REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2463 OF 2015

ASSISTANT GENERAL MANAGER & ORS. ... APPELLANTS

VERSUS

RADHEY SHYAM PANDEY ... RESPONDENT

WITH

CIVIL APPEAL NOS.2287-2288 OF 2010

CIVIL APPEAL NOS.5035-5037 OF 2012

CIVIL APPEAL NO.10813 OF 2013

J U D G M E N T

ARUN MISHRA, J.

1. The question involved is whether the respondent-employees are entitled to pension on completion of 15 years of service as per the State Bank of India Voluntary Retirement Scheme (for short, "the VRS framed in 2000").

2. The matter has been referred to larger Bench due to conflict of opinion between the Judges as to the admissibility of pension under the VRS.

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NARENDRA PRASAD
Date: 2020.03.02
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Reason:

3. After obtaining approval of the Government of India, the Indian Bank Association (IBA) evolved a Voluntary Retirement Scheme. The Central Board of Directors of the State Bank of India (in short 'the SBI') adopted and approved the scheme in its meeting held on 27.12.2000 for implementing the VRS for the employees of the bank by retiring them on completion of 15 years of service with the benefit provided in the scheme. The scheme had been drawn up, keeping in view the guidelines issued by the IBA. "Memorandum" dated 26.12.2000 was submitted by the Deputy Managing Director and the Corporate Development Officer for according approval to the proposals contained in the Memorandum as also for adopting the scheme as Annexure 'B' to the Memorandum.

4. The basis of Memorandum dated 26.12.2000, was the advice by IBA vide letter dated 31.8.2000 in which it was pointed out that they deliberated with the Government of India, Ministry of Finance (Banking Division), at its meeting with the Finance Minister, with Chief Executives of public sector banks on 13.6.2000. The human resource and manpower planning in public sector banks were reviewed, and a Committee was constituted to examine the issues concerned to public sector banks and to suggest suitable remedial measures. The Committee considered the economic reforms set in

motion in the year 1990, the high establishment cost and low productivity in public sector banks. It was felt that the banks convert their human resource into assets compatible with the business strategies through a variety of measures. The data available indicated that 43% of the employees in public sector banks were in the 46 + age group, and only 12% were in the 25-35 age group. It was felt that this pattern has severe implications for the banks regarding mobility, training, development of skills, and succession plans for higher-level positions. The workforce was in excess. In order to remedy the situation, the Committee placed before the Government two schemes, *viz.*, Sabbatical Leave, and a Voluntary Retirement Scheme. The IBA vide letter dated 13.7.2000 sought no objection from the Government for circulating the schemes to the banks for consideration and adoption by their Boards. The Government conveyed on 29.8.2000 that it did not have any objection for adopting and implementing the scheme by the respective Board of Directors. It advised that the banks may adopt these schemes for sabbatical leave and voluntary retirement based on the essential features of the schemes given in the annexure to the letter. The scheme provided eligibility for all permanent employees with 15 years of service. It provided for amount of *ex gratia* and other benefits accepted by the Government of India which were to be provided (i) gratuity as per the Gratuity Act/service

gratuity, as the case may be; (ii) pension (including commuted value of pension)/bank's contribution towards provident fund; and (iii) leave encashment as per rules.

5. After the Central Board of SBI approved the proposals contained in the memorandum on 27.12.2000, a circular was issued on 29.12.2000 in which it was mentioned that the IBA advised that as the Committee constituted by the Finance Ministry recommended introduction of a VRS in order to rationalise the manpower, the Government of India has no objection for adopting and implementing the VRS. It was clearly stated in the Circular dated 29.12.2000 that the Central Board of Directors accorded approval for adopting and implementing the SBI voluntary Retirement Scheme drawn up, "keeping in view the guidelines issued by the IBA." Copy of the scheme was placed as Annexure B. The scheme was open from 15.1.2001 till 31.1.2001. Specimen applications and other related forms *inter alia* for pension were also circulated, which formed part of the circular. The circular also made it clear that gratuity, provident fund contribution as per the Provident Fund Rules, pension in terms of the SBI Employees' Pension Fund Rules, leave encashment to be provided beside the amount of *ex gratia*.

6. The heart and soul of the scheme were that benefits to be given on completion of 15 years of service. The eligibility for benefits was provided to those who had completed 15 years of service as on 31.12.2000.

7. The SBI submitted that it reserved a right under the scheme to modify, amend or cancel it or any of the clauses and to give effect to it from any date deemed fit. The Deputy Managing Director-cum-CDO was the competent authority for the purpose. As specific queries were raised, a clarification was issued by the Deputy Managing Director on 15.1.2001, in which about a query whether an employee on completing 15 years of pensionable service as on the relevant date of retirement, would be entitled to pensionary benefits, in response, para 6(c) of the scheme was reiterated, and it was also mentioned that as per the existing rules, employees who had not completed 20 years of pensionable service, were not eligible for pension.

8. The clarification issued by the Deputy General Manager was not in the form of modification or amendment of the scheme. The Deputy General Manager in clarification quoted the provisions and simply stated the position of a rule that the pensionable service was 20 years. The communication was clarificatory and did not have the effect of modifying the SBI VRS scheme as approved and adopted.

9.(a) *Radhey Shyam Pandey* questioned the refusal of the bank to pay pension, vide communication dated 26.9.2006 in the writ application filed in the High Court at Allahabad. He retired on 31.3.2001 under the SBI VRS. On 18.3.2001, the bank accepted the offer of the employee to retire him voluntarily. He was aged 59 years three months and had nine months service still to go before attaining the age of superannuation. On 31.3.2001, when the VRS became effective, he had put in 19 years, nine months, and 18 days of pensionable service. He had to retire on completion of 60 years, and would have put in a little more than 20 years of pensionable service.

(b) The High Court held that the case of the employee fell under the Second Part of Rule 22(i)(a). He was in service of the bank on and after 11.11.1993 and completed ten years of pensionable service, and further, he attained the age of 58 years before the date he retired. The High Court opined that the clarification was not part of the VRS scheme. The employee retired outside rule as per the contractual retirement scheme. The contract had to prevail. In Pension Fund Rules, Clause (a) in Rule 22(i) was inserted to give the employees the benefit of pension after ten years of pensionable service even if they had joined late. The High Court found that the matter was covered by Rule 22(i)(a). The admissible benefit cannot be denied. If a contracting

party is entitled to take benefit of a permissible clause, then it cannot be denied to him.

(c) In *the Chairman, State Bank of India & Ors. v. Mihir Kumar Nandi & Anr.* (C.A. Nos. 5035-5037/2012), a Division Bench of the High Court of Calcutta dismissing the intra-court appeal, affirmed the order of the learned Single Judge and directed to make the payment of pension. The employee was appointed on 21.5.1988. He opted for VRS on 15.1.2001. The acceptance was conveyed on 17.3.2001 by which he was informed that he would be relieved of his duties on 31.3.2001. Vide letter dated 2.8.2001, the employee was granted a pension at the rate of Rs.1024 per month. However, vide communication dated 30.8.2001, the pension payment order, together with payment of commuted value, was stopped in view of the amendment of Rule 22 of the Pension Fund Rules. Though the amendments in Pension Fund Rules were made effective with effect from 31.3.2001, and the age of retirement had been raised from 58 years to 60 years, w.e.f. 22.5.1998, this had necessitated increase in age for admission to Pension Fund to 58 years specified in Rule 22(i)(a) of the Rules so that the employees who have retired/are retiring on attaining the age of 60 years after completing ten years of pensionable service on or after 22.5.1998 are eligible for pension.

(d) The Central Board of the SBI in its meeting held on 30.1.2001 accorded approval to the amendment in Rules 8 and 22(i)(a) of the Rules as set out in Annexure 1. The Trustees of the SBI Employees' Pension Fund in their meeting on 30.10.2001 adopted the amended rules. Consequently, a Circular was issued on 8.11.2001. The amendment was given effect from 31.3.2001, the date on which it was notified, though it was adopted by the Trustees of the SBI Trust Pension Fund in October 2001.

(e) A Division Bench of the High Court held respondent-employee, as per rules on 17.3.2001, the date on which his offer was accepted, was eligible to get the pension. On 31.3.2001, the amended rules were published, which took away the existing right to get the pension. In VRS Scheme, it was mentioned that the pension would be payable in accordance with the rules as on 31.3.2001. The employee had no means of knowing about the future amendment of the Pension Rules, which would be detrimental to his interest. If he had known the fact, then he would not have opted for the scheme. The silence maintained by the employer in such a situation amounted to a fraud on its part. The High Court relied upon section 17 of the Contract Act and Illustration (d) to section 19 of the Contract Act. The High Court further held that it was the duty of the employer to disclose that there would be a future amendment on the last date of their service by

which their right to pension would be taken away. The same cannot but be said to be unfair and arbitrary. Thus, the High Court held that action is violative of Article 14 of the Constitution of India. The employee is entitled to the relief of pension along with interest.

10. *Ramesh Prasad Nigam* (supra) had joined the services in 1984 in the clerical cadre and was confirmed on 2.3.1985. He had applied for VRS, having completed 15 years of service and 57 years of age. The clarification was internal circulation. It was not within the knowledge of employees; as such, he was entitled to the pension.

11. (a) In C.A. Nos.2287-88/2010, M.P. Hallan joined the services of the bank on 18.5.1981 as a clerk. The acceptance under VRS was communicated on 17.3.2001. On 27.3.2001, he applied to withdraw his request made under VRS as retirement was w.e.f. 31.3.2001. The Bank declined application on 18.4.2001 on the ground that the last date of withdrawal of the application was 15.2.2001. The employee claimed pension under Pension Fund Rules in terms of SBI Employees' Pension Fund Rules (hereinafter referred to as 'Pension Rules'). By writing a letter on 12.4.2001, the claim of the employee for withdrawal of application for voluntary retirement, pension, and leave encashment was again declined on 4.7.2001. Thereafter, he filed a writ petition in the High Court of Punjab & Haryana.

(b) The High Court rejected the claim concerning the withdrawal from VRS. As the last date for withdrawal was over, and acceptance had been communicated, however, considering Rule 22 of the Pension Rules, the High Court opined that as the employee completed more than 19 years and ten months of service on 31.3.2001, therefore, the first part of clause one of Rule 22 is not applicable. Further, the third part of clause (a) is not applicable as he has completed ten years of service but not attained the age of 60 years. The case of the employee was covered under the second part of clause (a) of Rule 22, which enabled the member to get a pension if an employee in the service of the bank on or after 1.11.1993, and completed ten years pensionable service and attained 58 years age. The employee applied in terms of the Pension Rules prevailing in January 2001. Alternatively, if an employee was in service of the bank on or after 1.11.1993, having completed ten years of pensionable service and on attaining the age of 58 years, shall be entitled to a pension. Thus, he fulfilled the requirement of second part of clause (a) of Rule 22 as he was in service of the bank on 1.11.1993 and completed ten years of pensionable service, and the age of 58 years, therefore, in terms of Rule 22, he was entitled to pension as well as leave encashment dues along with interest at the rate of 9 percent per annum.

12. On behalf of the bank, it was submitted that VRS 2000 stipulated that the pension in terms of SBI Pension Fund Rules on the relevant date, i.e., 31.3.2001, was to be provided. In other words, in case the employee was entitled to a pension in terms of Pension Rules and not otherwise. A provision was added in Rule 22(1) of the Pension Rules in the year 1986, accordingly, the pension was to be granted in all cases relating to voluntary retirement on completion of 20 years of service. The employees opting for the SBI-VRS would be governed only by Rule 22(i)(c) as it falls under the category of voluntary retirement. Under Rule 22(iii), a member who has been permitted to retire under clause 22(i)(c) shall be entitled to a proportionate pension, which is on completion of 20 years of pensionable service. Eligibility clause 3 has nothing to do with the admissibility of the pension. It was further submitted that the employees who completed ten years of pensionable service and were 60 years of age were entitled to pension; while employees under the VRS on completion of 15 years would not get pension and for that 20 years' service was necessary, the submission of employees that it would be discriminatory is based on incorrect premise. There is no challenge to the SBI Pension Rules or SBI-VRS. The bank provided the pensionable service period of 10 years on attaining the age of 60 years in terms of reservation policy. The bank appoints late entrants like ex-servicemen who, after serving in Armed

Forces, join the bank and are left only with about ten years of service before they attain the age of superannuation. It is to grant benefit to such a particular category of employees that a period of 10 years on attaining the age of superannuation of 60 years was provided in Rule 22(i)(a).

13. The appellants further submitted that 20 years' period is provided in case of voluntary retirement to ensure that an employee on whom the bank has spent a considerable amount during training, works for a substantial period before he seeks retirement. It is a uniform policy followed by the bank. Regulation 28 was amended in 2002 providing for 15 years of service. It applies to the employees who are governed by the Bank Employees' Pension Regulations, 1995. These regulations do not apply to SBI employees as the SBI Pension Rules govern them. SBI employees are entitled to Provident Fund, gratuity and pension in terms of the Rules on completion of 20 years of service. Thus, there cannot be any comparison of SBI employees with the employees of other nationalised banks. The clarification dated 11.01.2000 has also been relied on by the bank. Now more than 19 years have passed and to grant a pension to all those who have retired, w.e.f. 1.4.2001 would cast a huge financial liability on the bank.

