SUPREME COURT OF INDIA

Indian Airlines Ltd.

Vs.

Prabha D.Kanan

C.A.No.4767 with 4768 of 2006

(S.B.Sinha and Dalveer Bhandari,JJ.,)

10.11.2006

JUDGEMENT

S.B.Sinha,J.,

1. Leave granted in S.L.Ps.

2. Constitutionality and/ or validity of Regulation 13 of the Indian Airlines (Flying Crew) Service Regulations (for short "the Regulations") is in question in these appeals which arise out of a judgment and order dated 30th August, 2005 passed by the High Court of Bombay in Writ Petition No. 2030 of 2003.

3. Indian Airlines Ltd. (Corporation) was constituted under the Air Corporation Act, 1953 (for short "the 1953 Act). Regulations were framed by Appellant No. 1 in the year 1994 by Act No. 13 of 1994. The Parliament enacted Air Corporations (Transfer of Undertakings and Repeal) Act, 1994 (for short "the 1994 Act") whereby and where under, the right, title and interest of Indian Airlines were transferred to Indian Airlines Limited. In terms of Section 45 of the 1953 Act, the Corporation made Regulations. Regulation 13 of the said Regulations is in the following terms :

> "13.The services of an employee may be terminated without assigning any reasons to him/her and without any prior notice but only on the following grounds not amounting to misconduct under the Standing Orders, namely :
>
> (a) If he/she is, in the opinion of the Company (the Board of Directors of Indian Airlines) incompetent and unsuitable for continued employment with the Company and such incompetence and unsuitability is such as to make his/her continuance in employment detrimental to the interest of the Company;
>
> OR

if his/her continuance in employment constitutes, in the opinion of the Company (the Board of Directors of Indian Airlines), a grave security risk making his/her continuance in service detrimental to the interests of the Company;

OR

if in the opinion of the Company (the Board of Directors of Indian Airlines) there is such a justifiable lack of confidence which, having regard to the nature of duties performed, would make it necessary in the interest of the Company, to immediately terminate his/her services.

(b) No employee shall resign from the employment of the Company without giving six months notice in writing to the Company of his/ her intention to resign; Provided that Managing Director of the Company may dispense with or reduce the period of six months on grounds of continued ill-health of the employee or such other compelling or extraordinary circumstances which in the opinion of the Managing Director warrant such dispensing with or reduction in the period of notice :

Provided further that the Company will be at liberty to refuse to accept termination of his/ her services by an employee where such termination is sought in order to avoid disciplinary action contemplated or taken by the Management."

4. Different provisions of the Regulations took effect from different dates, viz., 1.4. 1977, 1.3.1993 and 17.3.1993.

5. The question as regards the validity of Rule 9 of the Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules, 1979 came up for consideration before this Court in *Central Inland Water Transport Corporation Limited and another v. Brojo Nath Ganguly and another*[1] the relevant portion whereof was as under

"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....."

6. Constitution of India contains a provision for dispensing with an inquiry in terms of proviso (b) appended to clause (2) of Article 311 of the Constitution of India in regard to commission of a misconduct on the grounds specified therein.

7. The question as to whether services of a permanent employee can be terminated on the ground that it was no longer expedient to continue to employ the employee concerned initially came up for consideration in the case of *Workmen of Hindustan Steel Ltd. and another v. Hindustan Steel Ltd. and others*[2] A Division Bench of this Court while comparing

the said provisions with the proviso (b) appended to Clause (2) of Article 311 of the Constitution of India opined:

> ".....Power to dispense with inquiry is conferred for a purpose and to effectuate the purpose power can be exercised. But power is hedged in with a condition of setting down reasons in writing why power is exercised. Obviously therefore the reasons which would permit exercise of power must be such as would clearly spell out that the inquiry if held would be counter-productive. The duty to specify by reasons the satisfaction for holding that the inquiry was not reasonably practicable cannot be dispensed with. The reasons must be germane to the issue and would be subject to a limited judicial review. Undoubtedly sub-article (3) of Article 311 provides that the decision of the authority in this behalf is final. This only means that the Court cannot inquire into adequacy or sufficiency of reasons. But if the reasons ex facie are not germane to the issue namely of dispensing with inquiry the Court in a petition for a writ of certiorari can always examine reasons ex facie and if they are not germane to the issue record a finding that the prerequisite for exercise of power having not been satisfied, the exercise of power was bad or without jurisdiction. If the court is satisfied that the reasons which prompted the concerned authority to record a finding that it was not reasonably practicable to hold the inquiry, obviously the satisfaction would be a veneer to dispense with the inquiry and the Court may reject the same. What is obligatory is to specify the reasons for the satisfaction of the authority that it was not reasonably practicable to hold such an inquiry. Once the reasons are specified and are certainly subject to limited judicial review as in a writ for certiorari, the Court would examine whether the reasons were germane to the issue or was merely a cloak, device or a pretence to dispense with the inquiry and to impose the penalty. Let it not be forgotten what is laid down by a catena of decisions that where an order casts a stigma or affects livelihood before making the order, principles of natural justice namely a reasonable opportunity to present one's case and controvert the adverse evidence must have full play. Thus even where the Constitution permits dispensing with the inquiry, a safeguard is introduced that the concerned authority must specify reasons for its decision why it was not reasonably practicable to hold the inquiry."

