

SUPREME COURT OF INDIA

Punjab National Bank By Chairman

Vs.

Astamija Dash

C.A.No.3125 of 2008

(S Sinha and V Sirpurkar JJ.)

30.04.2008

JUDGMENT:

S.B. SINHA, J.

1. Leave granted in both the matters.
2. These two appeals arise out of a judgment and order dated 20th May, 2005 rendered by the Division Bench of the Orissa High Court at Cuttack in WP No. 2333 of 1991.
3. Writ Petitioner (Respondent in appeal arising out of SLP) No. 18997 of 2005 and Appellant in the connected appeal) was appointed as a Management Trainee in the Punjab National Bank (Bank). She was duly selected by the Banking Service Recruitment Board, Delhi. An offer of appointment was made to her favour on or about 28th July, 1986 inter alia on the following terms and conditions :-

"2. TRAINING/PROBATION/CONFIRMATION

"You will be on training/probation for a period of 2 years from the date of your joining the Bank and you will be considered for confirmation in the service, subject to your satisfactory report on your training, passing Bank's confirmation test and receipt of satisfactory report from the Police authorities about your character and antecedents. You may also be required to pass a test in a language other than your mother tongue before confirmation.

3. During the period of probation your services can be terminated by giving one month's notice or payment of one month's emoluments in lieu thereof. The Bank may, however, in its discretion extend your probation by a further period not exceeding one year. If you desire to leave the services of the Bank at any time during the period of probation, including the extended period thereof, if any, you shall give a month's notice or in lieu thereof, you shall pay a month's emoluments to the bank."

4. She joined the services of the Bank immediately thereafter.

Pursuant to the condition that she must pass the confirmation test, she appeared in the said examination on 29th May, 1988. She did not pass the said examination. She was, however, again asked to appear in the examination on 1st October, 1989. By a letter dated 5th September, 1989 she expressed her inability to do so, stating :-

" I invite a kind reference to your letter dated 18th August, 1989 wherein I was advised to appear in the confirmation test scheduled to be held on 1 October, 1989 in Central Staff College, Delhi. In this context, I would like to inform you that I am passing through the period of pregnancy and am advised by the doctor not to undertake long journey during the period of pregnancy till delivery as a result of which I will not be able to appear the test.

I, therefore, request you to kindly consider my case sympathetically and permit me to appear the test on the next schedule date, in future. I enclose a medical certificate for your information and favourable consideration."

5. She had two mis-carriages. She was asked again to appear in the examination on 19th August, 1990. She appeared in the said test, but could not succeed. In the meanwhile the probation period expired on 28th July, 1988. It was extended by another year i.e. till 28th July, 1989.

6. Indisputably, she had otherwise completed her period of probation. She also fulfilled the other conditions of service. Her services, however, were terminated by an order dated 9th November, 1990 stating :-

"You were appointed as a Management Trainee on 25.8.1986. One of the terms of your appointment stipulates that :

"3. CONFIRMATION

You will be considered for confirmation in the Bank service after two years on :

- a) Satisfactory report of your training.
- b) Passing Bank's confirmation Test.
- c) You may also be required to pass a test in language other than your mother tongue before confirmation.

In the event of your not satisfactorily completing the training referred to in sub para 3(a) or failure to qualify the Bank's confirmation test within the training/probation period of two years or to pass

the test in a language other than your mother tongue, your probation may be extended by a further period not exceeding one year.

If during the period of probation, including the period of extension, if any, the competent authority is of the opinion that you are not fit for confirmation to be retained in the bank service, your services shall be liable to be terminated by one month's notice or payment of one month's emoluments in lieu thereof.

You had appeared in the confirmation test held on 29.5.1988 but you did not qualify the same. In the confirmation test held on 1.10.1989, you have been advised to appear for the test but you had remained absent. Although the Bank would have been justified in terminating your services in accordance with your terms of appointment, a lenient view was taken and you were given a last and final opportunity for qualifying the confirmation test in August, 1990. You appeared in the Bank's confirmation test held on 19.8.1990 but did not qualify the test."

7. She preferred an appeal thereagainst before the appellate authority asking for another chance to clear the confirmation test stating that similarly situated employees including one Indubala had been given another chance to appear at the examination. However, the said appeal was dismissed by an order dated 28th November, 1990.

8. She filed a writ petition before the High Court, inter alia, contending:- i) In terms of the Punjab National Bank (Officers) Service Regulations, 1979 insistence of passing the confirmation test was illegal.

ii) As the extended period of probation expired on 28th July, 1989 she should be deemed to have been confirmed in service.

iii) She had been subjected to discriminatory treatment viz-a- vis. Indubala who was granted an opportunity to appear in the confirmation test for the 4th time on the ground of illness of her mother.