14. It was submitted on behalf of the employees that the decision rendered by the High Court is appropriate. No case for interference is made out in appeals. The very essence of the VRS was the admissibility of pension on completion of 15 years of service and other benefits. Once the scheme was adopted and approved by the Central Board of SBI, the clarification could not have been made to the detriment of employees. The clarification did not have effect of the amendment, modification, or cancellation of the VRS scheme as approved and adopted by Board. The amendment in the Pension Regulations of 1995 was carried out by other public sector banks with retrospective effect in 2002, though the scheme was floated and implemented in the year 2000-2001. However, the benefits were extended on the strength of the VRS scheme even before amending the Regulations of 1995. The SBI adopted the Scheme in *toto* and Pension Rule 22 providing eligibility of 20 years applies only to those cases where employees seek retirement in the ordinary course of completion of 10 years or 20 years, as the case may be. The VRS was taken in the specific scheme providing eligibility and benefits on completion of 15 years of service, and that constituted a concluded contract. It was not open to the bank to alter the terms. In case the bank's submission is accepted, it would lead to a situation that employees who have already reached the age of superannuation, would have been entitled to take

VRS. The bank has misled the employees, and the action could not be said to be fair. Once an offer was accepted and after that to amend the rules or not to amend the rules till 31.3.2000 depended on exercise of power by SBI which may have the effect to deprive the pension when the option was not available even to withdraw the offer as it was the last day of the employment. Rule 22 was amended, that too with retrospective effect. Thus, the employees who joined service after retirement from other services, have completed the age of 58 years and were in employment as on 1.11.1993 were entitled to a pension. They have also been deprived of the benefit of pension, which would have been otherwise available to them. In case pension was not to be paid, it was not a profitable bargain for them to forego pension only for *ex gratia* benefit. It was incumbent upon the SBI to amend the Rule, in case it was necessary to do so. Otherwise, also, the meaning of the expression "pension" to be paid as per rules was that proportionate pension to be awarded to the employees with 15 years' service who were eligible for benefits granted as specified in the circular and the VRS scheme. The clarification issued on 11.1.2000 only pointed out the provisions of the VRS scheme as well as the existing position of the rule. It could not have effect to take away the benefit in any manner which became available to the employees of obtaining the pension on completion of 15 years of permanent pensionable service. On the one

hand, employees who served for ten years and attained the age of superannuation were entitled to pension and to deprive the same to a permanent employee who rendered the service for 15 years, would be *per se* discriminatory, unfair and arbitrary. Once the scheme was floated and approved, the bank being State within the purview of Article 12 of the Constitution of India, it would not be permissible for it to discriminate and act unfairly. The VRS constituted an independent contract and was binding upon the bank. The benefits could not have been taken away from eligible employees who accepted VRS, which was implemented by the bank for its benefit to induct new skills as well as to rationalise the workforce. Thus, appeals being bereft of merit, deserve dismissal.

15. The main question is whether, under the scheme as approved and adopted by the Central Board of SBI, the pension is admissible to the employees on completion of 15 years of permanent service. Connected question is whether employees have been denied benefit of pension unfairly and arbitrarily contrary to the essential terms of the scheme.

16. Firstly, it is necessary to consider the nature of the package, which was accepted in the resolution by the Central Board of Directors of SBI in its meeting dated 27.12.2000. As already mentioned, exercise

was done in order to rationalise the workforce as it was felt that banks were overstaffed. The IBA advised the SBI regarding the issues confronting the public sector banks. In the memorandum submitted to the Central Board of Directors of SBI, the following facts were mentioned as to the adoption of Scheme in right earnest and requirement of manpower planning:

> "The data available with IBA indicates that 43% of employees in Public Sector Banks are in the 46+ age group, and only 12% are in the 25-35 age group. This pattern has serious implications for the Banks with reference to mobility, training, development of skills, and succession plans for higher-level positions. This, coupled with excess manpower wherever it exists, would come in the way of induction of new skills and proper career progression.
>
> The Committee has recommended the introduction of a Voluntary Retirement Scheme that would assist the Banks in their effort to optimise their human resources and achieve a balanced age and skills profile in keeping with their business strategies. IBA has advised that the Government of India has conveyed that they have no objection to the banks' placing before their respective Boards of Director's proposals for adopting and implementing the Voluntary Retirement Scheme. It has been advised that Banks may adopt the scheme after obtaining their Boards' approval and implement it in right earnest." (emphasis supplied)
>
> "a) The high establishment costs of the Bank vis-à-vis the foreign banks and new private sector banks have been a matter of concern. The percentage of staff expenses to total expenses in the Bank is 21.85 against the percentage of 7.66 and 3.04 for foreign banks and new private sector banks, respectively. Even if we compare it with other Public Sector Banks, our ratio is adverse.
>
> d) With the computerisation of accounting and other work at a large number of branches, manpower, which was needed for balancing of books, is now rendered surplus. This indicates an imperative need to rationalize the manpower at these branches. While we have already initiated steps for the productive redeployment of staff at these branches through shift banking and seven-day banking, there still exists scope for improvement in this area. Most of these branches are situated in metropolitan and urban centers. Incidentally, the

> experience of other banks in respect of voluntary retirement schemes shows that a maximum number of applications have been received from these centers.
>
> f) As against the average of 43% of employees in Public Sector Banks in the 46+ age group, we have 47% of the employees in this age group. Of this, 1/5th are in the age group of 56 and above. To put it simply, 21,824 employees will reach the age of superannuation and retire by March 2005.
>
> In the light of the above-mentioned factors, it will be seen that the manpower of the Bank will undergo major changes in the ensuing years in number and deployment. Further, considering the variety of business the Bank undertakes, and its special role in the banking sector, over-emphasis on quantitative parameters would be inappropriate. An approach paper on Manpower Planning is placed at Annexure-'A'.
>
> Considering the various aspects of Manpower Planning, we are of the view that the Voluntary Retirement Scheme should be employed as a moderate tool to right-size the manpower in State Bank of India."

In the light of aforesaid, it is clear that the VRS scheme was devised as a tool to reduce overstaffing. The memorandum submitted to the Central Board contained the following significant aspects:

> "Keeping in view the above, the IBA guidelines and the feedback received from other Banks, the draft 'SBI Voluntary Retirement Scheme (SBIVRS)' is prepared and placed for approval at Annexure-'B.'
>
> It is proposed to introduce SBIVRS for employees who have as on 31-12-2000, completed 40 years of age or 15 years of service as approved by the Government of India and conveyed by IBA. In terms of the IBA scheme, the Banks' Boards may specify any other category as ineligible. We propose to exclude the Watch and Ward staff as these positions cannot be reduced. We also propose to exclude highly skilled and qualified staff from the Scheme.
>
> SBIVRS will be voluntary in nature. The decision to seek retirement under the Scheme rests with the employee only. The management will retain the discretion as to whether to accept or not the request for voluntary retirement under the Scheme. We have to ensure that while, on the one hand, our Bank benefits by the rightsizing of the staff strength, on the

> other, any sudden exodus of a very large number of staff does not destabilise the normal operations of the Bank. Considering the attractive features of the Scheme, in terms of ex-gratia payment, etc., a large number of applications are expected. However, the Bank will have to control the outflow according to its requirements. Towards this end, it will be necessary to retain the discretion with the management of the Bank to limit the number of employees allowed to retire in each category of staff to be covered under SBIVRS, and we propose to retain such discretion."
>
> (emphasis supplied)

It was proposed to introduce a VRS for employees who on 31.12.2000, completed 15 years of service as approved by the Government of India and conveyed by IBA. So, it assumes significance that what was approved and conveyed, in terms of the IBA scheme, the Banks' Boards were permitted to specify any other category as ineligible. The SBI considering its requirement proposed to exclude the Watch and Ward staff as these positions could not be reduced. It was also proposed to exclude the highly skilled and qualified staff from the scheme.

Funds outlay was also proposed in the memorandum submitted to the Central Board as under:

> **"FUNDS OUTLAY**
> As per the estimate received from Bank's actuary, an outlay of approximately Rs. 2100 crores would be required for the implementation of SBIVRS if 10% of the employees opt for retirement. The break-up being as under:
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> | | |
> |---|---|
> | Ex-gratia | Rs. 1300.00 crores |
> | Leave encashment | Rs. 180.00 crores |
> | Additional Provision for Gratuity | Rs. 140.00 crores |
> | Additional Provision for Pension | Rs. 480.00 crores |
>
> (These estimates may undergo a change on receipt of

clarification from Government of India as to the components of 'Pay' for the purpose of Ex-gratia)"

A provision was made for the pension. The bank reserved the right to modify, amend or cancel any or all the clauses. The Deputy Managing Director and CDO would be the competent authority. Following is the relevant clause regarding modification of the scheme:

> **"MODIFICATION OF THE SCHEME**
> Bank reserves the right to modify, amend or cancel any or all the clauses of the Scheme and to give effect thereto from any date it may deem fit. The Dy. Managing Director and CDO would be the Competent Authority for the purpose."

The effective date of retirement was 31.3.2001. The relevant clause is extracted hereunder:

> **"EFFECTIVE DATE OF RETIREMENT**
> While the SBIVRS will be open to employees from 15th January 2001 to 31st January 2001 (both days included), the retirement under SBIVRS is proposed to be given effect from 31st March 2001."

17. The letter dated 31.8.2000 annexed to memorandum submitted to the Central Board of the SBI is also of utmost significance in order to understand what was accepted by the Central Board. The relevant portion of the letter dated 31.8.2000 of IBA is extracted hereunder:

> "Attention is invited to letter DO No. 11/1/99-IR dated 22.05.2000, addressed to the Chief Executive of public sector banks by the Government of India, Ministry of Finance (Banking Division), wherein banks have been advised to carry out detailed manpower planning in order to adopt measures to have optimum human resource at various levels in keeping with the business strategies and requirements of each bank.
>
> At the meeting the Finance Minister had with Chief Executives of public sector banks on 13th June 2000, the human resource and man-power planning in public sector banks were reviewed, and a Committee was constituted to examine the issues confronting public sector banks in that regard and

suggest suitable remedial measures."

"In order to remedy this situation with the urgency that circumstances demand, the Committee has placed before the Government two schemes, viz., Sabbatical Leave and a Voluntary Retirement Scheme that would assist the banks in their effort to optimise their human resource and achieve a balanced age and skills' profile in keeping with their business strategies. Salient features of the two schemes are given in the Annexure.

IBA, vide its letter dated 13th July 2000, has sought no objection from the Government for circulating the schemes to the Banks for consideration and adoption by their Boards. The Government have conveyed to us that they have no objection to the banks' placing the two schemes before their respective Board of Directors for adopting and implementing the above schemes. It has been advised that the Banks may adopt these schemes for sabbatical and voluntary retirement based on the essential features of the schemes given in the Annexure, after obtaining their Board's approval and implement them in right earnest." (emphasis supplied)

"Banks are also requested to take special note of the following:

1. Section 10(10C) of the Income Tax Act read with Rule 2BA.

2. As per the amendments brought in by the Finance Act 2000, so long as the bank complies with the rules framed under Section 10(10C), prior approval from the Chief Commissioner or Director General of Income-tax, as the case may be, is not required for VRS.

3. Income-tax shall be deducted at source in respect of ex-gratia exceeding Rs.5.00 lakhs or such other ceiling as may be prescribed under the Income-tax Act.

4. Only completed years of service will be reckoned for arriving at the minimum eligible service. Subject to this, fraction of service of six months and above will be reckoned as one year for the purpose of calculating the ex-gratia.

5. While exercising discretion to decline applications for VRS or to make exceptions in the case of employees categorised as ineligible for VRS, the decision should not be discriminatory among employees who are similarly placed and the reasons therefor should be recorded.

6. The competent authority for accepting VRS for the various categories/class of employee should be clearly laid down by the Board of Directors.

7. Banks should ensure compliance with requirements under labour legislations before giving effect to the Scheme."

18. IBA's letter dated 31.8.2000 makes clear the salient features of the VRS scheme that all permanent employees with 15 years of service were eligible to retire. Ineligible persons have also been specified. In unqualified terms, it was mentioned in the annexures that such employees would be entitled to the amount of ex gratia of 60 days' salary for each completed year of service or salary for the number of months service is left, whichever is less. Other benefits admissible were gratuity, pension including the commuted value of pension, bank's contribution towards provident fund, and leave encashment as per rules. Thus, scheme was to grant pension to all such employees who opted for VRS on completion of 15 years of service and other benefits as specified in the scheme. The Government of India, Ministry of Finance, Department of Economic Affairs, (Banking Division), that it communicated approval vide letter dated 29.8.2000 to IBA, it was sent to the SBI also, the same is extracted hereunder:

"F. No. 11/1/99-IR (Vol.II)
Government of India
Ministry of Finance
Department of Economic Affairs
(Banking Division)

New Delhi, dated the 29th August 2000

To
The Chairman
Indian Banks' Association
MUMBAI

Sub:- Human Resource Management and Manpower Planning in Public Sector Banks-Introduction of a Voluntary Retirement Scheme/Scheme for Sabbatical Leave.

Sir,

I am directed to refer to IBA's letter No. PD/ACAP/GOVT/521 dated 13th July 2000 sending therewith a copy of the interim report of the Committee on Human Resource Management in Public Sector Banks and requesting for no objection from the Government for circulating to banks Voluntary Retirement Scheme and Scheme for granting Sabbatical Leave for consideration and adoption by their Boards, and to say that Government has no objection to the proposals contained therein.