It was observed:

> ".....It is time for such a public sector undertaking as Hindustan Steel Ltd. to recast S.O. 32 and to bring it in tune with the philosophy of the Constitution failing which it being other authority and therefore a State under Article 12 in an appropriate proceeding, the vires of S.O. 32 will have to be examined. It is not necessary to do so in the present case because even on the terms of S.O. 32, the order made by the General Manager is unsustainable."

8. The validity or otherwise of the said proviso came up for consideration before this Court in *Union of India and another v. Tulsiram Patel*[3] wherein inter alia it was held

".....Much as this may seem harsh and oppressive to a Government servant, this Court must not forget that the object underlying the second proviso is public policy, public interest and public good and the Court must, therefore, repel the temptation to be carried away by feelings of commiseration and sympathy for those Government servants who have been dismissed, removed or reduced in rank by applying the second proviso. Sympathy and commiseration cannot be allowed to outweigh considerations of public policy, concern for public interest, regard for public good and the peremptory dictate of a constitutional prohibition....."

It was further observed

".....Those who formed the Constituent Assembly were not the advocates of a despotic or dictatorial form of Government. They were the persons who enacted into our Constitution the Chapter on Fundamental Rights. The majority of them had fought for freedom and had suffered imprisonment in the cause of liberty and they, therefore, were not likely to introduce into our Constitution any provision from the earlier Government of India Acts which had been intended purely for the benefit of a foreign imperialistic power. After all, it is not as if a Government servant is without any remedy when the second proviso has been applied to him. There are two remedies open to him, namely, departmental appeal and judicial review. The scope and extent of these remedies will be considered later in the course of this judgment....."

9. In Brojo Nath Ganguly (supra), Clause (i) of Rule was termed to be a 'the Henry VIII Clause'. It was held that it conferred arbitrary and unguided power upon the Corporation. It was found to be violative of audi alteram partem rule of natural justice which was implicit in Article 14 of the Constitution of India. It was held to enable the Corporation to discriminate between the employees and employees.

10. This Court rejected a contention raised on behalf of appellant therein that the same pertains to contract and held that even if that be so it was violative of Section 23 of the Indian Contract Act being containing an unconscionable term.

11. This Court took note of the fact that there were 970 Government companies and its agencies and instrumentalities and they constitute the largest employer in the country and, thus, a clause like Rule 9(i) in a contract of employment affecting large sections of the public is harmful and injurious to the public interest.

12. This Court held that no opportunity whatever of a hearing is at all to be afforded to the permanent employee whose services are to be terminated in exercise of power. It rejected the contention that the Board of Directors would not exercise this power arbitrarily or capriciously as it consists of responsible and highly placed persons stating :

".....This submission ignores the fact that however highly placed a person may be, he must necessarily possess human frailties....."

13. It, however, appears that it specially referred to the case of Air India Regulations which had a similar clause.

14. It was observed :

> ".....Undoubtedly, in certain circumstances the principles of natural justice can be modified and, in exceptional cases, can even be excluded as pointed out in Tulsiram Patel case. Rule 9(i), however, is not covered by any of the situations which would justify the total exclusion of the audi alteram partem rule."

15. Air India and Indian Airlines who have similar regulations thereafter amended Regulation 13.

16. A similar question came up for consideration before this Court in *Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others*[4] wherein this Court specifically referred to Regulation 9(b) of Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations.

17. Sabyasachi Mukharji, CJ who delivered the minority opinion noticed the regulation framed by Indian Airlines in the following terms:

> "13. The services of an employee are terminable at 30 days on either side or basic pay in lieu :
>
> Provided, however, the Corporation will be at liberty to refuse to accept the termination of his service by an employee where such termination is sought in order to avoid disciplinary action contemplated or taken by the management."

18. The learned Chief Justice noticed that the Board of Directors of Indian Airlines have approved the amendment carried out in Regulation.

19. In para 109 of the judgment, the learned Chief Justice opined :

> "109. Efficiency of the administration of these undertakings is very vital and relevant consideration. Production must continue, services must be maintained and run. Efficacy of the services can be ensured only if manned by disciplined employees or workers. Discipline, decency and order will have to be maintained. Employees should have sense of participation and involvement and necessarily sense of security in semi-permanent or quasi-permanent or permanent employment. There must be scope for encouragement for good work. In what manner and in what measure, this should be planned and ensured within the framework of the Constitution and, power mingled with obligations, and duties enjoined with rights, are matters of constitutional adjustment at any particular evolved stage of the philosophy of our Constitution."

20. B.C. Ray, J. speaking for the majority, however, declared the said rule to be ultra vires inter alia on the premise that it conferred unbriddled, uncanalised and arbitrary power without conforming to audi alteram partem rule of principle of natural justice which was violative of Section 23 of the Indian Contract Act.

Sawant, J. opined:

"233. 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."

It has been observed:

"In fact, one of the public undertakings, viz., Indian Airlines has come out with such regulation being amended Regulation 13 of its Employees' Service Regulations, and the same has been placed on record by them. What is necessary to note in this connection is that the reading of such circumstances in the existing regulation would require its extensive recasting which is impermissible for the court to do. I know of no authority which supports such wide reading down of any provision of the statute or rule/regulation. For all these reasons the doctrine of reading down is according to me singularly inapplicable to the present case and the arguments in support of the same have to be rejected."