9. The High Court rejected the first two contentions raised by the writ petitioner herein but accepted the third. The writ petition was allowed on the said premise.

10. Both the parties, being aggrieved, are before us.

11. Mr. Dhruv Mehta, learned counsel appearing on behalf of the Bank would submit:-

i) Although Regulations do not provide for a confirmation test, the writ petitioner having accepted the conditions of appointment, she cannot be permitted to approbate or reprobate.

ii) Her services having not been expressly confirmed, the doctrine of implied confirmation is not applicable in view of the decision of the Division Bench of the Allahabad High Court in General Manager, Punjab National Bank and others vs. Khar Bhan Ram : (1995) II LLJ 93 All.

iii) Reliance placed by the High Court on the case of Indubala was misplaced as an affidavit explaining the situation had not been taken into consideration and in any event no legal right can be claimed on the basis of an illegality committed by the employer as Article 14 of the Constitution of

India speaks of a positive right.

12. Mr. S.S. Upadhyay, learned Senior Counsel, appearing on behalf of the writ petitioner, on the other hand, would submit :- i) The order of termination being not based on unsatisfactorily completion of the in-house training or the non-passing of a language test, which only have been provided for in the Regulations, the impugned order of termination could not have been passed on the premise that the writ petitioner did not pass the confirmation test. ii) Having regard to Regulations 15 and 16 of the Regulations, her services having been terminated on 9th November, 1990 i.e., after the extended period of the period of probation upto 28th July, 1989 expired, she would be deemed to have been confirmed in service. iii) In any event she had clearly been discriminated against inasmuch as an employee who was similarly situated had been given a fourth opportunity to clear the said confirmation test, whereas the writ petitioner was not.

13. The Bank is a scheduled Bank within the meaning of the provisions of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. It has various statutory powers. It has inter alia power to frame Regulations. In exercise of its powers conferred upon it by Section 19 read with sub-section (2) of Section 12 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, the Board of Directors of the Punjab National Bank, in consultation with the Reserve Bank of India and with the previous sanction of the Central Government made Regulations known as the Punjab National Bank (Officers') Service Regulations, 1979 (for short Regulations). Applicability of the said Regulations to the case of the writ petitioner is not in dispute.

14. Regulations 15, 16 and 36, which are relevant for our purposes may be noticed.

In terms of sub-regulation (1) of Regulation 15, the period of probation is two years. Sub-regulation (1) of Regulation 16 provides for confirmation of service, if in the opinion of the competent authority, the officer has satisfactorily completed the training in any institution to which he might have been deputed for training and in the in-service training in the bank. The proviso appended thereto provides for passing a test in a language other than the mother tongue of the office. Sub-regulation (2) of Regulation 16 provides for extension of the period of probation only in the event the officer does not satisfactorily complete either or both the trainings referred to in sub-regulation (1) or fails to pass the test referred to therein. Extension of the period of probation, however, could not exceed a further period of one year. Sub-regulation (3) of Regulation 16 provides that service of an employee can be terminated in the case of a direct appointee, by one month's notice or payment of one month's emoluments in lieu thereof only when during the period of probation, including the period of extension, if any, the competent authority is of the opinion that the officer is not fit for promotion.

Regulation 36 provides for maternity regulation in terms whereof leave upto a period of six months can be granted.

16. Indisputably, the Regulations do not provide for passing of any confirmation test. Such a confirmation test had been prescribed only in the letter of appointment. Ordinarily, although when conflict occurs between an executive order and a statutory Regulation, the latter will prevail; we will proceed on the premise that such a condition could be imposed by the competent authority.

17. We, for the time being, would also assume that having regard to the doctrine of approbation and reprobation as also the doctrine of election, the writ petitioner could not question the validity or

otherwise of the said executive action.

18. While saying so, however, we are not unmindful of the observations made by this Court in *Municipal Corporation, Raipur vs. Ashok Kumar Misra* : (1991) 3 SCC 325.

"6. Exercise of the power to extend the probation is hedged with the existence of the rule in that regard followed by positive act of either confirmation of the probation or discharge from service or reversion to the substantive post within a reasonable time after the expiry of the period of probation. If the rules do not empower the appointing authority to extend the probation beyond the prescribed period, or where the rules are absent about confirmation or passing of the prescribed test for confirmation of probation then inaction for a very long time may lead to an indication of the satisfactory completion of probation."