2. The draft circular letter sent by IBA has been slightly modified. Copy of the modified draft is enclosed herewith.

3. It is requested that a copy of the circular issued to the banks may please be sent to Banking Division for record.

Yours faithfully

Sd/- (U.P. SINGH)
DIRECTOR (IR)"

19. The agenda submitted on 27.12.2000 for consideration of the Central Board of SBI along with resolution are extracted as under:

"AGENDA NO.3

Man- Power Planning and SBI Voluntary Retirement Scheme (SBI VRS)

Submitted Memorandum dated the 26th December 2000 by the Deputy Managing Director & Corporate Development Officer, recommending that for the reasons stated therein, approval be accorded for the proposals contained in the Memorandum as also for adopting the stated approach to manpower planning and introduction SBIVRS in terms of the provisions contained in the Scheme at Annexure 'B' of the Memorandum.

Copies of the Memorandum were placed before the Directors present at the Meeting.

''APPROVED"
(SEAL)

20. Annexure 'B' to the memorandum contained the VRS. The VRS was prepared in view of the guidelines of the IBA. The amount of *ex gratia* and other benefits specified in the scheme under clauses 5/ 6 of the scheme are extracted hereunder:

> "5. Amount of Ex-gratia:
>
> The staff members whose request for retirement under SBIVRS has been accepted by Competent Authority will be paid an amount of ex-gratia of 60 days' salary (pay plus stagnation increments plus dearness allowance) for each completed year of service (for this purpose fraction of service of six months and above will be taken as one year and accordingly service of less than six months will not be counted) or salary for the number of months service is left, whichever is less. Fraction of a month, if any, will be ignored.
>
> 'Relevant Date' means the date on which the employee ceases to be in service of the Bank as a consequence of the acceptance of the Bank as a consequence of the acceptance of the request for voluntary retirement under the Scheme. For the purpose of calculation of ex-gratia, 60 days' salary mentioned in the Scheme is to be taken as equivalent to 2 months' salary (with reference to salary for the month in which employee is relieved from service on Voluntary Retirement.
>
> Income Tax shall be deducted at source in respect of ex-gratia exceeding Rs. 5.00 lakhs or such other ceiling as may be prescribed under the Income Tax Act on the relevant date."

The benefits were as under:

> "6. Other benefits
>
> (a) Gratuity as payable under the extant instructions on the relevant date.
>
> (b) Provident Fund contribution as per State Bank of India Employees' Provident Fund Rules as on relevant date.
>
> (c) <u>Pension in terms of State Bank of India Employees' Pension Fund Rules on the relevant date (including commuted value of pension).</u>
>
> (d) Encashment of balance of Privilege Leave, as applicable, on the relevant date.

(e) Respective facilities extended to officers/others such as retention of accommodation, telephone, car, continuation of housing loan, etc. will be extended to officers. Others retiring under SBIVRS as per present dispensations, at the discretion of Competent Authority. However, in such cases of retention of physical facilities, 50% of the amount of ex-gratia payable will be released only after the employee surrenders the facility. No interest, however, will be paid for the amount so withheld. All other outstanding loans/advances will have to be repaid before date of retirement under SBIVRS, failing which the amount of ex-gratia and other terminal benefits payable to the employee will be appropriated towards the outstanding loans/advances; and the balance only will be payable to the employee."

21. Most significantly, the scheme of the IBA, accepted by the Board on 27.12.2000, was for providing pension on completion of 15 years of service. The pension specified in clause 6 of scheme was to be worked out in terms of the Pension Fund Rules including the commuted value of the pension. It was not mentioned in the VRS adopted by the SBI that the person on completion of 15 years would not be entitled to the benefit of pension. On the other hand, proposal of IBA, as approved by the Government of India, was accepted *in toto* by SBI. When gauged in terms of the proposals of the IBA, the essential feature was that an employee was entitled to get pension on completion of 15 years of service. The meaning of the expression "pension" in terms of the rules would be proportionate pension on completion of 15 years of service as per the terms of calculation provided in Rule 23 of the Pension Rules. VRS is an independent contract and the background in which it was floated, pension on completion of 15 years of service was an essential

part of the scheme of VRS 2000, as approved by the Government and floated by the IBA and adopted by all the Banks, and Pension Rules were to be amended accordingly.

22. The Government of India suggested to the IBA to amend Regulation 29 of the Regulations of 1995 so that the employees do not lose the benefit of pension, the IBA may work out modalities and suggest amendments, if any, required to be made in the Pension Regulations to ensure that the employees get the benefit of pension. The letter dated 5.9.2000 of Government of India is extracted hereunder:

> "F. No. 4/8/4/2000-IR
> Government of India,
> Ministry of Finance,
> Department of Economic Affairs
> (Banking Division)
> New Delhi, 5-9-2000
>
> To
> The Personnel Advisor,
> Indian Banks' Association,
> Mumbai
> *Sub.*: Amendment to Regulation 29 of the Pension Regulations.
> Sir,
> I am directed to refer to this Division's Letter No. 11/1/99 IR dated 29-8-2000, conveying the Government's no objection for circulation of Voluntary Retirement Scheme in public sector banks. The Scheme, inter alia, provides that employees with 15 years of service or 40 years of age shall be eligible to take voluntary retirement under the Scheme. As per the provisions contained in Regulation 29 of the Pension Regulations, an employee can take voluntary retirement after 20 years of qualifying service and thereafter becomes eligible for pension. Thus, employees having rendered 15 years of service or completing 40 years of age but not having completed 20 years

> of service shall not be eligible for pensionary benefits on taking voluntary retirement under the Scheme.
>
> In order to ensure that such employees do not lose the benefit of pension, IBA may work out modalities and suggest amendments, if any, required to be made in the Pension Regulations to ensure that these employees also get the benefit of pension.
>
> Yours faithfully,
> sd/-
> (U.P. Singh)
> Director (IR)"

23. SBI issued a circular on 10.1.2001 with respect to the withdrawal of the application submitted under the scheme. It was decided that the employee could withdraw the application on or before 15.2.2001 by making a written request.

24. Clarification was issued on 15.1.2001 to a query raised, whether or not the employees on completing 15 years of pensionable service would be entitled to pensionary benefits. Following is a relevant portion:

> "3. Whether or not the employees, completing 15 years of pensionable service as on relevant date (date of retirement under SBIVRS), will be entitled for pension benefits?
>
> In this connection, we invite a reference to para 6(c) of the Scheme forwarded under the cover of Staff Circular letter No. CDO/81 dated 30/12/2000. The payment of pension to the employee retiring under SBIVRS would be governed by State Bank of India Employees Pension Fund Rules on the relevant date (including commuted value of pension). However, as per existing rules, employees who have not completed 20 years of Pensionable Service are not eligible for pension."

It is clear from answer that the staff circular dated 30.12.2000 was reiterated. Payment of pension to an employee retiring under VRS would be governed by rules on the relevant date, i.e., 31.3.2001. At

the same time, the position of the existing rule was indicated that those employees who had not completed 20 years of pensionable service were not eligible for a pension. It was not clarified what was the meaning and purport of para 6(c) of the scheme. It was not mentioned that an employee would not be entitled to pension on 15 years of service as per the scheme approved by the Government of India and floated by the IBA and adopted by the Central Board of SBI. The above clarification being in form of opinion, could not be said to have caused a modification, amendment, or cancellation of any of the clauses of VRS or resolution passed by the Board, nor it was so stated. It was necessary to state that on completion of 15 years of service, employees would not be paid pension. The existing rule position was known to everybody, whereas the scheme was framed for providing pension on completion of 15 years of service.

25. Rule 22 of the Pension Rules of SBI as it existed up to 9.3.2001 and amended are extracted hereunder:

Existing Rule

"22(i) A member shall be entitled to a pension under these rules on retiring from the Bank's service-

(a) After having completed 20 years' pensionable service provided that he has attained the age of 50 years or if he is in the service of the Bank on or after 01.11.93, after having completed ten years pensionable service provided that he has attained the age of 58 years.
(b) After having completed twenty years' irrespective of the age he shall have attained if he shall satisfy the authority competent to sanction his retirement by approved medical certificate or

otherwise that he is incapacitated for further active service;
(c) After having completed twenty years pensionable service, irrespective of the age he shall have attained at his request in writing;
(d) After twenty-five years' pensionable service.“

Amended Rule

“22(i) A member shall be entitled to a pension under these rules on retiring from the Bank’s service-

(a) After having completed twenty years' pensionable service provided that he has attained the age of fifty years or if he is in the service of the Bank on or after 01.11.93, after having completed 10 years, pensionable service provided that he has attained the age of fifty-eight years or if he is in the service of the bank on or after 22.05.1998. After having completed ten years, pensionable service provided that he has attained the age of sixty years.
(b) After having completed twenty years' pensionable service, irrespective of the age he shall have attained if he shall satisfy the authority competent to sanction his retirement by approved medical certificate or otherwise that he is incapacitated for further active service;
(c) After having completed twenty years pensionable service, irrespective of the age he shall have attained at his request in writing;
(d) After twenty-five years' pensionable service."

26. It is clear from Rule 22 that pension is admissible to an employee thus:

1) After having completed 20 years’ pensionable service provided that he has attained the age of 50 years; or
2) If he is in the service of the Bank on or after 01.11.1993, after having completed 10 years pensionable service provided that he has attained the age of 50 years; or
3) If he is in the service of the Bank on or after 22.05.1998, after having completed 10 years pensionable service provided that he has attained the age of 60 years.

27. Rule 22(1)(c) was incorporated in the Pension Fund Rules *w.e.f.* 20.9.1986 when the bank decided *inter alia* to introduce VRS on completion of 20 years of service. The unamended rule 22(i)(a) provided the normal age of retirement to be 58 years. Thereafter, as per the guidelines issued by the Government on 22.5.1998, the age of retirement was increased from 58 to 60 years. Accordingly, Rule 22(i)(a) was proposed to be amended on 30.1.2001, and instead of 58 years, the age of retirement of 60 years was to be incorporated. On 28.5.1998, the Executive Committee of the Central Board of SBI pending amendment to the related service rules adopted the age of retirement as 60 years. The amendment was notified on 31.3.2001 and approved by the Trustees of the SBI Employees' Pension Fund on 30.10.2001.

28. Similar scheme of VRS concerning nationalised banks was implemented according to the decision of the Government of India. In Punjab & Sind Bank, it was to remain open from 1.12.2000 to 31.12.2000; Punjab National Bank: 1.11.2000 to 30.11.2000; Bank of India: 15.11.2000 to 14.12.2000; Union Bank of India: 1.12.2000 to 31.12.2000; United Bank of India: 1.1.2001 to 31.1.2001. In SBI, the said scheme was adopted by the Central Board on 27.12.2000.

29. The State Bank of India was constituted under the SBI Act, 1955. The nationalised banks were taken over in terms of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. Under the Act of 1970, the Punjab National Bank (Employees) Pension Regulations, 1995, were framed. Regulation 28, provided pension on attaining the age of superannuation, and Regulation 29 provided pension on voluntary retirement on completion of 20 years of qualifying service. Regulation 29(5), applicable to the banks mentioned above, provided that the qualifying service of an employee retiring voluntarily under the Regulation shall be increased by a period not exceeding five years, subject to the condition that the total qualifying service rendered by such employee shall not exceed 33 years.

30. The VRS 2000 came up for consideration before this Court in *Bank of India & Ors. v. O.P. Swarnakar & Ors*., (2003) 2 SCC 721 in the context of Regulation 29(5) of Regulations, 1995. The Court held that the scheme is contractual and provided for pensionary benefits on completion of 15 years of service. The decision was followed in *HEC Voluntary Retd. Employees Welfare Society v. Heavy Engineering Corporation Ltd.*, (2006) 3 SCC 708.

31. Due to introduction of Scheme, Regulation 28 of Regulations of 1995 was proposed to be amended. It was amended in the year 2002

with a retrospective effect from 1.9.2000. By way of amendment, a proviso has been inserted in Regulation 28 thus:

> "28. *Superannuation pension*.—Superannuation pension shall be granted to an employee who has retired on his attaining the age of superannuation specified in the Service Regulations or Settlements."
>
> "Provided that pension shall also be granted to an employee who opts to retire before attaining the age of superannuation, but after having served for a minimum period of 15 years in terms of any scheme that may be framed for the purpose by the Bank's Board with the concurrence of the Government."
> (emphasis supplied)

32. The employees who opted for VRS on completion of 15 years of service within the specified period in 2000/2001, were given the benefit of pension. The Regulations came to be amended in 2002 with the retrospective effect. However, the benefit under Regulation 29(5) was not extended to the optees/employees who completed 20 years of service by adding 5 years of qualifying service. Regulations 29(1) and 29(5) applicable to the said banks are extracted hereunder:

> **"**29. *Pension on voluntary retirement*.—(1) On or after the 1st day of November 1993 at any time, after an employee has completed twenty years of qualifying service he may, by giving notice of not less than three months in writing to the appointing authority retire from service:
>
> Provided that this sub-regulation shall not apply to an employee who is on deputation or on study leave abroad unless after having been transferred or having returned to India he has resumed charge of the post in India and has served for a period of not less than one year:
>
> Provided further that this sub-regulation shall not apply to an employee who seeks retirement from service for being absorbed permanently in an autonomous body or a public sector undertaking or company or institution or body, whether incorporated or not to which he is on deputation at the time of seeking voluntary retirement:

> Provided that this sub-regulation shall not apply to an employee who is deemed to have retired in accordance with clause (1) of Regulation 2.
>
> x x x
>
> (5) The qualifying service of an employee retiring voluntarily under this Regulation shall be increased by a period not exceeding five years, subject to the condition that the total qualifying service rendered by such employee shall not in any case exceed thirty-three years and it does not take him beyond the date of superannuation."