Sawant, J. while considering the doctrine of reading down noticed:

".....In fact, one of the public undertakings, viz., Indian Airlines has come out with such regulation being amended Regulation 13 of its Employees' Service Regulations, and the same has been placed on record by them. What is necessary to note in this connection is that the reading of such circumstances in the existing regulation would require its extensive recasting which is impermissible for the court to do. I know of no authority which supports such wide reading down of any provision of the statute or rule/regulation. For all these reasons the doctrine of reading down is according to me singularly inapplicable to the present case and the arguments in support of the same have to be rejected."

Sawant, J. and Ramaswamy, J. adopted the reasonings of Ray, J.

21. The learned Judges, however, did not deal with the question as to whether Regulation 13 could be said to be ultra vires.

22. Amended Regulation also came up for consideration before this Court in *Hari Pada Khan v. Union of India and others*[5] wherein while referring to Hindustan Steel Ltd. (supra) and Tulsiram Patel (supra), this Court opined :

"5. The doctrine of principle of natural justice has no application when the authority concerned is of the opinion that it would be inexpedient to hold an enquiry and that it would be against the interest of security of the Corporation to continue in employment the offender-workman when serious acts are likely to affect the foundation of the institution. In Union of India v. Tulsiram Patel, a Constitution Bench of this Court upheld the validity of the similar provisions under Article 311 of the Constitution. Recently, in SLP (C) No. 11659 of 1992 the matter had come up before this Court on 13-11-1995, where the validity of a pari materia provision was questioned. This Court upheld the validity stating that the above clause will operate prospectively.

6. A contention has been raised by Mr Krishnamani that in Tulsiram Patel case this Court had upheld the validity of the rule subject to the principle of natural justice. It is needless to mention that the principle of natural justice requires to be modulated consistent with the scheme of the rules. It is settled law that the principle of natural justice cannot supplant but can supplement the law. In that view of the matter, the rule having been made to meet specified contingency the principle of natural justice by implication, stands excluded. We do not think that the rule is ultra vires of Articles 14 and 21 as stated earlier."

23. In the amended Regulation 13, care had been taken to set out the circumstances in which the services of an employee can be terminated by way of discharge without holding enquiry and it took stock of eventualities which do not constitute misconduct and yet retention of an employee in the service by the management for any one of the grounds mentioned in the said regulation might be considered as detrimental for the management or against public interest.

24. The question again came up for consideration before this Court in *Basudeo Tiwary v. Sido Kanhu University and Others*[6] wherein Rajendra Babu, J. opined

"9. The law is settled that non-arbitrariness is an essential facet of Article 14 pervading the entire realm of State action governed by Article 14. It has come to be established, as a further corollary, that the audi alteram partem facet of natural justice is also a requirement of Article 14, for natural justice is the antithesis of arbitrariness. In the sphere of public employment, it is well settled that any action taken by the employer against an employee must be fair, just and reasonable which are the components of fair treatment. The conferment of absolute power to terminate the services of an employee is an antithesis to fair, just and reasonable treatment. This aspect was exhaustively considered by a Constitution Bench of this Court in *Delhi Transport Corpn. v. D.T.C. Mazdoor Congress*[7].

11. In the light of these principles of law, we have to examine the scope of the provision of Section 35(3) which reads as follows:

"35. (3) Any appointment or promotion made contrary to the provisions of the Act, statutes, rules or regulations or in any irregular or unauthorised manner shall be terminated at any time without notice."

12. The said provision provides that an appointment could be terminated at any time without notice if the same had been made contrary to the provisions of the Act, statutes, rules or regulations or in any irregular or unauthorised manner. The condition precedent for exercise of this power is that an appointment had been made contrary to the Act, rules, statutes and regulations or otherwise. In order to arrive at a conclusion that an appointment is contrary to the provisions of the Act, statutes, rules or regulations, etc., a finding has to be recorded and unless such a finding is recorded, the termination cannot be made, but to arrive at such a conclusion necessarily an enquiry will have to be made as to whether such appointment was contrary to the provisions of the Act etc. If in a given case such exercise is absent, the condition precedent stands unfulfilled. To arrive at such a finding necessarily enquiry will have to be held and in holding such an enquiry, the person whose appointment is under enquiry will have to be issued a notice. If notice is not given to him, then it is like playing Hamlet without the Prince of Denmark, that is, if the employee concerned whose rights are affected is not given notice of such a proceeding and a conclusion is drawn in his absence, such a conclusion would not be just, fair or reasonable as noticed by this Court in D.T.C. Mazdoor Sabha case1. In such an event, we have to hold that in the provision, there is an implied requirement of hearing for the purpose of arriving at a conclusion that an appointment had been made contrary to the Act, statute, rule or regulation etc. and it is only on such a conclusion being drawn, the services of the person could be terminated without further notice. That is how Section 35(3) in this case will have to be read."