19. The period of probation is governed by a statutory provision. The appointing authority is bound thereby. The initial period of probation is two years, subject only to non compliance of the conditions laid down under sub- regulation (1) of Regulation 16, namely failure to complete satisfactorily either or both the trainings referred to therein or passing of a language test, the period of probation can be extended. The statute mandates that it can be extended for a period not exceeding one year. The total period of probation, therefore, can be three years and not more. No doubt for confirming the services of an officer of the bank, the competent authority must satisfactorily form an opinion that the officer had completed the trainings in any institution to which the officer had been deputed as also the in-service training in the bank. It is not the case of the appellant-bank that the proviso appended thereto is applicable in the case of the writ petitioner.

20. Extension of the period of probation limited to one year, however, is circumscribed by the conditions specified in sub-regulation (2). What is apparent, has been made explicit by sub-regulation (3) as the competent authority has to form an opinion that the officer is not fit for confirmation only within the period of probation including the period of extension and not beyond the same.

21. The High Court, as noticed hereinbefore, has relied upon the decision of the Division Bench of the Allahabad High Court in the case of appellant- bank itself.

Chief Justice S.S. Sodhi, speaking for the Division Bench, distinguished the cases of *State of Punjab vs. Dharam Singh* :1968 (3) SCR 1 and *Om Pakash Maurya vs. U.P. Co-operative Sugar Federation, Lucknow* : 1986 Suppl. SCC 95 to hold :-

"It may be mentioned here that both *Dharam Singh* and *Om Prakash's* cases (supra) were later distinguished by the Supreme Court in *Municipal Corporation, Raipur v. Ashok Kumar Misra* (1991-II-LLJ-343), where the facts were somewhat similar as here in that the relevant service rules, besides requiring successful completion of probation for confirmation in service, also laid down, as an essential pre-condition, the passing of the departmental test. It was held that mere expiry of the period of probation did not automatically have the effect of deemed confirmation. Both the earlier judgments of the Supreme Court in *Dharam Singh* and *Om Prakash* cases (supra) were noticed and distinguished. Seen in this light, there can be no escape from the conclusion that in the circumstances here, mere expiry of the period of probation, without the respondent having qualified in the confirmation test, did not entitle him to confirmation in service.

22. The decisions of this Court in Dharam Singh (supra) and Om Prakash Maurya (supra), on the one hand, and Municipal Corporation, Raipur vs. Ashok Kumar Misra : (1991) 3 SCC 325, on the other, as would appear from the discussions made hereinafter had set the legal principles differently.

23. In Dharam Singh, a Constitution Bench of this Court categorically held that :-

"Where on the completion of the specified period of probation the employee is allowed to continue in the post without an order of confirmation., the only possible view to take in the absence of anything to the contrary in the original order of appointment or promotion or the service rules, is that the initial period of probation has been extended by necessary implication."

What is, therefore, evident is that the matter must be governed by the statutory rules.

24. The Rule in question which was applicable in Dharam Singh (supra) was sub-rule (3) of Rule 6 of the Punjab Educational Service (Provincialised Cadre) Class III Rules, 1961 which was in the following terms :- "6(3) On the completion of the period of probation the authority competent to make appointment may confirm the member in his appointment or if his work or conduct during the period of probation has been in his opinion unsatisfactory he may dispense with his services or may extend his period of probation by such period as he may deem fit or revert him to his former post if he was promoted from some lower post.

Provided that the total period of probation including extensions, if any, shall not exceed three years."

In view of the said Rule it was held :-

"This Court has consistently held that when a first appointment or promotion is made on probation for a specific period and the employee is allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to continue in his post as a probationer only, in the absence of any indication to the contrary in the original order of appointment or promotion or the service rules. In such a case, an express order of confirmation is necessary to give the employee a substantive right to the post, and from the mere fact that he is allowed to continue in the post after the expiry of the specified period of probation it is not possible to hold that he should be deemed to have been confirmed."

It was further held :-

"In the present case, r. 6(3) forbids extension of the period of probation beyond three years. Where, as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negated by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication."

25. The said principle was reiterated by a seven Judge Bench of this Court in Samsher Singh vs.

State of Punjab vs. State of Punjab : (1974) 2 SCC 831 stating :

"71. Any confirmation by implication is negated in the present case because before the completion of three years the High Court found prima facie that the work as well as the conduct of the appellant was unsatisfactory and a notice was given to the appellant on October 4, 1968 to show cause as to why his services should not be terminated. Furthermore, Rule 9 shows that the employment of a probationer can be proposed to be terminated whether during or at the end of the period of probation. This indicates that where the notice is given at the end of the probation the period of probation gets extended till the inquiry proceedings commenced by the notice under Rule 9 come to an end. In this background the explanation to Rule 7(1) shows that the period of probation shall be deemed to have been extended impliedly if a Subordinate Judge is not confirmed on the expiry of this period of probation. This implied extension where a Subordinate Judge is not confirmed on the expiry of the period of probation is not found in Dharam Singh case . This explanation in the present case does not mean that the implied extension of the probationary period is only between two and three years. The explanation on the contrary means that the provision regarding the maximum period of probation for three years is directory and not mandatory unlike in Dharam Singh case and that a probationer is not in fact confirmed till an order of confirmation is made."