33. The scheme in question came up for consideration in *O.P. Swarnakar & Ors.* (supra), in which SBI was one of appellants in C.A. Nos.3561-65/2002, the appeals were decided by this Court by a common judgment. It noted that reference to pension as per rules was made for computation of pension, and the employees who had completed 15 years of service were to be extended the benefit of VRS 2000 along with pension and other benefits. IBA wrote a letter dated 11.12.2000 to all public sector banks for amending Pension Regulations, 1995. The IBA mentioned that pension was to be paid to the employees as per VRS 2000. They would be eligible for *pro-rata* pension; as such, Regulation 28 be amended. The employees who applied for voluntary retirement after having rendered 15 years' service, under a special/ad hoc scheme formulated with the specific approval of the Government and the Board of Directors would be eligible for *pro-rata* pension for the period of service rendered as if they were to retire on attaining the age of superannuation on that date. The letter made it clear that the Government of India approved the pension

to be given on completion of 15 years of service. The scheme was for extending the benefit of pension to the employees retiring on completion of 15 years of permanent service, and the Government of India also desired that the IBA advised banks to make necessary amendments to their pension regulations, as mentioned in the Annexure. Thus, the essence of the VRS scheme was the benefit of *pro-rata* pension as per the rules on completion of 15 years of pensionable service.

34. It is apparent that the very fulcrum of the scheme was a felt need for inducting new workforce, with adequate knowledge of new skills such as modern technology, foreign exchange, venture capital, e-commerce, money management, etc. as pointed out by the Ministry of Finance in its letter dated 22.5.2000. The banks were overstaffed and for effective management and manpower planning, the desirability of introducing VRS was felt in order to rationalise the workforce and skill. Hence a Committee was constituted by the Central Government. In pursuance of report of the Committee, a policy decision was taken to frame the VRS. The scheme applied to employees who, on the date of the application, completed 15 years of service. The employees specified therein were otherwise not eligible to seek voluntary retirement on completion of 15 years under the rules/regulations. Under the scheme floated by the other banks, identical reliefs were

admissible, as in SBI VRS. The Scheme of Punjab National Bank is extracted hereunder:

> "7. x x x "*Amount of ex gratia*
>
> An employee seeking voluntary retirement under the Scheme will be entitled to the ex gratia amount mentioned below in para (*a*) or (*b*), whichever is less:
>
> (*a*) 60 days' salary (pay plus stagnation increments plus special pay plus dearness relief) for each completed year of service;
>
> *OR*
>
> (*b*) salary for the number of months of service left;
>
> *Other benefits*
>
> An employee seeking voluntary retirement under the Scheme will be eligible for the following benefits in addition to the ex gratia amount mentioned in para 6 above of this Scheme:
>
> (*i*) Gratuity as per the Payment of Gratuity Act, 1972 or gratuity payable under the Service Rules, as the case may be, as per existing rules.
>
> (*ii*)(*a*) Pension (including commuted value of pension) as per PNB (Employees) Pension Regulations, 1995.
>
> *OR*
>
> (*b*) Bank's contribution towards PF as per existing rules.
>
> (*iii*) Leave encashment as per existing rules."
>
> (emphasis supplied)

35. The eligibility criteria in all the schemes, including SBI VRS, clearly provided that employees who completed 15 years of service and particular age shall be eligible to apply. The benefits to which they were entitled, were culled out. In other banks, the pension was as per Pension Regulation, 1995. Thus, on eligibility of an employee, admissibility of the available reliefs in Scheme followed *i.e.,* the amount of *ex gratia* and other benefits, including pension, were to be paid as provided in the scheme. Otherwise, there was no purpose of retiring an employee with 15 years of service as they were not eligible

for retirement as per the rules before completion of 20 years of service in all nationalised banks as well as SBI. A reference to the admissibility of the pension as per rules/ regulations was made in all the VRS to mean that proportionate pension shall be admissible as provided in rules, this Court has noted it in *O.P. Swarnakar* (supra), thus:

> **"49.** An offer indisputably can be made to a group of persons collectively which is capable of being accepted individually, but the question which has to be posed and answered is as to whether having regard to the service jurisprudence; the principles of the Indian Contract Act would be applicable in the instant case. It is the specific case of the "banks" that the Schemes had been floated by way of contract. It does not have any statutory flavour. Reference to the Pension Scheme framed under the Regulations was made for computation of the pension."
>
> (emphasis supplied)

36. Significantly in *O.P. Swarnakar* (supra), this Court observed that employees must have proceeded to apply for VRS on the basis even though they have merely completed 15 years of service, which was not a qualifying service, under the Pension Regulations of Bank, they would be entitled to benefits in terms of the VRS scheme. The Court observed thus:

> **"89.** Furthermore, a large number of employees have withdrawn their offer only when a proviso was sought to be added to Regulation 28 aforementioned. In terms of the Scheme the employees, who expected to get benefits of sub-regulation (4) of Regulation 29 would be deprived therefrom. It is not in this dispute that the qualifying period for receiving pension was 20 years. Only upon completion of 20 years, in terms of the statutory regulation contained in Regulation 29, an employee could opt for voluntary retirement, and in terms

> thereof, he would be entitled to the benefits specified therein. The said Regulations had specifically been mentioned for the purpose of computation, which would include invocation of sub-regulation (4) of Regulation 29, providing for relaxation of 5 years towards the qualifying period. The employees must have proceeded on the basis that despite the fact that they have merely rendered 15 years of service, which was not a qualifying service under the Regulations, they would be entitled to the pensionary benefits in terms of the Scheme. By introducing the proviso to Regulation 28 pension was sought to be made pro rata in place of full pension." (emphasis supplied)

37. In *O.P. Swarnakar & Ors.* (supra), it was held that the scheme was not a part of statutory regulations. It was in the realm of contract. That being so, the Central Government did not need to place the same before Parliament; and secondly, if the same was a regulation, the laying-down rule is merely directory and not mandatory. This Court relied upon the decisions in *Jan Mohd. Noor Mohd. Bagban v. State of Gujarat*, AIR 1966 SC 385 and *Atlas Cycle Industries Ltd. v. State of Haryana*; 1979 (2) SCC 196 and held that the scheme could not be said to be bad in law, thus:

> **"124.** Firstly, the Scheme is not a part of the statutory regulation. It was in the realm of contract. That being, so it was not necessary for the Central Government to place the same before Parliament.
>
> **125.** Secondly, even if the same was a regulation, the laying-down rule is merely a directory one and not mandatory.
>
> **126.** In *Jan Mohd. case*, AIR 1966 SC 385, the law is stated in the following terms: (AIR pp. 394-95, para 18)
>
> "*18*. Finally, the validity of the rules framed under Bombay Act 22 of 1939 was canvassed. By Section 26(1) of the Bombay Act, the State Government was authorised to make rules for the purpose of carrying out the provisions of the Act. It was provided by sub-section (5) that the rules made under Section 26 shall be laid before each of the Houses of the Provincial

> Legislature at the session thereof next following and shall be liable to be modified or rescinded by a resolution in which both Houses concur, and such rules shall, after notification in the Official Gazette, be deemed to have been modified or rescinded accordingly. It was urged by the petitioner that the rules framed under Bombay Act 22 of 1939 were not placed before the Legislative Assembly or the Legislative Council at the first session, and therefore they had no legal validity. The rules under Act 22 of 1939 were framed by the Provincial Government of Bombay in 1941. At that time, there was no Legislature in session, the Legislature having been suspended during the emergency arising out of World War II. The session of the Bombay Legislative Assembly was convened for the first time after 1941 on 20-5-1946, and that session was prorogued on 24-5-1946. The second session of the Bombay Legislative Assembly was convened on 15-7-1946, and that of the Bombay Legislative Council on 3-9-1946 and the rules were placed on the Assembly Table in the second session before the Legislative Assembly on 2-9-1946 and before the Legislative Council on 13-9-1946. Section 26(5) of Bombay Act 22 of 1939 does not prescribe that the rules acquired validity only from the date on which they were placed before the Houses of Legislature. The rules are valid from the date on which they are made under Section 26(1). It is true that the Legislature has prescribed that the rules shall be placed before the Houses of Legislature, but failure to place the rules before the Houses of Legislature does not affect the validity of the rules, merely because they have not been placed before the Houses of the Legislature. Granting that the provisions of sub-section (5) of Section 26 by reason of the failure to place the rules before the Houses of Legislature were violated, we are of the view that sub-section (5) of Section 26 having regard to the purposes for which it is made, and in the context in which it occurs, cannot be regarded as mandatory. The rules have been in operation since the year 1941, and by virtue of Section 64 of Gujarat Act 20 of 1964, they continue to remain in operation."
>
> **127.** In *Atlas Cycle Industries' case*, (1979) 2 SCC 196, the same view has been reiterated.
>
> **128.** We, therefore, are of the opinion that the Scheme in question cannot be said to be bad in law."

38. The Court concerning the provision of withdrawal held that the relevant clause of the scheme created an enforceable right in case the State Bank failed to adhere to its preferred policy.

39. In our opinion, the reference in the SBI VRS to the admissible benefits, like pension shall be as per the pension rules, was for the purpose of computation of pension. It is apparent from a reading of the scheme that proportionate pension was admissible to employees as noted in para 49 of *O.P. Swarnakar & Ors*. (supra). A similar expression was used in the schemes of nationalised banks also. This Court has noted expression in the scheme that pension as per rules to mean for computation of pension. The formula for computation for a pension is provided in Rule 23 of the SBI Pension Rules.

40. It is of utmost significance that the Central Board in its meeting dated 27.12.2000 accorded approval “for the proposals contained in the Memorandum.” A bare perusal of the memorandum makes it clear that the letter of IBA dated 31.8.2000 was enclosed as part of the memorandum submitted to the Central Board. In the memorandum, it was mentioned "that the Government of India conveyed that they had no objection to the banks' placing before their respective Boards of Director's proposals for adopting and implementing the Voluntary Retirement Scheme. It advised that Banks may ‘adopt’ the scheme after obtaining their Boards' approval and implement it in ‘right earnest’." The memorandum also contained that the employees who completed 15 years of service were to be the beneficiaries of VRS as approved by the Government of India and conveyed by the IBA. The

approval by Government of India and scheme, conveyed by IBA, was to provide for the benefit of pension on completion of 15 years of service. The same was an essential condition of the scheme. The Annexure, which was part of the memorandum, provided inter alia the benefit of pension, including the commuted value of pension without any rider of completion of 20 years period of service. Once SBI accepted the proposals contained in the memorandum, when we gauge the scheme in the light of the subject matter of the memorandum which was unconditionally approved, it became clear and beyond the pale of doubt that in VRS (Annexure B) inasmuch as the expression to provide the benefit of pension as per rules was only for providing the proportionate pensionary benefit of the qualifying service on and above 15 years, rendered by an employee.

41. The IBA advised the banks for amending the rules. The Government of India, Ministry of Finance, also issued a letter dated 5.9.2001 to the Bank to amend the rules. There was a proposal to amend the rules. After the scheme was implemented in 2000, the nationalised banks, including the Punjab National Bank, amended their rules in 2002 with retrospective effect. However, the fact remains the VRS schemes were implemented by banks governed by the Banking Companies Act, 1970, by making payment of pension though Regulation 28 of Regulation of 1995 provided for 20 years of qualifying

service at the relevant time. Once a particular scheme of VRS, based on the recommendations of Committee formed by Government of India, was formulated and floated by IBA. In all fairness, it was required to be implemented in right earnest in that form in which it was approved and adopted by the Board of Directors of SBI on 27.12.2000. In case the Board of Directors were of the opinion that the scheme was not acceptable to them, they could have rejected it or could have stated they reject the proposal for paying pension on completion of 15 years of service which was the essence of a scheme formed to reduce workforce of Bank and for achieving other objectives. Nonetheless, on the contrary, resolution dated 27.12.2000 indicates that the proposals of IBA/Government was approved unconditionally. Thus, in case it was so necessary to amend the pension rules as done by other banks, it was incumbent upon the State Bank of India to amend its rules either after implementation of the scheme as was done by other banks or before giving effect to VRS.

42. It is also significant to mention that SBI accepted the scheme as approved by the Government and floated by IBA. In case SBI had declined to accept or wanted to modify, it was necessary for it to take approval of Government of India as to its scheme. As per section 49, the Central Government has the power to make rules. Section 50 deals with the power of Central Government to make regulations. Section

50(1) provides that the Central Board, after consultation with the Reserve Bank of India and with the previous sanction of the Central Government, can make Regulations. Under Section 50(2)(o), the Regulations can be made by the Central Board with the previous sanction of the Central Government with respect to superannuation pension and other funds for the benefit of the employees of the State Bank. Section 50(2)(o) reads:

> "50. Power of Central Board to make regulations.—(1) The Central Board may, after consultation with the Reserve Bank and with the previous sanction of the Central Government [by notification in the Official Gazette,] make regulations, not inconsistent with this Act and the rules made thereunder, to provide for all matters for which provision is expedient for the purpose of giving effect to the provisions of this Act.
>
> (2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for—
>
> x x x
>
> (o) the establishment and maintenance of superannuation pension, provident or other funds for the benefit of the employees of the State Bank or of the State Bank or of the dependents of such employees or for the purposes of the State Bank, and the granting of superannuation allowances, annuities and pensions payable out of any such fund;]"

43. Thus, it is apparent that the Central Board of SBI could not have framed a scheme different than the one approved by the Central Government on its own, nor could have implemented it without approval of the Central Government. In case it wanted to modify or amend the scheme, as approved by the Government of India, it was incumbent upon it to send its modified scheme to the Central

Government for approval. No scheme for VRS could have been framed without approval of the Government of India. In fact, the Central Board accepted the proposal of IBA, as approved by the Government of India. In case SBI's stand is accepted, its scheme would have been valid as no modification could have been made without approval of the Government of India. In fact, no such modification was made, as held above.