25. Yet again in *Uptron India Ltd. v. Shammi Bhan and another*[8] Saghir Ahmad, J opined that the principles of natural justice must be complied with and the employee concerned must be informed of the grounds for which action was proposed to be taken against him for overstaying the leave. [See also S*tate of Punjab v. Jagir Singh*[9], and *V.C. Banaras Hindu University and Ors. v. Shrikant*[10],

26. Keeping in view the aforementioned legal principles, we may notice the factual matrix of the matter.

27. Prabha D. Kanan (respondent) joined service of the Corporation as an air hostess on 28th September, 1977. She was promoted as Deputy Manager in Inflight Service Department. On 18th June, 2002, she was put on duty in Flight IC-617-961 operating on sector Mumbai-Hyderabad-Bangalore-Sharjah. When the flight landed at Hydera-bad, she along with other crew members went for customs clearance from the Departure Hall to board the connecting flight being Flight No. 961 from Hyderabad to Sharjah via Bangalore. Immediately after take off, it was called back at the request of the Customs Authorities. Respondent was asked to deplane by Custom Authorities. She was arrested for carrying Indian currency amounting to Rs. 22,07,978/- along with foreign currency, viz., 180 UAE Dirhams, 13- Kuwaiti Dirhams, 3 Bahraini Dirhams and 20 Nepali Rupees. She is said to have made a confessional statement before the Custom Authorities in terms of Section 108 of the Customs Act that she had been

carrying unauthorisedly the said amount. Her husband on the basis of her statement was also arrested. The arrest of respondent and her involvement in a racket of dealing in foreign exchange in violation of Foreign Exchange and Regulation Act was extensively reported in newspapers on 19th June, 2002. Respondent was released on bail on 3rd July, 2002. Her services were terminated invoking Regulation 13 of the Regulations by the Board of Directors of the Corporation by a letter dated 9th August, 2002 stating :

> "This is to inform you that the Board of Directors of Indian Airlines Ltd. has decided to terminate your services with immediate effect under Regulation 13 of Service Regulations applicable to you. Accordingly, your services stand terminated with immediate effect from 09.08.2002. Though you are not entitled to any notice or salary in lieu thereof in terms of Regulation 13, however, a cheque No. 354551 dated 09.08.2002 for Rs. 21,734/- is enclosed."

28. A writ petition was filed by respondent before the High Court of Delhi. In its judgment dated 30th August, 2005, while rendering Regulation 13 as ultra vires, it was held :

> "We have noted the relevant judgments. We have to note that the incident leading to termination is not denied by the petitioner, she had accepted the guilt at least initially and the criminal trial is still pending. Considering that the serious allegations are found worthy of acceptance by the Board of Directors, we do not think that we should compel the Board of Directors to reinstate such an employee in whom they have obviously lost confidence. She will, however, have to be compensated monetarily. By now, the rates of interest have gone down considerably and nearly to half of what is mentioned in O. P. Bhandari's case (supra). This being so, if the petitioner 1994 AIR SCW 711 is to be adequately compensated, we direct that she be paid six years' salary towards both back wages as well as for loss of employment in future. This will be on the basis of her last drawn basic pay and dearness allowance. Respondents will pay the petitioner the amount refunded by her towards the provident fund and gratuity also with interest at the rate provided under the statutes governing them. This should be the appropriate compensation for the termination of her services and loss of employment considering that she has about 10 years of service hereafter....."

29. Mr. Arun Jaitley and Mr. Lalit Bhasin, learned senior counsel appearing on behalf of the Corporation would submit :

> “(i) that the High Court committed a manifest error in holding Regulation 13 to be unconstitutional insofar as it failed to take into consideration that the same does not confer any unguided or arbitrary power.
>
> (ii) Regulation 13, it was pointed out, does not speak of misconduct. It speaks of justifiable lack of confidence having regard to (a) incompetence, (b) unsuitability and (c) security. Regulation, thus, provides for the specific contingencies specified therein.

(iii) An assessment of such contingencies is required to be made by the highest available authority. What would be the material for arriving at a conclusion is a reasonable apprehension that the act on the part of the employee would be detrimental to the interest of the country.

(iv) The High Court also failed to take into consideration the history of the precedents of this Court as also how the Regulation was amended having regard to the directions issued by this Court in Hindustan Steel Ltd. (supra). Strong reliance in this behalf has been placed on *Ajit Kumar Nag v. General Manager (PJ) Indian Oil Corporation Ltd. Haldia and Others*[11]

30. Mr. Uday Umesh Lalit, learned senior counsel appearing on behalf of respondent, per contra would submit :

> "(i) that Regulation of Air India was not saved by Section 8 of the 1994 Act.
>
> (ii) Reference of the amended Regulation in Delhi Transport Corporation (supra) itself would not be a ground for upholding the validity thereof.
>
> (iii) Regulation 13 is arbitrary as no reason is required to be assigned as to which of the provisions had been applied.
>
> (iv) When an extraordinary power has been conferred keeping in view the objective criteria laid down therein, it was obligatory on the part of the Corporation to spell out as to how they were invoking the said extraordinary rule which was not rule.
>
> (v) It was in that sense contended that not only reasons were required to be assigned but opportunity was also required to be given for making a representation.
>
> (vi) Extraordinary power cannot be invoked except in a case of security risk. It may not be permissible to invoke the said power only on the purported ground of "justifiable lack of confidence".
>
> (vii) Only because power has been conferred upon a high authority, the same by itself is not a ground to uphold the constitutionality of the provision. Had there been a provision for complying with the principles of natural justice, the same would have been a solace to the employee. Our attention was drawn to a decision of this Court in *Institute of Chartered Accountants of India v. L.K. Ratna and Others*[12] wherein the provisions of Chartered Accountants Act, 1949 were upheld opining that although no hearing was required to be given but such a hearing had been provided for by the Appellate Authority
>
> (viii) The question as regards the applicability of the principles of natural justice would depend upon the facts and circumstances of each case. Strong reliance in this behalf has been placed on *Babubhai and Co. and Others v. State of Gujarat and Others*[13]

(ix) In any event, even in relation to quantum of compensation, the High Court should have taken into consideration that she had put in 20 years of service. While doing so, the attending circumstances were also required to be considered, viz., she had checked in her baggage; she was already in the cabin; the suitcase was found in the baggage handling area; and she was said to be the owner of the unclaimed suitcase which was denied and disputed. She although had made confession but the same was retracted. She was found to be not guilty not only in the adjudicating proceedings but also in the criminal case.

