by notice in writing given to the banking company or, as the case may be, the transferee bank at any time before the expiry of one month next following the date on which the scheme is sanctioned by the Central Government, intimated their intention of not becoming employees of the banking company on its reconstruction or, as the case may be of the transferee bank, the payment to such employees of compensation, if any, to which they are entitled under the Industrial Disputes Act, 1947, and such pension, gratuity, provident fund and other retirement benefits ordinarily admissible to them under the rules or authorisation of the banking company immediately before the date of the order of moratorium; ...

#(k) and (l) * * *##

(6)(a) A copy of the scheme prepared by the Reserve Bank shall be sent in draft to the banking company and also to the transferee bank and any other banking company concerned in the amalgamation, for suggestions and objections, if any, within such period as the Reserve Bank may specify for this purpose :

(b) The Reserve Bank may make such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the banking company and also from the transferee bank, and any other banking company concerned in the amalgamation and from any members, depositors or other creditors of each of those companies and the transferee bank.

(7) The scheme shall thereafter be placed before the Central Government for its sanction and the Central Government may sanction the scheme without any modifications 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 * * *##

(7-A) The sanction accorded by the Central Government under sub-section (7), whether before or after the commencement of section 21 of the Banking Laws (Miscellaneous Provisions) Act, 1963, shall be conclusive evidence that all the requirements of this section relating to reconstruction, or, as the case may be, amalgamation have been complied with and a copy of the sanctioned scheme certified in writing by an officer of the Central Government to be a true copy thereof, shall, in all legal proceedings (whether in appeal or otherwise and whether instituted before or after the commencement of the said section 21), be admitted as evidence to the same extent as the original scheme.

(8) On and from the date of the coming into operation of the scheme or any provisions thereof, the scheme or such provision shall be binding on the banking company or, as the case may be, on the transferee bank and any other banking company concerned in the amalgamation and also on all the members, depositors and other creditors and employees of each of those companies and of the transferee bank, and on any other person having any right or liability in relation to any of those companies or the transferee bank .....

#(9) * * *##

(10) If any difficulty arises in giving effect to the provisions of the scheme, the Central Government may by order do anything not inconsistent with such provisions which appears to it necessary or expedient for the purpose of removing the difficulty.

(11) Copies of the scheme or of any order made under sub-section (10) shall be laid before both Houses of Parliament, as soon as may be, after the scheme has been sanctioned by the Central Government, or, as the case may be, the order has been made ....."

#(12) to (15) * * *##

Allegation advanced on behalf of the excluded employees is that the draft scheme contemplated under sub-section (6)(a) did not specifically mention names of the excluded employees and at a later stage when the scheme was sent up by the RBI to the Central Government a schedule containing the names of the excluded employees was attached to each of the schemes. Section 45 of the Act provides a legislative scheme and the different steps required to be taken under this section have been put one after the other. A reading of this section indicates a sequence oriented pattern. What would ordinarily be incorporated in the draft scheme is indicated in sub-section (5). After the requirements of sub-section (5) are complied with and the scheme comes to a presentable shape, sub-section (6)(a) requires a copy thereof as prepared by RBI to be sent to the banking company (transferor) as also to the transferee bank. Clause (b) of sub-section (6) authorises RBI to make modifications in the draft scheme as it may consider necessary in the light of suggestions and objections received from the banking company and the transferee bank. On a simple construction of sub-section (5) and (6) and on the basis of the sequence pattern adopted in section 45, it would be legitimate to hold that the Act contemplates the employees to be excluded to be specifically named in the draft scheme. Since it is a draft scheme prepared by RBI and the right to object or to make suggestions is extended to both the banking company as also the transferee bank, and in view of the fact that clause (i) of sub-section (5) specifies this item to be a matter which may be included in the scheme, it must follow that the legislative intention is that the scheme would incorporate the names of such employees as are intended to be excluded in accordance with the scheme. Once it is incorporated in the scheme, the banking company as also the transferee bank would be entitled to suggest/object to the inclusion of names of employees. It may be that the names of some of the employees may have been wrongly include and the banking company - the hitherto employer - would be in a position to suggest/object to the inclusion of the names or it may even be that names of some undesirable employees which should have been left out have been omitted and the banking company as the extant employer of such employees would be most competent to deal with such a situation to bring about rectifications by exercising the power to suggest/object to the draft scheme. The contention advanced on behalf of RBI that since it is open to it under sub-section (6)(b) of section 45 to make modifications to the draft scheme, even if the names were not included earlier, at the stage of finalising the scheme for placing it before the Central Government as required under sub-section (7), the earlier non-inclusion is not a contravention is not acceptable. We are of the view that in case some employees of the banking company are intended to be excluded, their names have to be specifically mentioned in the scheme at the draft stage. The requirement of specific mention is significant and the legislature must be taken to have intended compliance of the requirement at that stage. Mr. Salve for the RBI adopted the stand that the provisions of section 45 did not specifically concede a right of objection or making of suggestions to employees and in sub-section (6)(b) mention was made only of members, depositors or other creditors. For the reasons we have indicated above, this aspect of the contention does not impress us.