44. Once it approved the Scheme SBI being an instrumentality of State under Article 12, is bound by the principle of fairness and representation made that it accepted the contents of memorandum and the scheme floated by IBA and invited the applications based on approving the memorandum which contained proposal of pension on rendering 15 years of permanent pensionable service, it could not later on wriggle out of its obligation taking a rigmarole by claiming shelter of the Rules or by not amending the Rules or by issuing a clarification which was fanciful, irrational and contrary to the spirit of the resolution of the Board. It would amount to an unfair and unreasonable action to deprive the employees of the benefit of pension because of the decision taken by the Central Board of Directors.

45. SBI is bound by resolution of Central Board of Directors. The Scheme was with the approval of the Government of India and

accepted, implemented by all the banks in true spirit except by SBI. It cannot be permitted to act unfairly by virtue of having superior bargaining power by issuing vague clarification to the detriment of the economic interest of the employees. Clarification did not have the effect of re-writing or superseding the resolution of the Central Board nor effect of making modifications in the resolution passed by the Central Board of the SBI.

46. The VRS scheme was not floated by the SBI on its own volition. It was pursuant to an exercise that was undertaken by the IBA in view of the recent developments of modern technology considering the age group of the employees in the bank, the need to have a new skill, and to rationalise the manpower; a decision was taken. It was decided at the Government level to provide pension after completion of 15 years of service as a special measure, the banks were bound to implement it in that manner or not at all. The Central Board of Directors of the SBI accepted the VRS proposal of Government and IBA without any reservation of not providing pension along with other benefits, as mandated in the VRS scheme. The action of the instrumentality of the State cannot be violative of Article 14. It cannot be permitted to act arbitrarily. Articles 15 and 16 provide for equality and provide for an umbrella against discrimination.

47. Though the Deputy General Manager was authorised by the Central Board of Directors to amend, modify or cancel the VRS. The Rules were amended by other banks later in 2002. It was not stated in answer to the query that under the VRS scheme, a person who has rendered 15 years of qualifying service would not be entitled to a pension. Nor it was so stated in resolution dated 27.12.2000 of the Central Board of SBI. That apart, Deputy General Manager tried to interpret VRS scheme in isolation without considering what was approved by the Board. Not only the scheme but also the memorandum have to be read together to understand resolution of Board. Once the memorandum containing the IBAs proposal of providing pension was approved in absolute terms, the clarification could not be of any value to dilute the otherwise clear and unambiguous resolution of the Board of Directors. The Deputy General Manager did not have any such wide and arbitrary power to defeat the claim of the employees for pension on completion of 15 years of permanent service, which was their right. The action of D.G.M. could not be said to be in accordance with the resolution. The pension was the essence of the scheme, depriving it could not be said to be authorised, such action can only be termed as unfair and unreasonable and patently violative of Articles 14, 16, and 21 of the Constitution of India.

48. Yet another aspect which cannot be lost sight is that the bank mentioned in the scheme that the benefit would be admissible as per the rule which prevails on the appointed day, i.e., 31.3.2001. Thus, it is apparent that when VRS scheme was floated, it was in contemplation of amendment of rules which was suggested by the IBA and the Government of India in its communication dated 5.9.2001 so that employees were not deprived of the benefit of pension.

49. The question arises in case the bank accepts the proposal of VRS, and does not alter its rules, can employees be deprived of the benefit of pension in such an unconscionable manner over an event on which they had no control. It would be nothing, but an outcome of unfair and arbitrary act in case the SBI never intended to act upon the scheme it ought not to have accepted it, and once it approved VRS, it was incumbent upon it to amend its rule, if necessary, as was done by other banks in 2002 after scheme worked out in the year 2000. Even otherwise once it accepted the proposal of the Government of India, it would be violative of provisions of Articles 14 and 16 to permit it to wriggle out of its obligation under the guise that the bank did not amend its rules or pension was not admissible as per existing rules, mainly when the scheme provided for eligibility for pension on completion of 15 years, that formed independent contract. If the bank

is permitted to get rid of the scheme due to Rule position, then the scheme itself would become void and unenforceable. Bank cannot act in a fanciful manner, particularly with respect to retirement under VRS which was contractual and deny benefit of pension, a right accrued to the employees for receiving the pension in view of the memorandum and the resolution passed by the Central Board of Directors adopting memorandum and the SBI-VRS.

50. (a). The rights under contract cannot be taken away, and they become enforceable by a court of law. Bank cannot be permitted to make a representation and later on wriggle out of its obligation. It is not permissible to make a "misrepresentation". Under section 19 of the Contract Act, when consent is obtained by coercion, fraud, or 'misrepresentation,' the agreement is voidable at the option of the aggrieved party. In *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr.*, (1986) 3 SCC 156, this Court considered the contract of employment between the Central Inland Water Transport Corporation and its employees and also the rules. In that context, observed thus:

> **"75.** Under Section 19 of the Indian Contract Act, when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. It is not the case of either of the contesting respondents that there was any coercion brought to bear upon him or that any fraud or misrepresentation had been practiced upon him. Under Section 19-A, when consent to an agreement is caused by

undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused and the court may set aside any such contract either absolutely or if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just. Sub-section (1) of Section 16 defines "Undue influence" as follows:

"16. '*Undue influence*' *defined.*—(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other."

The material provisions of sub-section (2) of Section 16 are as follows:

"(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(*a*) where he holds a real or apparent authority over the other …."

We need not trouble ourselves with the other sections of the Indian Contract Act except Sections 23 and 24. Section 23 states that the consideration or object of an agreement is lawful unless inter alia the court regards it as opposed to public policy. This section further provides that every agreement of which the object or consideration is unlawful is void. Under Section 24, if any part of a single consideration for one or more objects, or anyone or any part of any one of several considerations for a single object is unlawful, the agreement is void. The agreement is, however, not always void in its entirety for it is well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. The general rule was stated by Willes, J., in *Pickering* v. *Ilfracombe Ry. Co.* (1868) LR 3 CP 235 (at p. 250) as follows:

"The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

(emphasis supplied)

(b). In *Brojo Nath Ganguly* (supra), this Court considered the concept of unconscionable bargain and as to actions showing no regard for conscience; irreconcilable with what is right or reasonable, observed thus:

> **"76.** Under which head would an unconscionable bargain fall? If it falls under the head of undue influence, it would be voidable but if it falls under the head of being opposed to public policy, it would be void. No case of the type before us appears to have fallen for decision under the law of contracts before any court in India nor has any case on all fours of a court in any other country been pointed out to us. The word "unconscionable" is defined in the *Shorter Oxford English Dictionary*, Third Edition, Volume II, page 2288, when used with reference to actions, etc. as "showing no regard for conscience; irreconcilable with what is right or reasonable." An unconscionable bargain would, therefore, be one which is irreconcilable with what is right or reasonable."
>
> (emphasis supplied)

(c). *Chitty on Contracts* was referred in *Brojo Nath Ganguly* (supra) about the old ideas of freedom of contract in modern times, 25th Edn., Vol. 1, para 4, Chitty observed:

> **"79.** In this connection, it is useful to note what Chitty has to say about the old ideas of freedom of contract in modern times. The relevant passages are to be found in *Chitty on Contracts*, 25th Edn., Vol. I, in paragraph 4, and are as follows:
>
> "These ideas have to a large extent lost their appeal today. 'Freedom of contract,' it has been said, 'is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large.' Freedom of contract is of little value when one party has no alternative between accepting a set of terms proposed by the other or doing without the goods or services offered. Many contracts entered into by public utility undertakings and others take the form of a set of terms fixed in advance by one party and not open to discussion by the other. These are called '*contracts d'adhesion*' by French lawyers. Traders frequently contract, not on individually negotiated terms, but on those contained in a standard form of contract settled by a trade association. And the terms of an employee's contract of employment may be determined by agreement between his trade union and his employer, or by a statutory scheme of employment. Such transactions are nevertheless contracts notwithstanding that freedom of contract is to a great extent lacking.
>
> Where freedom of contract is absent, the disadvantages to consumers or members of the public have, to some extent, been offset by administrative procedures for consultation, and

by legislation. Many statutes introduce terms into contracts which the parties are forbidden to exclude, or declare that certain provisions in a contract shall be void. And the courts have developed a number of devices for refusing to implement exemption clauses imposed by the economically stronger party on the weaker, although they have not recognized in themselves any general power (except by statute) to declare broadly that an exemption clause will not be enforced unless it is reasonable. Again, more recently, certain of the judges appear to have recognized the possibility of relief from contractual obligations on the ground of 'inequality of bargaining power.'"

What the French call "*contracts d'adhesion*," the American call "adhesion contracts" or "contracts of adhesion." An "adhesion contract" is defined in *Black's Law Dictionary*. 5th Edn., at page 38, as follows:

"*Adhesion contract.*—Standardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms. Not every such contract is unconscionable."

80. The position under the American law is stated in *Reinstatement of the Law — Second* as adopted and promulgated by the American Law Institute, Volume II which deals with the law of contracts, in Section 208 at page 107, as follows:

"§ 208. *Unconscionable Contract or Term*

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."

In the Comments given under that section, it is stated at page 107:

"Like the obligation of good faith and fair dealing (§ 205), *the policy against unconscionable contracts or terms applies to a wide variety of types of conduct*. The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy. *Policing against unconscionable contracts or terms has sometimes been accomplished* by adverse construction of language, by manipulation of the rules of offer

and acceptance or *by determinations that the clause is contrary to public policy* or to the dominant purpose of the contract. Uniform Commercial Code § 2-302 Comment 1 .... A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. *But gross inequality of bargaining power, together with terms unreasonably favourable to the stronger party*, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms."

(emphasis supplied)

There is a statute in the United States called the Universal Commercial Code, which applies to contracts relating to sales of goods. Though this statute is inapplicable to contracts not involving sales of goods, it has proved very influential in what is called in the United States, "non-sales" cases. It has many times been used either by analogy or because it was felt to embody a generally accepted social attitude of fairness going beyond its statutory application to sales of goods. In the Reporter's Note to said Section 208, it is stated at p. 112:

"It is to be emphasized that a contract of adhesion is not unconscionable *per se*, and that all unconscionable contracts are not contracts of adhesion. Nonetheless, *the more standardised the agreement and the less a party may bargain meaningfully, the more susceptible the contract or a term will be to a claim of unconscionability*."

(emphasis supplied)

The position has been thus summed up by John R. Peden in '*The Law of Unjust Contracts*' published by Butterworths in 1982, at pages 28-29:

"... Unconscionability represents the end of a cycle commencing with the Aristotelian concept of justice and the Roman law *laesio enormis*, which in turn formed the basis for the medieval church's concept of a just price and condemnation of usury. These philosophies permeated the exercise, during the seventeenth and eighteenth centuries, of the Chancery court's discretionary powers under which it upset all kinds of unfair transactions. Subsequently the movement towards economic individualism in the nineteenth century hardened the exercise of these powers by emphasising the freedom of the parties to make their own contract. While the principle *of pacta sunt servanda* held dominance, the consensual theory still recognized exceptions where one party was overborne by a fiduciary, or entered a contract under duress or as the result of fraud. However, these exceptions were limited and had to be strictly proved.

It is suggested that the judicial and legislative trend during the last 30 years in both civil and common law jurisdictions has almost brought the wheel full circle. Both courts and

> parliaments have provided greater protection for weaker parties from harsh contracts. In several jurisdictions this included a general power to grant relief from unconscionable contracts, thereby providing a launching point from which the courts have the opportunity to develop a modern doctrine of unconscionability. American decisions on Article 2.302 of the UCC have already gone some distance into this new arena...."
>
> The expression "*laesio enormis*" used in the above passage refers to "*laesio ultra dimidium vel enormis*" which in Roman law meant the injury sustained by one of the parties to an onerous contract when he had been overreached by the other to the extent of more than one-half of the value of the subject-matter, as for example, when a vendor had not received half the value of property sold, or the purchaser had paid more than double value. The maxim "*pacta sunt servanda*" referred to in the above passage, means "contracts are to be kept."
>
> (emphasis supplied)

This Court held that due to inequality of bargaining power, unreasonable terms, unreasonable favour to the stronger party may involve an element of deception or compulsion, or may show that the weaker party had no meaningful choice. The Court in *Brojo Nath Ganguly* (supra) also observed that in the sphere of the law of contract, the test of reasonableness or fairness has emerged. Even an unreasonable clause cannot be enforced as that would be unconscionable.

Here the reasonable construction in the matter is that the pension is clearly admissible as per the resolution passed by the Central Board of Directors of SBI, which is sought to be denied, it was for SBI to amend Rules. Such an action would be unconscionable, and courts cannot be said to be powerless in such a situation to enforce the SBI VRS with an obligation to make payment of pension.