(Emphasis supplied)

26. In Om Parkash Maurya vs. U.P. Coop. Sugar Factories Federation : (1986) Suppl. SCC 95 following Dharam Singh, this Court held :- "4. In the instant case the order of appointment promoting the appellant to the post of Commercial Officer merely indicated that his probationary period could be extended and he could be reverted to the post of Office Superintendent without any notice. Stipulation for extension of probationary period in the appointment order must be considered in accordance with the proviso to Regulation 17(1) which means that the probationary period could be extended for a period of one year more. Indisputably on the expiry of the appellant's initial probationary period of one year, the appointing authority extended the same for another period of one year which also expired on September 4, 1982. During the period of probation appellant's services were neither terminated nor was he reverted to his substantive post instead he was allowed to continue on the post of Commercial Officer. On the expiry of the maximum probationary period of two years, the appellant could not be deemed to continue on probation, instead he stood confirmed in the post by implication. The appellant acquired the status of a confirmed employee on the post of Commercial Officer and the appointing authority could not legally revert him to the lower post of Superintendent."

(Emphasis supplied)

27. The said principle, we may notice, was again reiterated in Chief G.M., State Bank of India vs. Bijoy Kumar Mishra : (1997) 7 SCC 550 wherein this Court had the occasion to consider a *pari materia* rule, stating :- "10. There can thus be no doubt that the deemed confirmation which is inferred from the employer's conduct is permissible only when it follows from the positive act of the employer permitting the employee to continue to work on the post even after completion of the maximum period of probation permitted under the Service Rules since no other inference is possible in such a situation from the employer's conduct of continuing to take work from the employee after that period."

28. We may, having noticed the legal principles enunciated by this Court, consider the decision of

this Court in Ashok Kumar Misra (supra). The relevant Rule which was involved therein was Rule 8 of Madhya Pradesh Government Servants' General Conditions of Service Rules, 1961 which was in the following terms :-

"8. Probation . (1) A person appointed to a service or post by direct recruitment shall ordinarily be placed on probation for such period as may be prescribed. (2) The appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year.

Note . A probationer whose period of probation is not extended under this sub-rule, but who has neither been confirmed nor discharged from service at the end of the period of probation shall be deemed to have been continued in service, subject to the condition of his service being terminable on the expiry of a notice of one calendar month given in writing by either side. (3) A probationer shall undergo such training and pass such departmental examinations during the period of his probation as may be prescribed.

(4) and (5) are not relevant, hence omitted.

(6) On the successful completion of probation and the passing of the prescribed departmental examinations, the probationer shall be confirmed in the services or post to which he has been appointed."

29. The note appended to sub-rule (2) of Rule 8 as also sub-rule (6) thereof made all the difference. In terms of note appended to sub-rule (2) a legal fiction was created in terms whereof upon completion of the extended period of probation the employee would have been continued in service, subject to the condition that the same would be terminable on the expiry of a notice of one calendar month and furthermore an express order confirming the service would be necessary.

In the aforementioned situation Dharam Singh (supra) and Om Prakash Maurya (supra) were distinguished opining :-

"6. Exercise of the power to extend the probation is hedged with the existence of the rule in that regard followed by positive act of either confirmation of the probation or discharge from service or reversion to the substantive post within a reasonable time after the expiry of the period of probation. If the rules do not empower the appointing authority to extend the probation beyond the prescribed period, or where the rules are absent about confirmation or passing of the prescribed test for confirmation of probation then inaction for a very long time may lead to an indication of the satisfactory completion of probation. But in this case Rule 8 expressly postulates otherwise. The period of probation is subject to extension by order in writing for another period of one year. Passing the prescribed examinations and successful completion of probation and to make an order of confirmation are condition precedent. Mere expiry of the initial period of probation does not automatically have the effect of deemed confirmation and the status of a deemed confirmation of the probation. An express order in that regard only confers the status of an approved probationer. We are of the view that note to sub-rule (2) read with sub-rule (6) of Rule 8 manifests the legislative intent that confirmation of the probation of the respondent would be made only on successful completion of the probation and the passing of the prescribed examinations. It is not the respondent's case that he passed all the examinations. He shall be deemed to be continued on probation. Before confirmation the appointing authority is empowered to terminate the service of the probationer by issuing one calendar month's notice in writing and on expiry thereof the service

stands terminated without any further notice. Within three months from the date of expiry of original two years period of probation and within one year's period, the order of termination was made. In this view the question of conducting an inquiry under the Classification, Control and Appeal (Rules) after giving an opportunity and that too for specific charges does not arise."