6. It is the common case of RBI as also the transferee banks that the records of service of each of the employees had been scrutinised and the names for inclusion in the scheme were picked up on the basis of materials like irresponsible action in regard to sanction of loans and accommodations to customers which affected the financial stability of the banking company concerned. Such an allegation made in the counter-affidavit in this Court has been seriously disputed by the litigating excluded employees. It is their positive case that there was no foundation in such allegation and dubious loans, if any, had been sanctioned under instructions of the superior in the banking company and, therefore, did not involve any delinquency on the part of such employees. Since it is the case of the respondents that exclusion had been ordered on the basis of an objective assessment

and the very foundation of the allegation upon which such assessment has been made is disputed, a situation arose where facts had to be ascertained; and it involved assessment. That has admittedly not been done.

7. These employees were in employment under a contract with the banking companies which were private banks. They have been excluded from service under the transferee banks and the contracts have now been terminated as a result of inclusion of their names in the schemes. It cannot be disputed - nay has not been - that exclusion has adversely affected this category of employees and has brought about prejudice and adverse civil consequences to them. Two contentions have been raised with reference to this aspect of the matter :

> (1) There has been infraction of natural justice, and
>
> (2) the transferee banks which are "State" and RBI which has monitored the operation being admittedly "State", their action in excluding some of the employees of the banking company and taking over the services of others who are similarly situated is hit by article 14 of the Constitution. It may be pointed out that according to the excluded employees, many facing similar allegations and/or in worse situation have been taken over.

8. Whether there is infraction of article 14 of the Constitution on the allegation advanced would depend upon facts relating to the excluded employees as also the allegedly derelict employees whose services have been taken over. In the absence of an enquiry in which the excluded employees should have been given an opportunity of participation, it has become difficult for us to probe into the matter further.

9. Admittedly, the excluded employees have neither been put to notice that their services were not being continued under the transferee banks nor had they been given an opportunity of being heard with reference to the allegations now levelled against them. Learned counsel for RBI and the transferee banks have taken the stand that the scheme-making process under section 45 is legislative in character and, therefore, outside the purview of the ambit of natural justice under the protective umbrella whereof the need to put the excluded employees to notice or enquiry arose. It is well-settled that natural justice will not be employed in the exercise of legislative power and Mr. Salve has rightly relied upon a recent decision of this Court being Union of India v. Cynamide India Ltd ((1987) 2 SCC 720). in support of such a position. But is the scheme-making process legislative? Power has been conferred on the RBI in certain situations to take steps for applying to the Central Government for an order of moratorium and during the period of moratorium to propose either reconstruction or amalgamation of the banking company. A scheme for the purposes contemplated has to be framed by RBI and placed before the Central Government for sanction. Power has been vested in the Central Government in terms of what is ordinarily known as a Henry-VIII clause for making orders for removal of difficulties. Section 45(11) requires that copies of the schemes as also of such orders made by the Central Government are to be placed before both Houses of Parliament. We do not think this requirement makes the exercise in regard to schemes a legislative process. It is not necessary to go to any other authority as the very decision relied upon by Mr. Salve in the case of Cynamide India Ltd. [1987] 2 SCC 720, lays down the test. In paragraph 7 of the judgment it has been indicated :