(d). This Court considered the enforcement of unreasonable contracts and enforceability thereof in *Brojo Nath Ganguly* (supra) thus:

> **"83.** Yet another theory which has made its emergence in recent years in the sphere of the law of contracts is the test of reasonableness or fairness of a clause in a contract where there is inequality of bargaining power. Lord Denning, MR, appears to have been the propounder, and perhaps the originator —at least in England, of this theory. In *Gillespie Brothers & Co. Ltd.* v. *Roy Bowles Transport Ltd.*, (1973) QB 400, where the question was whether an indemnity clause in a contract, on its true construction, relieved the indemnifier from liability arising to the indemnified from his own negligence, Lord Denning said (at pages 415-416):
>
> "The time may come when this process of 'construing' the contract can be pursued no further. The words are too clear to permit of it. *Are the courts* then powerless? Are they *to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable*? When it gets to this point, I would say, as I said many years ago:
>
> 'there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused': *John Lee & Son* (*Grantham*) *Ltd.* v. *Railway Executive, (1949) 2 All ER 581.*
>
> It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so."
>
> (emphasis supplied)
>
> In the above case, the Court of Appeal negatived the defense of the indemnifier that the indemnity clause did not cover the negligence of the indemnified. It was in *Lloyds Bank Ltd.* v. *Bundy* (1974) 3 All ER 757 that Lord Denning first clearly enunciated his theory of "inequality of bargaining power." He began his discussion on this part of the case by stating (at page 763) :
>
> "There are cases in our books in which *the courts will set aside a contract*, or a transfer of property, *when the parties have not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall.* Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to

> unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the court."
>
> (emphasis supplied)
>
> He then referred to various categories of cases and ultimately deduced therefrom a general principle in these words (at page 765):
>
> "Gathering all together, I would suggest that *through all these instances there runs a single thread*. They rest on '*inequality* of bargaining power.' By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue,' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. *One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself*. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases."
>
> (emphasis supplied)

(e). The Court clearly held that the contracts, which are the outcome of misrepresentation, cannot be enforced, and inequality of bargaining power merit the intervention of the court. In *A. Schroeder Music Publishing Co. Ltd. v. Macaulay (formerly Instone)* (1974) 1 WLR 1308, Lord Diplock made the following observations at pp. 1315-16 thus:

> "84. …. "My Lords, the contract under consideration in this appeal is one whereby the respondent accepted restrictions upon the way in which he would exploit his earning power as a songwriter for the next ten years. Because this can be

> classified as a contract in restraint of trade the restrictions that the respondent accepted fell within one of those limited categories of contractual promises in respect of which the courts still retain the power to relieve the promisor of his legal duty to fulfill them. In order to determine whether this case is one in which that power ought to be exercised, what your Lordships have in fact been doing has been to assess the relative bargaining power of the publisher and the songwriter at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the songwriter promises that were unfairly onerous to him. Your Lordships have not been concerned to inquire whether the public have in fact been deprived of the fruit of the song writer's talents by reason of the restrictions, nor to assess the likelihood that they would be so deprived in the future if the contract were permitted to run its full course.
>
> It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the court is implementing is not some 19th century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable. Under the influence of Bentham and of *laissez faire* the courts in the 19th century abandoned the practice of applying the public policy against unconscionable bargains to contracts generally, as they had formerly done to any contract considered to be usurious; but the policy survived in its application to penalty clauses and to relief against forfeiture and also to the special category of contracts in restraint of trade. If one looks at the reasoning of 19th-century judges in cases about contracts in restraint of trade one finds lip service paid to current economic theories, but if one looks at what they said in the light of what they did, one finds that they struck down a bargain if they thought it was unconscionable as between the parties to it and upheld it if they thought that it was not.
>
> So I would hold that the question to be answered as respects a contract in restraint of trade of the kind with which this appeal is concerned is: '*Was the bargain fair*?' *The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract. For the purpose of this test, all the provisions of the contract must be taken into consideration.*"

(f). A term which exempts the stronger party from his ordinary common law liability should not be given effect except when it is

reasonable, as observed in *Levison v. Patent Steam Carpet Co. Ltd.*, (1949) 2 All ER 581 at 584 relied upon in *Brojo Nath Ganguly* (supra) thus:

> **"85.** The observations of Lord Denning, M.R., in *Levison* v. *Patent Steam Carpet Co. Ltd.* are also useful and require to be quoted. These observations are as follows (at page 79) :
>
> "In such circumstances as here the Law Commission in 1975 recommended that a term which exempts the stronger party from his ordinary common law liability should not be given effect except when it is reasonable: see The Law Commission and the Scottish Law Commission Report, Exemption Clauses, Second Report (1975) (August 5, 1975), Law Com. No. 69 (H.C. 605), pp. 62, 174; and there is a Bill now before Parliament, which gives effect to the test of reasonableness. This is a gratifying piece of law reform: but I do not think we need wait for that Bill to be passed into law. You never know what may happen to a Bill. Meanwhile, the common law has its own principles ready to hand. In *Gillespie Bros. & Co. Ltd.* v. *Roy Bowles Transport Ltd.* (1973) QB 400, I suggested that an exemption or limitation clause should not be given effect if it was unreasonable, or if it would be unreasonable to apply it in the circumstances of the case. I see no reason why this should not be applied today, at any rate in contracts in standard forms where there is inequality of bargaining power."

(g). Courts have to construe the contracts according to the tenor. In this regard, in *Brojo Nath Ganguly* (supra), the Court considered the question thus:

> **"87.** In *Photo Production Ltd.* v. *Securicor Transport Ltd.* (1980) AC 827, a case before the Unfair Contract Terms Act, 1977, was enacted, the House of Lords upheld an exemption clause in a contract on the defendants' printed form containing standard conditions. The decision appears to proceed on the ground that the parties were businessmen and did not possess unequal bargaining power. The House of Lords did not, in that case, reject the test of reasonableness or fairness of a clause in a contract where the parties are not equal in bargaining position. On the contrary, the speeches of Lord Wilberforce, Lord Diplock, and Lord Scarman would

seem to show that the House of Lords in a fit case would accept that test. Lord Wilberforce, in his speech, after referring to the Unfair Contract Terms Act, 1977, said (at page 843) :

"This Act applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and reasonable. It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, *in commercial matters generally, when the parties are not of unequal bargaining power*, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions."

(emphasis supplied)

Lord Diplock said (at page 850-51):

"Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as *obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind*, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear."

(emphasis supplied)

Lord Scarman, while agreeing with Lord Wilberforce, described (at page 853) the action out of which the appeal before the House had arisen as "a *commercial dispute between parties well able to look after themselves"* and then added: "*In such a situation* what the parties agreed (expressly or impliedly) is what matters, and the duty of the courts is to construe their contract according to its tenor."

88. As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognised, at least in certain areas of the law of contracts, that there can be unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, Section 138(2) of the German Civil Code provides that a transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of

> will of another to obtain the grant or promise of pecuniary advantages ... which are obviously disproportionate to the performance given in return". The position, according to the French law, is very much the same."

(h). In *Brojo Nath Ganguly* (supra), it was pointed out what court should do in such a matter thus:

> **"89.** Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of 19th-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample underfoot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws." The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply

> where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen, and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

(i). The Court in *Brojo Nath Ganguly* (supra) held that the contract, which affected a large number of persons if they are unconscionable, unfair, and unreasonable, the contract is voidable. The court would not compel each person with whom the party with superior bargaining power had contracted to go to court to adjudge the contract voidable and would result in a multiplicity of litigation. It observed:

> **"91.** Is a contract of the type mentioned above to be adjudged voidable or void? If it was induced by undue influence, then under Section 19-A of the Indian Contract Act, it would be voidable. It is, however, rarely that contracts of the types to which the principle formulated by us above applies are induced by undue influence as defined by Section 16(1) of the Indian Contract Act, even though at times they are between parties one of whom holds a real or apparent authority over the other. In the vast majority of cases, however, such contracts are entered into by the weaker party under pressure of circumstances, generally economic, which results in inequality of bargaining power. Such contracts will not fall within the four corners of the definition of "undue influence" given in Section 16(1). Further, the majority of such contracts are in a standard or prescribed form or consist of a set of

> rules. They are not contracts between individuals containing terms meant for those individuals alone. Contracts in prescribed or standard forms or which embody a set of rules as part of the contract are entered into by the party with superior bargaining power with a large number of persons who have far less bargaining power or no bargaining power at all. Such contracts which affect a large number of persons or a group or groups of persons, if they are unconscionable, unfair, and unreasonable, are injurious to the public interest. To say that such a contract is only voidable would be to compel each person with whom the party with superior bargaining power had contracted to go to court to have the contract adjudged voidable. This would only result in multiplicity of litigation, which no court should encourage and would also not be in the public interest. Such a contract or such a clause in a contract ought, therefore, to be adjudged void. While the law of contracts in England is mostly judge-made, the law of contracts in India is enacted in a statute, namely, the Indian Contract Act, 1872. In order that such a contract should be void, it must fall under one of the relevant sections of the Indian Contract Act. The only relevant provision in the Indian Contract Act, which can apply is Section 23, when it states that "The consideration or object of an agreement is lawful, unless ... the court regards it as ... opposed to public policy."

(j). The Court also considered the “public policy”. The same is not the policy of a particular Government. It connotes some matter which concerns the public good and the public interest. Action has to be subservient to public policy. This Court in the context of Contract Act and Public Policy made the following observations:

> **“92.** The Indian Contract Act does not define the expression "public policy" or "opposed to public policy." From the very nature of things, the expressions "public policy," "opposed to public policy," or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts, and similarly, where there has been a well-

recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought— "the narrow view" school and "the broad view" school. According to the former, courts cannot create new heads of public policy, whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in *Janson* v. *Driefontein Consolidated Gold Mines Ltd.*: "Public policy is always an unsafe and treacherous ground for legal decision." That was in the year 1902. Seventy-eight years earlier, Burrough, J., in *Richardson* v. *Mellish,* (1824-34) All ER 258, described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in *Enderby Town Football Club Ltd.* v. *Football Assn. Ltd.* (1971) Ch 591: "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles." Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "*History of English Law*," Volume III, page 55, has said:

> "In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles, it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them."

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority, our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always

be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

93. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of *A. Schroeder Music Publishing Co. Ltd.* v. *Macaulay* (1974) 1 WLR 1308, however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different, where the purpose of the contract is illegal or immoral. In *Kedar Nath Motani* v. *Prahlad Rai*, AIR 1960 SC 213, reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said: (at page 873) :

"The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action, and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the court, the plea of the defendant should not prevail."

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void."

51. This Court also considered the law of contract and its interpretation in changing times in *Delhi Transport Corporation v. D.T.C. Mazdoor Congress & Ors.*, (1991) Supp 1 SCC 600 thus:

> **"279.** In paragraph 4 of *Chitty on Contracts* (25th edn., vol. 1) it is stated that "freedom of contract is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed and no injury is done to the economic interest of the community at large."
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> **280.** In Anson's Law of Contract at pages 6 and 7 stated the scope of freedom of contract in the changing circumstances thus:
>
> "Today the position is seen in a very different light. Freedom of contract is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large. In the more complicated social and industrial conditions of a collectivist society, it has ceased to have much idealistic attraction. It is now realised that economic equality often does not exist in any real sense and that individual interests have to be made to subserve those of the community hence there has been a fundamental change both in our social outlook and in the policy of the legislature towards contract and the law today interferes at numerous points with the freedom of the parties to make what contract they like. The relation between employers and employed, for example, have been regulated by statutes designed to ensure that the employee's condition of work are safe, that he is properly protected against redundancy, and that he knows his terms of service. The public has been protected against economic pressure by such measures as the Rent Acts, the Supply of Goods (Implied Terms) Act, the Consumer Credit Act, and other similar enactments. These legislative provisions will override any contrary terms which the parties may make for themselves. Further, the legislature has intervened in the Restrictive Trade Practices Act, 1956, and the Fair Trading Act, 1973 to promote competition in industry and to safeguard the interests of consumers. This intervention is specially necessary today when most contracts entered by ordinary people are not the result of individual negotiation. It is not possible for a private person to settle the terms of his agreement with a British Railways Board or with a local electricity authority."
>
> The 'standard form' contract is the rule. He must either accept the terms of this contract in toto or go without. Since, however, it is not feasible to deprive oneself of such necessary services, the individual is compelled to accept on those terms. In view of this fact, it is quite clear that freedom of contract is now largely an illusion."

52. (a). It has been emphasised in *D.T.C.* (supra) that the period of contract is to be reasonable and the employee has a right to know the

conditions of work and he is properly protected against redundancy. Approving decision in *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr.* (1983) 3 SCC 156 Court held thus:

> **"282.** In *Brojo Nath case* (1986) 3 SCC 156, Madon, J. elaborately considered the development of law relating to unfair or unreasonable terms of the contract or clauses thereof in extenso, and it is unnecessary for me to traverse the same grounds once over. The learned Judge also considered the arbitrary, unfair, and unbridled power on the anvil of distributive justice or justness or fairness of the procedure envisaged therein. The relevant case law in that regard was dealt with in extenso in the light of the development of law in the Supreme Court of United States of America and the House of Lords in England and in the continental countries. To avoid needless burden on the judgment, I do not repeat the same reasoning. I entirely agree with the reasoning, and the conclusions reached therein on all these aspects."