31. In that view of the matter, she should be directed to be reinstated in service with full backwages.

32. Respondent was holding a very high ranking post. She was in-charge of a flight. Admittedly, a suit case was found which was booked by her, which, however, remained unclaimed. The Custom Authorities found the same. Only Respondent was singled out as the owner of the suit case. It is not in dispute that the suit case contained a large sum of money including foreign currencies. Whoever be the owner thereof did not make any declaration as regard thereto. Rs. 22 lakhs were recovered. She was arrested only on her confession. Thereafter only, the impugned order was passed.

33. The Board of Directors consisting of five directors, viz., Shri Sunil Arora , Chairman and Managing Director, IAL, Shri V. Subramanian, Jt. Secretary and Financial Advisor, Ministry of Civil Aviation, Shri J.N. Gogoi, Offg. Managing Director, Air India, Shri S.K. Narula, Chairman, Airports Authority of India and Shri P. P. Vora, Chairman, IDBI, passed the impugned order.

34. Evidently, there is no provision for appeal since the decision is taken by the highest authority of the corporate entity, viz., Board of Directors which includes the Chairman also. Appellant is a body corporate. No appeal can be made against the order passed by the Chairman and the Board of Directors. The order being passed by a highest authority, the question of providing for appeal would not arise. Even in Tulsiram Patel (supra), this Court held that no appeal would be available from an order passed by the President of India. Regulation 13 is invoked when the termination of the services is effected by reason of some act on the part of the employee which does not amount to misconduct. It can be invoked:

"(i) where an employee is rendered incompetent and unsuitable.

(ii) where continuance in employment may also constitute a grave security risk.

(iii) where there is justifiable lack of confidence.

(iv) where lack of confidence must have a direct correlation to the nature of duties performed.

(v) where the Board must consider it to be necessary in the interest of the Corporation to immediately terminate the services of the employee concerned.”

The provisions, therefore, provide for inbuilt safeguards.

35. In Ajit Kumar Nag (supra), a three-Judge Bench of this Court had the occasion to construe Standing Order 20(vi) of the Certified Standing Orders of Indian Oil Corporation which reads as under :

"Where a workman has been convicted for a criminal offence in a court of law or where the General Manager is satisfied for reasons to be recorded in writing, that it is neither expedient nor in the interest of security to continue the workman, the workman may be removed or dismissed from service without following the procedure laid down under III of this clause."

36. The Court noticed that standing Order No. 32 in Hindustan Steel Ltd. (supra) was more or less similar to Standing Order 20(vi) of the certified standing of Respondent, therein. Strong reliance was placed by Appellant for advancing the contention that the said clause was ultra vires in Hari Pada Khan (supra). This Court, however, opined

> "26. We are unable to accept the contention. It is true that in Hari Pada Khan this Court upheld the order of dismissal by expressly observing that it would be subject to result of trial but what Mr. Rao forgets is that in Hari Pada Khan the power was exercised by the General Manager not under the second part of Standing Order 20(iv), but under the first part thereof, which covered cases of conviction of a workman for a criminal offence. The second part dealt with satisfaction of the General Manager about the expediency of not keeping a workman in service. Since the power was exercised by the General Manager on the first part and the basis was registration of a criminal case against the workman, obviously, this Court was justified in observing that when the action was taken on the basis of pendency of a criminal case, the action of dismissal of the workman must abide by the result of the trial. The facts of the case before us are totally different. In this case, the General Manager has exercised the power under the second part of Standing Order 20(vi) which empowered him to take action on satisfaction for reasons to be recorded in writing that it was not in the interest of security to continue the workman in service. The 2005 AIR SCW 4986, (Para 24) direction in Hari Pada Khan therefore, does not apply to the factual matrix of the present case for claiming relief by the appellant."

37. Referring to Tulsiram Patel (supra), this Court held that as security of a State is not involved and a limited power is conferred upon the General Manager being the highest administrative head of the Corporation, it cannot be contended that the power had been conferred upon a petty officer of the Corporation. It was further opined :

> "35. We are equally not impressed and hence unable to uphold the contention that clause (vi) of Standing Order 20 confers a blanket or uncanalised power on the General Manager. In our judgment, sufficient guidelines and safeguards have been

provided in the Standing Orders themselves, such as (i) the power is conferred on the highest administrative head of the Corporation; (ii) eventualities have been specifically and expressly stated in clause (vi) of Standing Order 20; (iii) satisfaction of the General Manager that such an eventuality has arisen; (iv) recording of reasons in writing; and (v) right of appeal against the decision of the General Manager. Such a provision, in our considered view, cannot be held arbitrary or unreasonable, violative of Article 14 of the Constitution."