30. The order of termination in that case was, therefore passed within the extended period of probation in service. Ashok Kumar Misra (supra), therefore, in our opinion did not speak in a different tone and is in conformity with the legal principles laid down in Dharam Singh (supra) and others.

31. The High Court, therefore, in our opinion was not correct in relying upon the decision of the Division Bench of the Allahabad High Court in the case of the appellants bank. It, with utmost respect, did not lay down the correct law and is, therefore, liable to be over-ruled.

32. So far as the question of discrimination meted out to the writ petitioner is concerned, we may notice that the High Court had come down heavily on the bank and, in our opinion, rightly so.

33. In the affidavit affirmed by one Rabi Shankar Sabat (Manager Personnel) of the Bank the Indubala case was sought to be distinguished stating:-

"5. That as regards the case of petitioner vis-à-vis case of one Ms. Indubala is concerned it is submitted that both the cases stand absolutely on different footing. Ms. Indubala is not a batchmate of petitioner. Ms. Indubala joined the bank as Management Trainee on 12.11.1984 and she was called for confirmation test of Management Trainee held by the bank on 13.7.1986. She did not appear in the said test. She was given another chance for confirmation test held on 26.4.1987 who appeared in the said test but failed. Ms. Indubala was again called for confirmation test held on 29.5.1988, as per the decision of the Executive Committee of the bank, however, she could not take the confirmation test this time due to her illness and accordingly her services were terminated by the Bank on 29.5.1988. On appeal by Ms. Indubala the matter was put up before the Executive Committee of the bank and the Executive Committee in its meeting held on 16.8.89 decided that in view of the fact that Ms. Indubala could not avail of the last i.e. 3rd chance due to her illness, she may be afforded another opportunity to appear in the confirmation test and this is how Ms. Indubala was given one more chance. Copy of decision of the Committee dated 16.8.89 is filed herewith as Annexure-F. On the other hand the petitioner joined the Bank as Management Trainee on 25.8.1986 and she failed to appear in the confirmation test held in April, 1988 and October, 1989. She was also given the 3rd chance the last chance where she did appear and failed to qualify. It may be noted here that Ms. Indubala was given the 3rd chance but she could not appear in the 3rd and last chance due to her illness. So both the cases stand on a different footing as such petitioner cannot claim any benefit on the basis of Ms. Indubala's case. Besides, that was a solitary case and as the Principle that one wrong cannot justify another wrong the petitioner cannot claim any advantage relying on the same."

34. At once we may notice that the said statement contained a factual error which has been very fairly conceded by Mr. Mehta as the ground for giving another opportunity to Indubala to appear at the confirmation test for the 4th time was not on the ground of her own illness but on her mother's illness.

35. Was the fact situation in Indubala's case is different from that of the writ petitioner? The answer

must be found in the judgment of the High Court, wherein it was held that the writ petitioner's case stands on a much better footing. As she could not appear in the third chance on account of the illness of her mother which did not depict the correct state of affairs whereas the writ petitioner underwent a mis-carriage of her conception in the month of April, 1988, she had to remain alone at the place of posting and could not prepare for the examination. At the time when she was called upon to appear in the examination for the second time, she was in the advance stage of pregnancy and she was medically advised not to move, as she had miscarriages at two previous occasions. That is the reason why she could not appear in the test. When she was called upon to appear for the third examination, she having undergone caesarian delivery, she was advised rest by the doctor. At the time of her examination, her son was only six month's old and was not keeping good health.

36. Submission of the Bank is that the competent authority had formulated a policy of not permitting anybody to appear in the test more than thrice. Strong reliance in this behalf is placed on the decision of the Executive Committee of the Bank dated 19th June, 1990 deciding that maximum number of 3 chances should be given to the Management Trainee for qualifying in the confirmation test failing which services of the probationer be terminated.

37. Regulation does not speak of any confirmation test. The offer of appointment does not speak about the number of chances to be given for passing the confirmation test. A decision was taken in this behalf when the writ petitioner had already appeared on one occasion. The decision even otherwise was to give atleast three opportunities to a candidate must be real and effective one. Such a contention must be considered having regard to the doctrine of reasonableness and fairness, which the Bank is required to comply with keeping in view its status of a State within the meaning of Article 12 of the Constitution of India. As a 'State' the Bank was bound to follow the equity clause contained in Articles 14 and 16 of the Constitution of India. Its action even in relation to its own employees is expected to be not only fair but also non-arbitrary.