> "Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is 'difficult in theory and impossible in practice'. Though difficult, it

> is necessary that the line must sometimes be drawn as different legal rights and consequences may ensue. The distinction between the two has usually been expressed as 'one between the general and the particular'. "A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'. Legislation is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particulars cases". It has also been said : 'Rule-making is normally directed towards the formulation of requirements having a general application to all members of a broadly identifiable class' while, 'an adjudication, on the other hand, applies to specific individuals or situations'. But this is only a broad distinction, not necessarily always true'."

Applying these tests it is difficult to accept Mr. Salve's contention that the framing of the scheme under section 45 involves a legislative process. There are similar statutory provisions which require placing of material before the two House of Parliament yet not involving any legislative activity. The fact that orders made by the Central Government for removing difficulties as contemplated under sub-clause (10) are also to be placed before the two House of Parliament makes it abundantly clear that the placing of the scheme before the two House is not a relevant test for making the scheme-framing process legislative. We accordingly hold that there is no force in the contention of Mr. Salve that the process being legislative, rules of natural justice were not applicable.

10.The alternate contention on this score is that the scheme-making process being an executive activity or alternately an administrative matter, rules of natural justice have no application. This contention has again to be rejected. Netheim in "Privy Council, Natural Justice and Certiorari" has indicated :

> "Formerly the presumption had been that there was no obligation to give a hearing unless the statute itself indicated such an obligation; now the presumption is that there is such an obligation unless the statute clearly excludes it, notwithstanding the vesting of a power, in subjective terms, in a minister responsible to Parliament".

As has been pointed out by Wells, J., in Perre Brothers v. Citrus Organisation Committee ((1975) 10 SASR 555), :

> It is now well established - and there is no need for me to canvass the innumerable authorities bearing on this point - that duties, responsibilities and functions of an administrative authority may be purely ministerial, or they may embody some quasi or semi-judicial characteristic".

At one time a good deal of ingenuity - and with all respect it seems to me a great deal of energy - was wasted in attempting to discern whether a particular function was administrative or quasi-judicial. In my view, the House of Lords, and now the High Courts, have, to a very large extent set all such controversies at rest.

In my opinion, the test now is not so much as to whether one can fairly call something "ministerial" or "administrative", or "quasi-judicial" but whether the duties of a non-judicial authority must,

having regard to the wording of the Act, be carried out in a spirit of judicial fairness".

11.In Re K (H.)(an infant) ((1967) 1 All ER 226 (QBD), Lord Parker, C. J., found that the immigration officer was not acting in a judicial or quasi-judicial capacity. Yet, the learned Chief Justice held that he still had to act fairly. In that case, it meant giving K an opportunity of satisfying the officer as to his age, and for that purpose he had to let K know what his immediate impression was so that K could disabuse him of it. Lord Parker observed "I appreciate that in saying that it may be said that one is going further that is permitted on the decided cases because heretofore at any rate the decisions of the courts do seem to have drawn a strict line in these matters according to whether there is or is not a duty to act judicially or quasi-judicially".

The obligation to act fairly even in administrative decision-making has since been widely followed.

12. Mullan in "Fairness : The New Natural Justice" has stated : -

> "Natural justice co-exists with, or reflected, a wider principle of fairness in decision-making and that all judicial and administrative decision-making and that all judicial and administrative decision-makers had a duty to act fairly".

In the case of State of Orissa v. Dr. Miss Binapani Dei ((1967) 2 SCR 625 : AIR 1967 SC 1269 : (1967) 2 LLJ 266), this Court observed :

> "It is true that the order is administrative in character, but even an administrative order which involves civil consequences as already stated, must be consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken, the High Court was, in our judgment, right in setting aside the order of the State".