(b). This Court in *D.T.C.* (supra) with respect to the alteration of Government contracts and the right of the State to impose unconstitutional conditions, observed:

> **"283.** The problem also could be broached from the angle whether the State can impose unconstitutional conditions as part of the contract or statute or rule etc. In (1959-60) 73 *Harvard Law Review*, in the Note under the caption 'Unconstitutional Condition' at pages 1595-96 it is postulated that the State is devoid of power to impose unconstitutional conditions in the contract that the power to withhold largesse has been asserted by the State in four areas i.e. (1) regulating the right to engage in certain activities; (2) administration of government welfare programme; (3) government employment; and (4) procurement of contracts. It was further adumbrated at pages 1602-03 thus:
>
> "The sovereign's constitutional authority to choose those with whom it will contract for goods and services is, in effect, a power to withhold the benefits to be derived from economic dealings with the government. As government activity in the economic sphere increases, the contracting power enables the government to control many hitherto unregulated activities of

contracting parties through the imposition of conditions. Thus, regarding the government, as a private entrepreneur, threatens to impair constitutional rights. The government, unlike a private individual, is limited in its ability to contract by the Constitution. The federal contracting power is based upon the Constitution's authorisation of these acts 'necessary and proper' to the carrying out of the functions which it allocates to the national government. Unless the objectives sought by terms and conditions in government contracts requiring the surrender of rights are constitutionally authorised, the conditions must fall as ultra vires exercise of power."

Again at page 1603, it is further emphasised thus:

"When conditions limit the economic benefits to be derived from dealings with the government to those who forego the exercise of constitutional rights, the exclusion of those retaining their rights from participation in the enjoyment of these benefits may be violative of the prohibition, implicit in the due process clause of Fifth Amendment and explicit in the equal protection clause of the Fourteenth Amendment against unreasonable discrimination in the governmental bestow of advantages. Finally, disabling those exercising certain rights from participating in the advantages to be derived from contractual relations with the government may be a form of penalty lacking in due process. To avoid invalidation for any of the above reasons, it must be shown that the conditions imposed are necessary to secure the legitimate objectives of the contract, ensure its effective use, or protect society from the potential harm which may result from the contractual relationship between the government and the individual."

284. Professor Guido Calabresi of Yale University Law School in his "*Retroactivity, Paramount Power and Contractual Changes*" (1961-62) 71 Yale Law Journal 1191, stated that the government can make contracts that are necessary and proper for carrying out any of the specific clauses of the Constitution or power to spend for general welfare. The Federal Government has no power, inherent or sovereign, other than those specifically or explicitly granted to it by the Constitution. At page 1197, it is further stated thus:

"The government acts according to due process standards for the due process clause is quite up to that task without the rule. Alterations of government contracts are not desirable in a free country even when they do not constitute a 'taking' of property or impinge on questions of fundamental fairness of the type comprehended in due process. The government may make changes, but only if war or commerce require them and not on the broader and more ephemeral grounds that the general welfare would be served by the change. Any other rule would allow the government to welch almost at will."

x x x

> **286.** In *Brojo Nath case* (supra, after elaborate consideration of the doctrine of "reasonableness or fairness" of the terms and conditions of the contract vis-a-vis the relative bargaining power of the contracting parties this Court laid down that the principles deducible from the discussion made therein is in consonance with right or reason intended to secure socio-economic justice and conform to mandate of the equality clause in Article 14. The principle laid was that courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power …. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal or where both parties are businessmen, and the contract is a commercial transaction.
>
> **287.** In today's complex world of giant corporations with their vast infrastructural organisations the State through its instrumentalities and agencies has been entering into almost every branch of industry and commerce and field of service, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."
>
> (emphasis supplied)

The Court held that there can be myriad situations which result in unfair and unreasonable bargains, which are the outcome of an unequal bargaining power. Each case has to be seen on its own facts and circumstances.

(c). In *D.T.C.* (supra), the Court also held that Article 14 sheds light on public policy to curb arbitrariness thus:

"294. In *Basheshar Nath* v. *CIT*, AIR 1959 SC 149, S.R. Das, C.J. held that Article 14 is founded on a sound public policy recognised and valued in all States, and it admonishes the State when it disregards the obligations imposed upon the State.

295. In *E.P. Royappa* v. *State of Tamil Nadu*, (1974) 4 SCC 3, Bhagwati, J. (as he then was) held that Article 14 is the genus while Article 16 is a specie. Article 16 gives effect to the doctrine of 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. "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 antithetical 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. In *Maneka Gandhi case* (1978) 1 SCC 248, it was further held that the principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence. In *Ramana case* (1979) 3 SCC 489, it was held that it is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions, namely, rational relation and nexus, the impugned legislative or executive action would plainly be arbitrary, and the guarantees of equality under Article 14 would be breached. Wherever, therefore, there is arbitrariness in State action, whether it be of legislature or of the executive or of an "authority" under Article 12, Article 14, "immediately springs into action and strikes down such State action." In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the constitution.

302. Article 14 is the general principle, while Article 311(2) is a special provision applicable to all civil services under the State. Article 311(2) embodies the principles of natural justice, but proviso to clause (2) of Article 311 excludes the operation of principles of natural justice engrafted in Article 311(2) as an exception in the given circumstances enumerated in three

> clauses of the proviso to Article 311(2) of the Constitution. Article 14 read with Articles 16(1), and 311 are to be harmoniously interpreted that the proviso to Article 311(2) excludes the application of the principles of natural justice as an exception; and the applicability of Article 311(2) must, therefore, be circumscribed to the civil services and be construed accordingly. In respect of all other employees covered by Article 12 of the Constitution, the dynamic role of Article 14 and other relevant articles like Article 21 must be allowed to have full play without any inhibition, unless the statutory rules themselves, consistent with the mandate of Articles 14, 16, 19 and 21 provide, expressly such an exception."
>
> (emphasis supplied)

(d). Arbitrariness in State action whether of the legislature or the executive or of an authority under Articles 12, 14 and 21 comes into play to strike down such an action. The Court in *D.T.C.* (supra) held thus:

> "**303.** Article 19(1)(g) empowers every citizen the right to avocation or profession etc. which includes right to be continued in employment under the State unless the tenure is validly terminated consistent with the scheme enshrined in the fundamental rights of the Constitution. Therefore, if any procedure is provided for deprivation of the right to employment or right to the continued employment till the age of superannuation as is a source to right to livelihood, such a procedure must be just, fair and reasonable. This Court in *Fertilizer Corporation Kamgar Union (Regd.), Sindri* v. *Union of India* (1981) 1 SCC 568, held that Article 19(1)(g) confers a broad and general right which is available to all persons to do works of any particular kind and of their choice. Therefore, whenever there is arbitrariness in State action — whether it be of the legislature or of the executive or of an authority under Article 12, Articles 14 and 21 spring into action and strikes down such an action. The concept of reasonableness and non-arbitrariness pervades the entire constitutional spectrum and is a golden thread which runs through the whole fabric of the Constitution. Therefore, the provision of the statute, the regulation or the rule which empowers an employer to terminate the services of an employee whose service is of an indefinite period till he attains the age of superannuation, by serving a notice or pay in lieu thereof must be conformable to the mandates of Articles 14, 19(1)(g) and 21 of the Constitution. Otherwise, per se, it would be void. In *Moti Ram Deka case*, AIR 1964 SC 600, Gajendragadkar, J. (as he then

was) after invalidating the Rules 149(3) and 148(3) under Article 311(2) which are in pari materia with Regulation 9(*b*) of the Regulations also considered their validity in the light of Article 14 and held thus: (SCR p. 731)

"Therefore, we are satisfied that the challenge to the validity of the impugned Rules on the ground that they contravene Article 14 must also succeed."

This was on the test of reasonable classification as the principle then was applied. Subba Rao, J. (as he then was) in a separate but concurring judgment, apart from invalidating the rule under Article 311(2) also held that the rule infringed Article 14 as well, though there is no elaborate discussion in that regard. But, Das Gupta, J. considered elaborately on this aspect and held: (SCR p. 770)

"Applying the principle laid down in the above case to the present Rule, I find on the scrutiny of the Rule that it does not lay down any principle or policy for guiding the exercise of discretion by the authority who will terminate the service in the matter of selection or classification. Arbitrary and uncontrolled power is left in the authority to select at its will any person against whom action will be taken. The rule thus enables the authority concerned to discriminate between two railway servants to both of whom Rule 148(3) equally applied by taking action in one case and not taking it in the other. In the absence of any guiding principle in the exercise of the discretion by the authority, the Rule has, therefore, to be struck down as contravening the requirements of Article 14 of the Constitution."

308. In *Ramana case* (1979) 3 SCC 489, it has been held that: (SCC p. 504, para 10)

"It is indeed unthinkable that in a democracy governed by the rule of law, the executive government or any of its officers should possess arbitrary power over the interests of the individual."

The procedure adopted should match with what justice demands. History shows that it is always subtle and insidious encroachments made ostensibly for a good cause that imperceptibly but surely erode the foundations of liberty."

(emphasis supplied)

(e). An employer cannot act in a manner that is in the negation of just, fair, and reasonable procedure. The Court held:

"329. I am, therefore, inclined to hold that the courts, though, have no power to amend the law by process of interpretation but do have power to mend it so as to be in

> conformity with the intendment of the legislature. Doctrine of reading down is one of the principles of interpretation of statute in that process. But when the offending language used by the legislature is clear, precise, and unambiguous, violating the relevant provisions in the Constitution, resort cannot be had to the doctrine of reading down to blow life into the void law to save it from unconstitutionality or to confer jurisdiction on the legislature. Similarly, it cannot be taken aid of to emasculate the precise, explicit, clear and unambiguous language to confer arbitrary, unbridled and uncanalised power on an employer which is a negation to just, fair and reasonable procedure envisaged under Articles 14 and 21 of the Constitution and to direct the authorities to record reasons, (*sic*) unknown or unintended procedure, in the manner argued by the learned counsel for the appellants." (emphasis supplied)

(f). In *D.T.C.* (supra) this Court also relied upon *S.G. Jaisinghani v. Union of India*, AIR 1967 SC 1427 :

> "331. x x x "In this context it is important to emphasise that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. *In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within defined limits.* The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable, and the citizen should know where he is. If a decision is taken without any principle or without any rule, it is unpredictable, and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey: *Law of the Constitution*, 10th edn., Introduction *cx.*) '*Law has reached its finest moments*,' stated Douglas, J. in *United States* v. *Wunderlich* 342 US 98, 'when it has freed man from the unlimited discretion of some ruler .... Where discretion is absolute, man has always suffered.' It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of *John Wilkes* (1770) 4 Burr 2528, 'means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague and fanciful'".
>
> (emphasis supplied)

(g). The Court emphasised that the decision has to be predictable and it cannot be uncertain. The decision has to be taken by application of known principles and rules. The exercise of power cannot be whimsical or capricious. This Court in *D.T.C.* (supra) held:

> **"332.** In an appropriate case where there is no sufficient evidence available to inflict by way of disciplinary measure, penalty of dismissal or removal from service and to meet such a situation, it is not as if that the authority is lacking any power to make rules or regulations to give a notice of opportunity with the grounds or the material on records on which it proposed to take action, consider the objections and record reasons on the basis of which it had taken action and communicate the same. However, scanty the material may be, it must form foundation. This minimal procedure should be made part of the procedure lest the exercise of the power is capable of abuse for good as well as for whimsical or capricious purposes for reasons best known to the authority and not germane for the purpose for which the power was conferred. The action based on recording reasoning without communication would always be viewed with suspicion. Therefore, I hold that conferment of power with wide discretion without any guidelines, without any just, fair or reasonable procedure is constitutionally anathema to Articles 14, 16(1), 19(1)(g) and 21 of the Constitution. Doctrine of reading down cannot be extended to such a situation." (emphasis supplied)

53. On the basis of aforesaid principles, it is apparent that once the Central Board of Directors accepted the memorandum for making payment of pension, in case it was not accepting the proposal in the memorandum, it ought to have said clearly that it was not ready to accept the proposals of the Government and the IBA and rejects the same. Once it approved the proposals referred to in the memorandum,

which were on the basis of IBA's letter and Government of India's decision it was bound to implement it in true letter and spirit. By accepting the same, binding obligation was created upon the SBI to make payment of pension on completion of 15 years of service. It cannot invalidate its own decision by relying on fact it failed to amend the rule, whereas other Banks did it later on with retrospective effect. They cannot invalidate otherwise valid decision by virtue of exclusive superior power to amend or not to amend the rule and act unfairly and make the entire contract unreasonable based on misrepresentation. It was open to the Board of Directors to reject the proposal. Once it accepted the proposal to make payment of pension on completion of 15 years of service as proposed in the memorandum, though the scheme is tried to be interpreted by the SBI that pension was to be admissible as provided in the rule that refers to proportionate pension as noted by this Court in *O.P. Swarnakar & Ors.*, (supra), and what was decided by Government of India/IBA, was not taken away rather adopted by the Central Board of Directors. The scheme of contractual nature has to be read in the context and in the backdrop of facts and what has been resolved by the Board of Directors. There is no ambiguity with respect to the admissibility of pension when the memorandum and the scheme are read together. In case of ambiguity and even if two interpretations are possible in the

backdrop of facts of the case, one in favour of the employees has to be adopted and so-called clarification dated 11.1.2000 even if considered in the manner so as to deny the benefit of pension, has to be held to be unenforceable, illegal and contrary to law.