38. In *E.P. Royappa vs. State of Tamil Nadu and another* : (1974) 4 SCC3, a Constitutional Bench of this court as regards the argument that the petitioner was appointed to a post that was inferior to the status and office of the Chief Secretary , thus offending Articles 14 and 16 of the Constitution, opined :-

"Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species, Article 16 gives effect to the doctrine or equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute

monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and Constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on equivalent relevant principles applicable alike to all similarly situated and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice : in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

It was further held:

"It is also necessary to point out that the ambit and reach of Articles 14 and 16 are not limited to cases where the public servant affected has a right to a post. Even if a public servant is in an officiating position, he can complain of violation of Articles 14 and 16 if he has been arbitrarily or unfairly treated or subjected to mala fide exercise of power by the State machine."

39. In the Constitution Bench decision of this court in *Mithu vs. State of Punjab* : 1983) 2 SCC 277, the issue to be decided was the vires of Section 303 of the Indian Penal Code vis-à-vis Article 21 of the Constitution. It was held that the same was unconstitutional as it violated the guarantee of equality clause contained in Article 14 and 21 since a person who is sentenced to life imprisonment incurs the mandatory penalty of death under Section 303 if he commits a murder while he is under the sentence of life imprisonment defied logic.

40. In *T.R. Kothandaraman and Ors. vs. Tamil Nadu Water Supply & Drainage Board and Ors.* : (1994) 6 SCC 282, the issue before this court was as regards what Article 16 has to say when the right to be considered for promotion is either barred or restricted on the basis of educational qualifications. Thus, the validity of Rule 2(b), which prescribed the ratio of 3:2 for direct recruits and promotees, the former being degree-holders and later diploma-holders was challenged as being violative of the guarantee of equality embodied in Article 16. Citing with approval Justice Krishna Iyer in *State of Jammu & Kashmir v. Trilokinath Khosa* : (1974) 1 SCC 19, it was thus stated:

"Krishna Iyer, J., stated that the social meaning of Articles 14 and 16 is neither dull uniformity nor specious 'talentism'. Further, the soul of Article 16 is the promotion of the common man's capabilities, opening up full opportunities to develop without succumbing to the sophistic argument of the elite that talent is the privilege of the few and they must rule. But then, personnel policy does require an eye on efficiency; and so, though 'chill penury' should not 'repress their noble rage', technical proficiency cannot be sacrificed at the altar of wooden equality. All these call for a striking of balance between the long hunger for equal chance of the lowlier and the disturbing concern of the community for higher standards of performance. Even so, mini-classifications based on micro-distinctions are false to our egalitarian faith; and over-doing of classification would be undoing of equality. The Court has to function always as a sentinel on the qui vive."

Thus, dismissing the writ petition, it was held that a harmony would thus be struck, by maintaining reasonableness in the ratio, between the call of social justice and the need for higher education,

without in any way jeopardising the principal object of classification, by the impugned rule.

41. In *T. Sham Bhat vs. Union of India (UOI) and Anr.* 1994 Supp (3) SCC 340, the vires of Regulation 2 of the Indian Administrative Service (Appointment by Selection) Second Amendment Regulations, 1989 - the IAS Second Amendment Regulations was challenged before this court. It inter-alia referred to the following judgments: "16. *Venkatashwara Theatre vs. State of Andhra Pradesh and Ors.* : (1993) 3 SCC 677, is a decision of this Court which points out, as to how discrimination can arise, if persons who are unequals are treated as equals, thus: "Just as a difference in the treatment of persons similarly situate leads to discrimination, so also discrimination can arise if persons who are unequals, i.e...differently placed, are treated similarly.... A law providing for equal treatment of unequal objects, transactions or persons would be condemned as discriminatory if there is absence of rational relation to the object intended to be achieved by the law."

Food Corporation of India vs. Kamdhenu Cattle Feed Industries : (1993) 1 SCC 71, is a decision of this Court where it is pointed out that requirement of non- arbitrariness in a State action, if ought to conform to Article 14 of the Constitution, due weight must be given to reasonable or legitimate expectations of the persons likely to be affected by such action, thus:

"To satisfy this requirement of non arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness."