38. The Court further opined that even in absence of an appeal, the employee is not remediless as a power of judicial review would be applicable.

39. As has been held by this Court in Ajit Kumar Nag (supra), per se, the provisions cannot be held to be arbitrary or discriminatory.

40. Although all persons comprising of the Board of Directors would have human frailties, as has been observed by this Court in Brojo Nath Ganguly (supra) but a provision for appeal cannot be made from the highest authorities.

41. Regulation provides for simpliciter discharge. It does not debar any employee from being reappointed. By such simpliciter discharge, the employee concerned would not be debarred from obtaining appointment elsewhere. Power can be exercised only in interest of the company. In a case of this nature, requirements to comply with principles of natural justice as such may not be practicable.

In Institute of Chartered Accountants of India (supra), it was stated :

"14. Our attention has been invited to the difference between the terms in which Section 21(3) and Section 21(4) have been enacted and, it is pointed out, that while in Section 21(4) Parliament has indicated that an opportunity of being heard should be accorded to the member, nowhere in Section 21(3) do we find such requirement. There is no doubt that there is that difference between the two provisions. But, to our mind, that does not affect the questions. The textual difference is not decisive. It is the substance of the matter, the character of the allegations, the far-reaching consequences of a finding against the member, the vesting of responsibility in the governing body itself, all these and kindred considerations enter into the decision of the question whether the law implies a hearing to the member at that stage."

It was further observed:

"17. It is then urged by learned counsel for the appellant that the provision of an appeal under Section 22-A of the Act is a complete safeguard against any insufficiency in the original proceeding before the Council, and it is not mandatory that the member should be heard by the Council before it proceeds to record its finding. Section 22-A of the Act entitles a member to prefer an appeal to the High Court against an order of the Council imposing a penalty under Section 21(4) of the

Act. It is pointed out that no limitation has been imposed on the scope of the appeal, and that an appellant is entitled to urge before the High Court every ground which was available to him before the Council. Any insufficiency, it is said, can be cured by resort to such appeal. Learned counsel apparently has in mind the view taken in some cases that an appeal provides an adequate remedy for a defect in procedure during the original proceeding. Some of those cases as mentioned in Sir William Wade's erudite and classic work on Administrative Law 5th Edn. But as that learned author observes (at p. 487), "in principle there ought to be an observance of natural justice equally at both stages", and

"If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial."

And he makes reference to the observations of Megarry, J. in Leary v. National Union of Vehicle Builders. Treating with another aspect of the point, that learned Judge said:

"If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."

The view taken by Megarry, J. was followed by the Ontario High Court in Canada in Re Cardinal and Board of Commissioners of Police of City of Cornwall. The Supreme Court of New Zealand was similarly inclined in *Wislang v. Medical Practitioners Disciplinary Committee*[14], and so was the Court of Appeal of New Zealand in Reid v. Rowley."

In Babubhai and Co. (supra), this Court held :

"6. It cannot be disputed that the absence of a provision for a corrective machinery by way of appeal or revision to a superior authority to rectify an adverse order passed by an authority or body on whom the power is conferred may indicate that the power so conferred is unreasonable or arbitrary but it is obvious that providing such corrective

machinery is only one of the several ways in which the power could be checked or controlled and its absence will be one of the factors to be considered along with several others before coming to the conclusion that the power so conferred is unreasonable or arbitrary; in other words mere absence of a corrective machinery by way of appeal or revision by itself would not make the power unreasonable or arbitrary, much less would render the provision invalid. Regard will have to be had to several factors, such as, on whom the power is conferred - whether on a high official or a petty officer, what is the nature of the power - whether the exercise thereof depends upon the subjective satisfaction of the authority or body on whom it is conferred or is it to be exercised objectively by reference to some existing facts or tests, whether or not it is a quasi-judicial power requiring that authority or body to observe principles of natural justice and make a speaking order etc.; the last mentioned factor particularly ensures application of mind on the part of the authority or body only to pertinent or germane material on the record excluding the extraneous and irrelevant and also subjects the order of the authority or body to a judicial review under the writ jurisdiction of the Court on grounds of perversity, extraneous influence, mala fides and other blatant infirmities. Moreover all these factors will have to be considered in the light of the scheme of the enactment and the purpose intended to be achieved by the concerned provision. If on an examination of the scheme of the enactment as also the purpose of the concerned provision it is found that the power to decide or do a particular thing is conferred on a very minor or petty officer, that the exercise thereof by him depends on his subjective satisfaction, that he is expected to exercise the power administratively without any obligation to make a speaking order then, of course, the absence of a corrective machinery will render the provision conferring such absolute and unfettered power invalid. But it is the cumulative effect of all these factors that will render the provision unreasonable or arbitrary and liable to be struck down. In three of the decisions referred to by counsel where the concerned provision was struck down the cumulative effect of several factors that were present in each was taken into consideration by the Court, while in C.R.H. Readymoney case the provision was held to be valid."

42. But, in a case of this nature although there is no provision for appeal, but even in a judicial review, the court may require the employer to produce the records, on a perusal whereof the court may come to a finding as to whether the order passed by the Board of Directors was bona fide or not.

43. A judicial review of such an order would be maintainable. In a case of judicial review, where no appeal is provided for, the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India would not confine its jurisdiction only to the known tests laid down therefor, viz., illegality, irrationality, procedural impropriety. It has to delve deeper into the matter. It would require a deeper scrutiny.