In A. K. Kraipak v. Union of India ((1970) 1 SCR 457 : (1969) 2 SCC 262), a Constitution Bench quoted with approval the observations of Lord Parker in Re K (H.) (an infant) ((1967) 1 All ER 226 (QBD), Hegde, J., speaking for the Court, stated : (SCC p. 272, para 20) Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not aribitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice, one fails to see why those rules should be made inapplicable to administrative enquiries. Oftentimes it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far-reaching effect that a decision in a quasi-judicial enquiry".

These observations in A. K. Kraipak's case ((1970) 1 SCR 457 : (1969) 2 SCC 262) were followed by another Constitution Bench of this Court in Chandra Bhavan Boarding and Lodging v. State of Mysoer ((1970) 2 SCR 600 : (1969) 3 SCC 84 : 38 FJR 1), In Swadeshi Cotton Mills v. Union of

India ((1981) 2 SCR 533 : (1981) 1 SCC 664 : AIR 1981 SC 818 : (1981) 51 Com Cas 210), a three Judge Bench of this court examined this aspect of natural justice. Sarkaria, J., who spoke for the Court, stated : (SCC pp. 683-84,para 28) "During the last two decades, the concept of natural justice has made great strides in the realm of administrative law. Before the epoch-making decision of the House of Lords in Ridge v. Baldwin (1964 AC 40 : (1963) 2 All ER 66 (HL)), it was generally thought that the rules of natural justice apply only to judicial or quasi-judicial proceedings and for that purpose, whenever a breach of the rule of natural justice was alleged, Courts in England used to ascertain whether the impugned action was taken by the statutory authority or tribunal in the exercise of its administrative or quasi-judicial power. In India also, this was the position before the ((1967) 2 SCR 625 : AIR 1967 SC 1269 : (1967) 2 LLJ 266) decision dated February 7, 1967, of this Court in Dr. Binapani Dei case, wherein it was held that even an administrative order or decision in matters involving civil consequences, has to be made consistently with the rules of natural justice. This suppose distinction between quasi-judicial and administrative decision, which was perceptibly mitigated in Binapani Die case ((1967) 2 SCR 625 : AIR 1967 SC 1269 : (1967) 2 LLJ 266) was further rubbed out to a vanishing point in A. K. Kraipak v. Union of India ((1970) 1 SCR 457 : (1969) 2 SCC 262) On the basis of these authorities it must be held that even when a State agency acts administratively, rules of natural justice would apply. As stated, natural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed so that they may be in a position (a) to make representations on their own behalf; (b) or to appear at a hearing or enquiry (if one is held); and (c) effectively to prepare their own case and to answer the case (if any) the have to meet.

13. Natural justice has various facets and acting fairly is one of them. RBI, which monitored the three amalgamations, was required to act fairly in the facts of the case. The situation necessitated a participatory enquiry in regard to the excluded employees. Since the decision to exclude them from service under the transferee banks is grounded upon a set of facts the correctness whereof they deny, if an opportunity to know the allegations and to have their say had been afforded, they could have no grievance on this score. The action deprives them of their livelihood and brings adverse civil consequences and could obviously not be taken on the ipse dixit of RBI officers without verification of fact. It is quite possible that a maneuvering officer of the banking company adversely disposed towards a particular employee of such bank could make a report against such employee and have him excluded from further service under the transferee bank. The possibility of exclusion on the basis of some mistake such as to identity cannot also be ruled out. There is all the more apprehension of this type as the process has to be completed quickly and very often the records of a large number of employees have to be scrutinised. We are of the view that the rules of natural justice apply to administrative action and in the instant cases the decision to exclude a section of the employees without complying with requirements of natural justice was bad.