Thus, holding the classification between the increase in number of years of continuous service of non-State Civil Service Class-I officers to make them eligible for selection to the Indian Administrative service which deprived them of the right to be considered for selection under the IAS Selection Regulations which held the field for over 33 years, as unjust, arbitrary, unreasonable and that which arbitrarily affected the legitimate and normal expectations of non-State Civil Service Class-I officers and was inhibited by Article 14 of the Constitution, the regulation was struck down as unconstitutional.

42. *Delhi Transport Corporation vs. D.T.C. Mazdoor Congress and others* : 1991 Supp (1) SCC 600, dealt with the question of constitutional validity of the right of the employer to terminate the services of permanent employees without holding any inquiry in certain circumstances by reasonable notice or pay in lieu of notice. After referring to a plethora of decisions of this court on the application of Article 14 and 16 in cases of public employment, it was opined:

"Thus it could be hold that Article 14 read with 16(1) accords right to an equality or an equal treatment consistent with the principles of natural justice. Any law made or action taken by the employer, corporate statutory or instrumentality under Article 12 must act fairly, justly and reasonably. Right to fair treatment is an essential inbuilt of natural justice. Exercise of unbridled and uncanalised discretionary power impinges upon the right of the citizen; vesting of discretion is no wrong provided it is exercised purposively judiciously and without prejudice. Wider the discretion, the greater the chances of abuse. Absolute discretion is destructive of freedom than of man's other inventions. Absolute discretion marks the beginning of the end of the liberty. The conferment of absolute power to dismiss a permanent employee is antithesis to justness or fair treatment. The exercise of discretionary power wide of mark would bread arbitrary, unreasonable or unfair actions

and would not be consistent with reason and justice. The provisions of a statute, regulations or rules that empower an employer or the management to dismiss, remove or reduce in rank of an employee, must be consistent with just, reasonable and fair procedure. It would, further, be held that right to public employment which includes right to continued public employment till the employee is superannuated as per rules or compulsorily retired or duly terminated in accordance with the procedure established by law is an integral part of right to livelihood which in turn is an integral facet of right to life assured by Article 21 of the Constitution. Any procedure prescribed to deprive such a right to livelihood or continued employment must be just, fair and reasonable procedure. In other words an employee in a public employment also must not be arbitrarily unjustly and unreasonably be deprived of his/her livelihood which is ensured in continued employment till it is terminated in accordance with just, fair and reasonable procedure. Otherwise any law or rule in violation thereof is void."

43. We have noticed hereinbefore the plight of the writ petitioner as to why she could not prepare well or appear at the second test. In such a situation an employee in certain establishments would be governed by the Maternity Benefit Act, 1961. All shops and establishments were brought within the purview of the said Act by Act No. 61 of 1988 w.e.f. 10th January, 1989. In terms of the provisions of the said Act, a woman is prohibited from working in an establishment during the period of six weeks from immediately following the day of her delivery, miscarriage or medical termination of pregnancy. She, if a request is made by her in this behalf, even would not be asked to work for the period specified in sub-section (4) of Section 4. Apart from the right to payment of maternity benefits, she would be entitled to the benefits of Sections 6 and 9 thereof. Section 9 reads as under :-

"9. Leave for miscarriage, etc. In case of miscarriage or medical termination of pregnancy, a woman shall, on production of such proof as may be prescribed, be entitled to leave with wages at the rate of maternity benefit, for a period of six weeks immediately following the day of her miscarriage, or, as the case may be, her medical termination of pregnancy."

44. Mr. Mehta has, however, drawn our attention to Regulation 36 of the Regulations to contend that maternity leave was admissible upto a period of 6 months only, on and from the 1st day of April, 2000. A statutory Regulation, as is well known, is subject to the provisions of a Parliamentary Act. Regulations framed by the Board of Directors of the Bank fail to provide for grant of maternity leave and other benefits to which a woman employee would be entitled to in terms of the Maternity Benefit Act, 1961. A subordinate legislation, as is well known, must be made in conformity with the Parliamentary Act.

45. In *Bombay Dyeing and Mfg. Co. Ltd. vs. Bombay Environmental Action Group and Ors.* : (2006) 3 SCC 434, this court opined:

"By reason of any legislation whether enacted by the legislature or by way of subordinate legislation, the State gives effect to its legislative policy. Such legislation, however, must not be ultra vires the Constitution. A subordinate legislation apart from being intra vires the Constitution, should not also be ultra vires the parent Act under which it has been made. A subordinate legislation, it is trite, must be reasonable and in consonance with the legislative policy as also give effect to the purport and object of the Act and in good faith."