54. It is apparent from the eligibility clause of the VRS scheme that eligibility is provided for the employees having 15 years of pensionable service and they will be entitled for benefits as provided in the scheme. The eligibility clause, when read with clauses providing the benefit, i.e., clauses 5 and 6 of the scheme, leaves no room for any doubt and makes it clear that employees with 15 years of service were treated as eligible to claim the benefit of the scheme floated by SBI. It was not the provision in the VRS scheme that incumbents having completed 20 years of service would be entitled for pensionary benefits. The scheme was carved out specially for attracting the employees by providing pension and other benefits to eligible persons like ex gratia, gratuity, pension and leave encashment. Deprivation of pension would make them ineligible for the benefits and would run repugnant to the eligibility clause.

55. The submission raised on behalf of the SBI that the draft scheme nowhere stipulated that 15 years' service would be the eligibility or that on completion of 15 years' service, the incumbent would be

eligible for pension, is factually incorrect. It is apparent from the material circumstances, documents, and correspondence that the decision was taken at all levels including the one by the Central Board of Directors of SBI, that the benefit of pension was to be given to the employees on completion of 15 years of service. In that perspective, vagueness of scheme of SBI, if any, can be of no advantage as it is clear beyond the pale of doubt that pension was heart and soul of the scheme with ex gratia on completion of 15 years of service. It is due to the reason that the benefit was to be accorded to the incumbents having completed 15 years of service, Regulation 28 as applicable to other nationalised banks was proposed to be modified as reflected in the letter of IBA dated 11.12.2000 and Government of India letter dated 5.9.2000. Later on, the regulation was amended in 2002 after the scheme had already been implemented in right earnest. There was not even an iota of doubt that VRS was to give benefits to all eligible employees having completed 15 years of service. It was apparent from the letter dated 29.12.2000 of SBI that the guidelines of IBA were approved by the Central Board of Directors in its meeting dated 27.12.2000. Para 2 of the letter dated 29.12.2000 of SBI Deputy Managing Director-cum-SDO is extracted hereunder:

> "2. Accordingly, the Central Board of Directors, in its meeting held on 27.12.2000, has accorded approval for adopting and implementing the Voluntary Retirement Scheme for the employees of the Bank, namely "SBI

> Voluntary Retirement Scheme (SBIVRS)." The Scheme "SBIVRS" has been drawn up, keeping in view the guidelines issued by IBA. A copy of the Scheme is placed at Annexure 'B'."
>
> (emphasis supplied)

56. As noted in *O.P. Swarnakar & Ors.*, (supra), the case of bank itself was that it was a contractual scheme. The expression "pension" as per rules was only for the purpose of working out the proportionate pension. It was clearly decided to open the scheme to employees who have put in 15 years of service. It was not provided in the scheme that the incumbent was required to render a pensionable service of 20 years as per the rules in order to acquire eligibility for the pension. The submission made on behalf of SBI is too tenuous to be accepted. It was observed in para 89 of *O.P. Swarnakar & Ors.*, (supra) quoted above that the employee must have proceeded on the basis of 15 years of service then they were entitled to pensionary benefits.

The Court further observed in *O.P. Swarnakar & Ors.*, (supra) that the scheme is enforceable thus:

> **"92.** However, the case of the State Bank of India stands slightly on a different footing. Firstly, the State Bank of India had not amended the Scheme. It, as noticed hereinbefore, even permitted withdrawal of the applications after (*sic* by) 15th February. The Scheme floated by the State Bank of India contained a clause (clause 7) laying down the mode and manner in which the application for voluntary retirement shall be considered. The relevant clause, as referred to hereinbefore, creates an enforceable right. In the event the State Bank failed to adhere to its preferred policy, the same could have been specifically enforced by a court of law. The same would, therefore, amount to some consideration."

57. While construing a contract, the language and surrounding circumstances of the overall scheme, memorandum and letters are to be read conjointly to find out whether any departure made by the Board of Directors in its Resolution dated 27.12.2000 is of pivotal significance. In this case, the decision was taken by it of approval of the IBA scheme as proposed. Its binding effect cannot be changed on the basis what parties choose to say afterward, nor they can be permitted to wriggle out. The contract is required to be read as a whole. It is apparent on a bare reading that optees will be eligible for proportionate pension under the Pension Regulations of the bank and therefore, the bank bears the risk of lack of clarity, if any.

58. In *Bank of India & Anr. v. K. Mohandas & Ors.*, (2009) 5 SCC 313 wherein several other banks were also parties, the question arose as to the nature of VRS, 2000. The Court noted the objectives, the amendment made in Regulation 28 in 2002, providing for 15 years of service. The scheme was open in November-December, 2000 and in Union Bank of India in January, 2001. The employees claimed that those who completed 20 years of service, were entitled to the benefit of provisions contained in Regulation 29(5) of Employees' Pension Regulations, 1995 applicable to the said banks. They claimed having completed the qualifying service of 20 years under Regulation 29, were entitled for 5 years' increase in the service tenure subject to the

maximum of 33 years which was not given to them on the ground that the benefit of VRS was available to incumbents having completed 15 years of service as provided in amended Regulation 28, and Regulation 29 was not applicable. This Court held that the benefit of VRS was available to the employees having completed 15 years of service, but the additional benefit which was available on completion of 20 years of service was also admissible as provided in Regulation 29(5).

59. While considering the aforesaid similar scheme of VRS, this Court observed with respect to the construction of the contract on the basis of the import of the words. The intention of the parties must be ascertained from the language they have used and considered in the light of surrounding circumstances, and the meaning cannot be changed by a course of conduct adopted by the parties in acting under it. This Court in *K. Mohandas* (supra) held thus:

> **"28.** The true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties.
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> **29.** In *Ottoman Bank of Nicosia* v. *Ohanes Chakarian*, Lord Wright made these weighty observations: (AIR p. 29)
> "... that if the contract is clear and unambiguous, its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it."

> **30.** In *Ganga Saran* v. *Firm Ram Charan Ram Gopal* AIR 1952 SC 9, a four-Judge Bench of this Court stated: (AIR p. 11, para 6)
>
> "*6.* ... Since the true construction of an agreement must depend upon the import of the words used and not upon what the parties choose to say afterwards, it is unnecessary to refer to what the parties have said about it."
>
> **31.** It is also a well-recognised principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted so as to bring them into harmony with the other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible. (*North Eastern Railway Co.* v. *Lord Hastings,* 1900 AC 260)"

60. With respect to lack of clarity in the scheme, this Court in *K. Mohandas* (supra) relied on maxim *verba chartarum fortius accipiuntur contra proferentem* to hold that banks who were responsible for formulation of the terms in the contractual Scheme, bear the risk of lack of clarity. Thus, the benefit has to be given to the employees by making interpretation against the banks. The Court held :

> **"32.** The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulations, 1995, and, therefore, they bear the risk of lack of clarity, if any. It is a well-known principle of construction of a contract that if the terms applied by one party are unclear, an interpretation against that party is preferred (*verba chartarum fortius accipiuntur contra proferentem*).
>
> **33.** What was, in respect of pension, the intention of the banks at the time of bringing out VRS 2000? Was it not made expressly clear therein that the employees seeking voluntary retirement will be eligible for pension as per the Pension Regulations? If the intention was not to give pension as provided in Regulation 29 and particularly sub-regulation (5) thereof, they could have said so in the Scheme itself. After all, much thought had gone into the formulation of VRS 2000, and

> it came to be framed after great deliberations. The only provision that could have been in mind while providing for pension as per the Pension Regulations was Regulation 29. Obviously, the employees, too, had the benefit of Regulation 29(5) in mind when they offered for voluntary retirement as admittedly Regulation 28, as was existing at that time, was not applicable at all. None of Regulations 30 to 34 was attracted."
>
> (emphasis supplied)

61. In *K. Mohandas* (supra) the Court considered the argument that Regulation 28 would be applicable only for providing 15 years of eligibility as provided by way of amendment of Regulation of 1995, and held that as the banks are "State" within the meaning of Article 12, it would be an arbitrary action on their part to deny the benefit of section 29(5), and there has to be harmonious construction to the scheme and Pension Regulations, thus:

> **"35.** We are afraid; it would be unreasonable if amended Regulation 28 is made applicable, which had not seen the light of the day and which was not the intention of the banks when the Scheme was framed. The banks in the present batch of appeals are public sector banks and are "State" within the meaning of Article 12 of the Constitution and their action even in contractual matters has to be reasonable, lest, as observed in *O.P. Swarnakar* (2003) 2 SCC 721, it must attract the wrath of Article 14 of the Constitution.
>
> **36.** Any interpretation of the terms of VRS 2000, although contractual in nature, must meet the test of fairness. It has to be construed in a manner that avoids arbitrariness and unreasonableness on the part of the public sector banks who brought out VRS 2000 with an objective of rightsizing their manpower. The banks decided to shed surplus manpower. By formulation of the special scheme (VRS 2000), the banks intended to achieve their objective of rationalising their force as they were overstaffed. <u>The special Scheme was, thus, oriented to lure the employees to go in for voluntary retirement. In this background, the consideration that was to pass between the parties assumes significance and a harmonious construction to the Scheme, and the Pension Regulations, therefore, has to be given</u>.

> **37.** The amendment to Regulation 28 can, at best, be said to have been intended to cover the employees with 15 years of service or more but less than 20 years of service. This intention is reflected from the communication dated 5-9-2000 sent by the Government of India, Ministry of Finance, Department of Economic Affairs (Banking Division) to the Personnel Advisor, Indian Banks' Association."
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> (emphasis supplied)

It opined that the amendment to Regulation 28 of 1995 Regulation intended to cover 15 years of service, i.e., employees with 15 years of service who have not completed 20 years of service. A similar action to amend the Rule was required to be taken by the SBI, but it failed to take it after having floated a similar scheme. It kept it uncertain what would be the position of the rule as on the appointed date, i.e., 31.3.2001. Be that as it may. But it was crystal clear that the incumbent with 15 years of service was eligible for the benefit as provided in the scheme itself. The benefit clause has to be read with the eligibility criteria. Once VRS was formulated and adopted by the SBI *in toto*, it constituted a complete contractual package in itself.

62. As urged on behalf of SBI if section 23 of the Contract Act is applied, then how it is helpful to the bank, is not understandable. In case it is held that the very scheme was opposed to the law/rules, the entire scheme would fall down. Once it adopted the scheme, invited applications and the employees acted upon it and retired on the basis of the scheme, they cannot be left in lurch. In case its submission is accepted, the Scheme becomes violative of Section 23 of Contact Act,

the bank would have to suffer the consequences of striking down of the very scheme and would be required to reinstate the employees and to pay them the salary and other benefits. However, SBI accepted the scheme, it was incumbent upon it to bring the rules in consonance with the similar VRS scheme as was done by other banks. The SBI accepted the scheme on 27.12.2000 without any ifs and buts. Thus, the anomaly was the outcome of the bank's inaction to propose and make amendment of rules. In such a scenario, the action of SBI is violative of Articles 14, 16 and 21 of the Constitution. The situation created by itself is not going to benefit the bank to lend support to arbitrary action. The bank was bound to extend the benefits by amending the rules, if necessary, to salvage the situation for itself. Breach of law has been committed by the SBI itself, its action is arbitrary and it cannot be permitted to take advantage of its own wrong.

63. The pension cannot be dealt with arbitrarily and cannot be denied in an unfair manner. The concept of pension was considered in *D.S. Nakara & Ors. v. Union of India*, (1983) 1 SCC 305. The right to a pension can be enforced through the court, it observed :

> **"20.** The antequated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in

> *Deokinandan Prasad* v. *State of Bihar* (1971) 2 SCC 330 wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in *State of Punjab* v. *Iqbal Singh*, (1976) 2 SCC 1.
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> **22.** In the course of transformation of society from feudal to welfare and as socialistic thinking acquired respectability. State obligation to provide security in old age, an escape from undeserved want was recognised and as a first step pension was treated not only as a reward for past service but with a view to helping the employee to avoid destitution in old age. The quid pro quo was that when the employee was physically and mentally alert, he rendered unto master the best, expecting him to look after him in the fall of life. A retirement system, therefore, exists solely for the purpose of providing benefits. In most of the plans of retirement benefits, everyone who qualifies for normal retirement receives the same amount (see *Retirement Systems for Public Employees* by Bleakney, p. 33)."

This Court observed that the principal aim of the socialist State as envisaged in the Preamble is to eliminate inequality. The basic framework of socialism is to provide security in the fall of life to the working people and especially provides security from the cradle to the grave when employees have rendered service in heydays of life, they cannot be destituted in old age, by taking action in an arbitrary manner and for omission to complete obligation assured one. Though there cannot be estoppel against the law but when a bank had the power to amend it, it cannot take shelter of its own inaction and SBI

ought to have followed the pursuit of other banks and was required to act in a similar fair manner having accepted the scheme.

64. Resultantly, we are of the opinion that the employees who completed 15 years of service or more as on cut-off date were entitled to proportionate pension under SBI VRS to be computed as per SBI Pension Fund Rules. Let the benefits be extended to all such similar employees retired under VRS on completion of 15 years of service without requiring them to rush to the court. However, considering the facts and circumstances, it would not be appropriate to burden the bank with interest. Let order be complied with and arrears be paid within three months, failing which amount to carry interest at the rate of 6 per cent per annum from the date of this order. The appeals are accordingly disposed of. No costs.

.....J.
(Arun Mishra)

.....J.
(M.R. Shah)

New Delhi;
March 2, 2020.

.....J.
(B.R. Gavai)