44. We may notice that keeping in view the situational changes and, particularly, outsourcing of the sovereign activities by the State, this Court has been expanding the scope of judicial review. It includes the misdirection in law, posing a wrong question or irrelevant question

and failure to consider relevant question. On certain grounds judicial review on facts is also maintainable. Doctrine of unreasonableness has now given a way to doctrine of proportionality.

45. In *S. N. Chandrashekar v. State of Karnataka* [15] this Court observed :

> "33. It is now well known that the concept of error of law includes the giving of reasons that are bad in law or (where there is a duty to give reason) inconsistent, unintelligible or substantially inadequate. (See de Smith's Judicial Review of Administrative Action, 5th Edn., p. 286.)
>
> 34. The Authority, therefore, posed unto itself a wrong question. What, therefore, was necessary to be considered by BDA was whether the ingredients contained in Section 14-A of the Act were fulfilled and whether the requirements of the proviso appended thereto are satisfied. If the same had not been satisfied, the requirements of the law must be held to have not been satisfied. If there had been no proper application of mind as regards the requirements of law, the State and the Planning Authority must be held to have misdirected themselves in law which would vitiate the impugned judgment.
>
> 35. In *Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai this Court referring to Cholan Roadways Ltd. v. G. Thirugnana-sambandam*[16] *held (SCC p. 637, para 14) :* (Para 17)
>
> "14. Even a judicial review on facts in certain situations may be available. In *Cholan Roadways Ltd. v. G. Thirugnanasambandam*[17] this Court observed (SCC p. 253, paras 34-35) : (Paras 33 and 34)
>
> '34. .....It is now well settled that a quasi-judicial authority must pose unto itself a correct question so as to arrive at a correct finding of fact. A wrong question posed leads to a wrong answer. In this case, furthermore, the misdirection in law committed by the Industrial Tribunal was apparent insofar as it did not apply the principle of res ipsa loquitur which was relevant for the purpose of this case and, thus, failed to take into consideration a relevant factor and furthermore took into consideration an irrelevant fact not germane for determining the issue, namely, that the passengers of the bus were mandatorily required to be examined. The Industrial Tribunal further failed to apply the correct standard of proof in relation to a domestic enquiry, which is "preponderance of probability" and applied the standard of proof required for a criminal trial. A case for judicial review was, thus, clearly made out.
>
> 35. Errors of fact can also be a subject-matter of judicial review. (See E. v. Secy. of State for the Home Deptt.) Reference in this connection may also be made to an interesting article by Paul P. Craig, Q.C. titled "Judicial Review, Appeal and Factual Error" published in 2004 Public Law, p.788."

46. Yet again in *State of U.P. v. Sheo Shanker Lal Srivastava*[18] this Court observed : 2006 AIR SCW 1149, (Paras 27 and 28)

> "24. While saying so, we are not oblivious of the fact that the doctrine of unreasonableness is giving way to the doctrine of proportionality.
>
> 25. It is interesting to note that the Wednesbury principles may not now be held to be applicable in view of the development in constitutional law in this behalf. See, for example, Huang v. Secy. of State for the Home Deptt. wherein referring to R. v. Secy. of State of the Home Deptt., ex p Daly it was held that in certain cases, the adjudicator may require to conduct a judicial exercise which is not merely more intrusive than Wednesbury, but involves a full-blown merit judgment, which is yet more than ex p. Daly requires on a judicial review where the court has to decide a proportionality issue."

47. Although it is of not much relevance but the history in relation to such regulation assumes importance in view of the fact that this Court in Hindustan Steel Ltd. (supra) directed framing of Regulation in the light of proviso (b) appended to Clause (2) of Article 311 of the Constitution of India. Regulation 13 has been amended accordingly

48. So far as the justifiability of the impugned order is concerned, we are of the opinion that the following facts are required to be taken into consideration.

49. Respondent was holding a post of trust and confidence. She had been issued a 'Red Airport Entry Pass' which gave unrestricted access to all civil airports in India and flying to other countries on the network of Indian Airlines. Any doubt on the integrity of the person holding such a post of trust and confidence may shake the confidence of the employer. If such activities are permitted, the same in a given case may provide for risk not only to the aircraft but also to a large section of people. The subjective satisfaction of the Board of Directors was based on the confession she made and the evidences collected by the Directorate of Enforcement. The fact that subsequently she had been exonerated or she had been discharged from the criminal case may not be of much significance as the validity of the order must be judged having regard to the fact-situation as was obtaining on the day on which the same was passed. We have noticed in the final order dated 13th December, 2005, the Custom, Excise and Service Tax Appellate Tribunal, South Zonal Branch at Bangalore exonerated Respondent.

50. However, having regard to the fact that there was no evidence as to why she carried the suitcase from Mumbai or she had been handed over the suitcase at Hyderabad and keeping in view the nature of investigation carried out by the Customs Authorities, the penalties imposed on her under Section 114 (i) of the Customs Act was held to be not sustainable stating :

"Summing up, we find :-

"(i) The investigation into this episode is not very thorough;

(ii) The reason for abandoning the currency has not been brought out;

(iii) There is no evidence to establish that the Appellants made an attempt to export the currency.