46. Similarly, in *Vasu Dev Singh and Ors. vs. Union of India and Ors.* : 2006 (11) SCALE 108, wherein the Validity of Section 3 of the East Punjab Urban Rent Restriction Act, 1949 was

challenged, this court after referring to a large number of decisions on subordinate legislation, held: "A statute can be amended, partially repealed or wholly repealed by the legislature only. The philosophy underlying a statute or the legislative policy, with the passage of time, may be altered but therefore only the legislature has the requisite power and not the executive. The delegated legislation must be exercised, it is trite, within the parameters of essential legislative policy. The question must be considered from another angle. Delegation of essential legislative function is impermissible. It is essential for the legislature to declare its legislative policy which can be gathered from the express words used in the statute or by necessary implication, having regard to the attending circumstances. It is impermissible for the legislature to abdicate its essential legislative functions. The legislature cannot delegate its power to repeal the law or modify its essential features."

[See also Employees State Insurance Corporation vs. H.M.T. Ltd. and another : 2008 (1) SCALE 341.]

47. We, however, are not oblivious of the fact that the contention as regards the applicability of the Maternity Benefit Act, 1961 had not been raised before the High Court. We will assume for the sake of arguments that the said Act is not applicable. However, we intend to emphasize that the attitude on the part of the State in exercise of its power of discretion should otherwise be commensurate with the doctrine of reasonableness. A State, even for applying the constitutional scheme of equality would not enforce its decision only upon taking into consideration the cases of the different parties before it. A woman who had undergone miscarriages, in our opinion, was entitled to a different treatment. Article 14 indisputably is a positive concept. Applicability of the doctrine of equality as a positive concept, therefore, should have been the premise that as a woman having regard to the state of affairs in which the writ petitioner was placed, she was entitled to obtain a different treatment from the employer. Article 14 does not apply in a vacuum. Whereas persons absolutely similarly situated, should be treated equally, equal treatment to the persons dis-similarly situated would also attract the wrath of Article 14. It is from that point of view that the writ petitioner's case ought to have been considered vis-a-vis Indubala. If the appellate authority was entitled to exercise its power of relaxation, which in the absence of any statutory interdict (presumably it was entitled to), it should have considered the case of the petitioner vis-à-vis Indubala, whose case, was rightly been found by the High Court stood at a much weaker foundation. Thus, Article 14 must be held to have been violated; the power of relaxation having been conceded to the appellate authority.

48. This aspect of the matter has been considered by this Court in *Nehru Yuva Kendra Sangathan vs. Mehbub Alam Laskar* : 2008 (1) SCALE 590. "A 'State' within the meaning of Article 12 of the Constitution of India should have placed full facts before the High Court. Only in its anxiety to show that the case of Ajay Kumar Gupta was different from that of the respondent, it came out with the truth that the respondent was guilty of a serious misconduct."

49. We are not unmindful that as a positive concept, Article 14 would not apply in illegality.

50. In *Nagar Mahapalika, Kanpur vs. Smt. Vibha Shukla and Ors.*: 2007 (8) SCALE 361, the court on the issue of regularization of services opined: "Equality is a positive concept. Therefore, it cannot be invoked where any illegality has been committed or where no legal right is established."

51. Similar opinion was expressed in *State of Orissa and Ors. vs. Prasana Kumar Sahoo* : 2007 (6) SCALE 236 at paragraphs 23 and 24 and in *Vice Chancellor, M.D. University, Rohtak vs. Jahan*

Singh : 2007 (4) SCALE 226 at paragraph 28.

52. The Executive Committee of the Bank had fixed the number of chances to be given to an employee in the confirmation test. If it is enforced against the writ petitioner having regard to her physical position, to appear in the second examination, the provisions thereof, keeping in mind the principle underlying the statutory provisions of Maternity Benefit Act, may not be held to be applicable. She was, thus, entitled to another opportunity to appear at the examination. The Executive Committee or for that matter the appellate authority cannot exercise the power of relaxation in a discriminatory manner. It was expected to act judiciously, assuming that the employer had a discretion in this behalf. Discretion cannot be equated with whims and caprices.

53. We, for the reasons abovementioned, are not in a position to accept the submission of Mr. Mehta that it was for the employer to decide as to how many chances have to be given to each employee and the Bank cannot be deprived of such discretionary jurisdiction.

54. For the views we have taken we need not deal with the question as to whether the insistence of confirmation test is not in accordance with the Regulations.

56. For the reasons abovementioned appeal filed by the Bank is dismissed and that of the writ petitioner is allowed. The writ petitioner shall be reinstated in service forthwith. She, however, may be paid only 50 % of the back wages. This order we are passing keeping in view that her services had been terminated on 9th November, 1990. The writ petitioner is also entitled to costs. Counsel's fee assessed at Rs.50,000/-.