14. It has been contended on behalf of the respondents that moratorium could be for a total period of six months and that was the time allowed for the entire operation to be conducted. In view of the time frame, by necessary implication, it must follow that application of the rules of natural justice compliance with which would involve a time-consuming process was ruled out. We do not think that there is any merit in this contention either. As a fact, in respect of the three banks, the total number of excluded employees is around 125. It is the common case of the parties that proceedings were pending against some of them. It may be that in view of the time frame a detailed enquiry involving communication of allegations, show cause, opportunity to lead evidence in support of the allegations and in defence of the stand of the employees may not be possible. Keeping the legislative scheme in view, perhaps a simpler enquiry, for instance, communication of the allegation

and even receiving an explanation and in cases where the allegation was serious or there was a total denial though there was firm basis for the allegation, a single personal hearing could be afforded. In this case, we are not really concerned with the manner or extent of hearing as there has been no hearing at all. It must, therefore, be held that the action of excluding these employees in the manner done cannot be supported.

15. Fair play is part of public policy and is a guarantee for justice to citizens. In our system of rule of law, every social agency conferred with power is required to act fairly so that social action would be just and there would be furtherance of the well-being of citizens. The rules of natural justice have developed with the growth of civilisation and the content thereof is often considered as a proper measure of the level of civilisation and Rule of Law prevailing in the community. Man within the social frame has struggled for centuries to bring into the community the concept of fairness and it has taken scores of years for the rules of natural justice to conceptually enter into the field of social activities. We do not think in the facts of the case there is any justification to hold that the rules of natural justice have been ousted by necessary implication on account of the time frame. On the other hand, we are of the view that the time limited by statue provides scope for an opportunity to be extended to the intended excluded employees before the scheme is finalised so that a hearing commensurate with the situation is afforded before a section of the employees is thrown out of employment.

16. We may now point out that the learned single judge of the Kerala High Court had proposed a post-amalgamation hearing to meet the situation but that has been vacated by the Division Bench. For the reasons we have indicated, there is no justification to think of a post-decisional hearing. On the other hand, the normal rule should apply. It was also contended on behalf of the respondents that the excluded employees could now represent and their cases could be examined. We do not think that would meet the ends of justice. They have already been thrown out of employment and having been deprived of livelihood, they must be facing serious difficulties. There is no justification to thrown them out of employment and then give them an opportunity of representation when the requirement is that they should have the opportunity referred to above as a condition precedent to the action. It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose.

17. "Amalgamation" as such, saved under article 31-A (1)(c) of the Constitution, is not under challenge here. Strong reliance, however, had been placed on the provisions of sub-section (7-A) of section 45 of the Act. The relevant part of it is as requoted here for convenience :

> The sanction accorded by the Central Government under sub-section (7) ... ... shall be conclusive evidence that all the requirements of this section relating to ..... amalgamation have been complied with ... ...

18. This provision is indeed one for purposes of evidence. In Smt. Somavanti v. State of Punjab ((1963 2 SCR 774 : AIR 1963 SC 151 : (1963) 33 Com Cas 745), this Court pointed out that there was no real difference between "conclusive proof" provided for in section 4 of the Evidence Act and "conclusive evidence" as appearing in sub-section (7-A). This provision does not bar the raising of the dispute of the nature received here. As we have already pointed out amalgamation is not under challenge. Parties are disputing as to what exactly are the requirements of the procedure laid down under the Act and the position that no opportunity was afforded to the excluded employees is not in dispute. To a situation as here the protection of the umbrella of conclusive evidence is not attached so as to bar the question from being examined. There is, therefore, nothing in sub-section (7-A) to

preclude examination of the question canvassed here.

19. The writ petitions and the appeals must succeed. We set aside the impugned judgments of the single judge and the Division Bench of the Kerala High Court and direct that each of the three transferee banks should take over the excluded employees on the same terms and conditions of employment under the respective banking companies prior to amalgamation. The employees would be entitled to the benefit of continuity of service for all purposes including salary and perks throughout the period. We leave it open to the transferee banks to take such action as they consider proper against these employees in accordance with law. Some of the excluded employees have not come to the court. There is no justification to penalise them for not having litigated. They too shall be entitled to the same benefits as the petitioners. Ordinarily, the successful parties should have been entitled to costs but in view of the facts that they are going back to employment, we do not propose to make orders of costs against their employers. We hope and trust that the transferee banks would look at the matter with an open mind and would keep themselves alive to the human problem involved in it.

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