(iv) The statements do not appear to have been given voluntarily;

(v) The currency was neither seized from the possession of the Appellants nor from the aircraft;

(vi) The test to prove an 'attempt' to illegally export as laid down in the case of Mohd. Yakub has not been proved."

51. In the criminal case, no charge was framed. Respondent was discharged only on the ground that she had not been found liable in the civil proceedings.

52. Appellant in the said proceedings had no role to play. We, therefore, are of the opinion that Regulation 13 is intra vires. We are bound by the decision of this Court in Ajit Kumar Nag (supra). The Board of Directors, in the aforementioned fact-situation, must be held to have public interest in mind.

53. In *Kanhaiyalal Agrawal and Others v. Factory Manager, Gwalior Sugar Company Ltd.*[19] whereupon Mr. Lalit placed strong reliance, this Court upheld the findings of the Industrial Court as also the High Court that the principles for invoking loss of confidence in the employee based on objective criteria , viz., (i) that the workman is holding a position of trust and confidence; (ii) by abusing such position, he commits acts which results in forfeiting the same; and (iii) to continue him in service would be embarrassing and inconvenient to the employer or would be detrimental to the discipline or security of the establishment; stood satisfied.

54. True, loss of confidence cannot be subjective but there must be objective facts which would lead to a definite inference of apprehension in the mind of the employer regarding trustworthiness of the employee and which must be alleged and proved. But, then all the criteria mentioned therein are present in the instant case.

55. The question which now arises is as to whether the Regulation 13 is applicable to the case of Respondent. Section 45 of the 1953 Act provides for regulation making power of the Corporation. It extends to the terms and conditions of service of officers and other employees of the Corporation other than the Managing Director and officers of any other categories referred to in Section 44 of the 1953 Act. Regulations were framed pursuant to or in furtherance of the said regulation making power. Regulation 13, as it stood earlier, did not contain any power in the Board of Directors to terminate the services of an employee.

Regulation 13 speaks of lack of confidence. Regulation 13 came into force with effect from 1.3.1993. Respondent indisputably was appointed prior thereto.

56. A question arose as to whether by reason of the repealing provisions contained in the 1994 Act, the Regulations framed under the 1953 Act survives and consequently the exercise of powers under Regulation 13 shall be void ab initio.

57. Our attention has been drawn to a decision of this Court in *Air India v. Union of India and Ors*[20]. wherein it was held

> "Section 8 of the 1994 Act does not in express terms save the said Regulations, nor does it mention them. Section 8 only protects the remuneration, terms and conditions and rights and privileges of those who were in Air India's employment when the 1994 Act came into force. Such saving is undoubtedly "to quieten doubts" of those Air India employees who were then in service. What is enacted in Section 8 does not cover those employees who joined Air India's service after the 1994 Act came into force. The limited saving enacted in Section 8 does not, in our opinion, extend to the said Regulations."

58. The said decision was rendered when a question was raised as to whether standing orders framed under Industrial Employment (Standing Orders) Act, 1946 survives the regulation-making power. It was held that the regulations have ceased to be effective on 29th January, 1994 and, thus, regulation-making power no longer survives.

59. Mr. Bhasin would submit that the provisions of the Regulations would apply to Respondent as :

> "(i) She never disputed the application of the Regulations.
>
> (ii) A Special Leave Petition covering the same area being SLP (C) No. 2230-31 of 2005 is pending before this Court."

60. As at present advised, we do not intend to enter into the said controversy. The judgment of this Court in Air India (supra) is binding on us. We have, therefore, no other option but to hold that Regulation 13 would not apply to the case of Respondent. However, despite the same, we are of the opinion that the interest of justice would be subserved if the nature of relief to Respondent granted by the High Court is upheld.

61. We, therefore, hold that although Regulation 13 is not unconstitutional but the same is not applicable in case of Respondent. However, we are furthermore of the opinion that in the peculiar facts and circumstances of this case and keeping in view the fact that she had put in 20 years of service she be paid eight years' salary towards both back wages as well as for loss of employment in future. This will be on the basis of her last drawn basic pay and dearness allowance. The Corporation will pay Respondent the amount refunded by her towards the

provident fund and gratuity at the rate of interest provided under the Statutes governing them. The relief granted to Respondent shall, in our opinion, subserve the interest of justice.

62. Both the appeals are allowed in part and to the extent mentioned hereinbefore. No costs.

Appeal partly allowed.

Judgment Referred.

[1]*(1986) 3 SCC 156*
[2]*(1984) Supp SCC 554*
[3]*(1985) 3 SCC 398*
[4]*(1991) Supp (1) SCC 600]*
[5]*(1996) 1 SCC 536*
[6]*(1998) 8 SCC 194*
[7]*AIR 1991 SC 101*
[8]*(1998) 6 SCC 538*
[9]*(2004) 8 SCC 129*
[10]*(2006) 6 SCALE 0066*
[11]*(2005) 7 SCC 0764*
[12]*(1986) 4 SCC 0537*
[13]*(1985) 2 SCC 0732*
[14]*AIR 1985 SC 0613*
[15]*(2006) 3 SCC 0208*
[16]*(2005) AIR SCW 4796*
[17]*(2005) AIR SCW 0084*
[18]*(2006) 3 SCC 0276*
[19]*(2001) 9 SCC 0609*
[20]*JT 1995 (5) SC 0578*