MANU/MH/0743/2000

Equivalent Citation: (2000)IILLJ366Bom, 2000(4)SCT745(Bombay)

IN THE HIGH COURT OF BOMBAY

O.O.C.J.A. No. 478/1995 with W.P. No. 907/1998

Decided On: 09.02.2000

Appellants: **Ramachandra S. Amonkar**
Vs.
Respondent: **Bank of India and Ors.**

Hon'ble Judges/Coram:
B.N. Srikrishna and Dr. S. Radhakrishnan, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: U.Y. Sangilkar and A.W. Dharwadkar, Advs.

For Respondents/Defendant: R.S. Pai and Swapna Malik, Advs., i/b., Haresh Mehta and Co.

Case Note:

(i) Labour and Industrial - dismissal - Regulation 6 (21) of Bank of India Officer Employees' (Discipline and Appeal) Regulations, 1976 and Article 14 of Constitution of India - petitioner employee of respondent bank was dismissed - petitioner gave notice for voluntary retirement which was rejected by respondent - petitioner was transferred to some other place and petitioner denied to comply with such Order of respondent - respondent held inquiry against petitioner in which petitioner remained ex parte - respondent passed dismissal Order against petitioner which was challenged by petitioner on ground that such Order was not passed according to Regulation 6 (21) - inquiry was held according to Regulation 6 (21) - no evidence was shown by petitioner that such inquiry report was futile - held, dismissal Order was rightly passed by respondent.

(ii) Forfeiture of gratuity - Rule 13 (2) of Bank of India Provident Fund Rules - respondent imposed a order of penalty of forfeiture of gratuity and employer's contribution to provident fund - petitioner challenged order of respondent - according to Rule 13 (2) respondent entitled to forfeit employer's contribution to provident fund to extent loss and damage caused by misconduct of employees who has been dismissed from service - held, order of forfeiture was rightly passed by respondent.

JUDGMENT

B.N. Srikrishna, J.

1. These two cases raise common and inter-connected issues and, therefore, by consent of the parties, they are disposed of by a common judgment. In fact, the writ petition appears to be a continuation of the cause of action from where the appeal

stops.

2. The material facts which are necessary for deciding both the appeal and the writ petition are as under:

3. The appellant joined the respondent No. 1 - Bank as an officer some times in the year 1962, even prior to the nationalisation of banks, which came about sometime in the year 1970. Some time in October 1988 the appellant was posted as Chief Manager, Singapore branch of the Respondent Bank. He came back to India on March 7, 1992 on the ground that his son was suffering from muscular dystrophy. On July 3. 1992 the appellant gave a notice of voluntary retirement. By a reply dated September 16, 1992 the General Manager of the Respondent No. 1-Bank declined to accept the request for voluntary retirement. By his letter dated October 2, 1992 the appellant maintained that there was no question of acceptance of voluntary retirement, and under the above service regulations, at the expiry of the stipulated period, he would cease to be an employee. On October 1, 1992 the appellant was served with an order transferring him to branch at Bhopal. The appellant did not comply with the transfer order and therefore he was suspended from service. There was correspondence between the appellant and the Respondent No. 1-Bank during the course of which the Respondent maintained its stand. Finally, the appellant filed Writ Petition No. 2568 of 1992 on November 19, 1992 before this Court seeking a direction from this Court to quash and set-aside the non-acceptance of his voluntary retirement as conveyed in the Bank's letter dated September 16, 1992 as also the suspension order dated October 1, 1992 served on him. By a judgment of the learned single Judge dated March 31, 1995, the writ petition came to be dismissed as without merit and the rule granted therein was discharged. The appeal is directed against the said judgment of the learned single Judge.

4. During the pendency of the aforesaid writ petition, the petitioner was served with the charge-sheet on December 14, 1993. The petitioner gave a detailed reply denying the charges against him and giving his own version by his letter dated May 14, 1995. A detailed enquiry was proposed to be held, but the petitioner declined to participate in the enquiry. The said enquiry, therefore, proceeded ex-parte. On November 26, 1995 the Enquiry Officer made his report giving his findings of the enquiry. The Enquiry Officer had held charge No. I(iv) as "not proved". The Disciplinary Authority, after considering the report, was of the view that the material on record before the domestic enquiry, adequately had proved the charges pertaining to Article No. I(iv). Consequently, by a notice dated October 29, 1996 the Disciplinary Authority proposed to reverse the finding of the Enquiry Officer and hold the appellant guilty of the charge No. I (iv) also. The appellant was given an opportunity to make representation there-against. The appellant gave his representation in three installments on November 11, 1996, November 13, 1996 and March 27, 1997. The Disciplinary Authority considered the aforesaid representations and the report made by the Enquiry Officer and by its order dated April 26, 1997 imposed a penalty of dismissal on the appellant. The appellant filed a departmental appeal which came to be rejected by the order dated August 13, 1997. The appellant thereafter made an application for settling his terminal dues such as gratuity and provident fund. At this stage the competent authority of the respondent-Bank decided that these dues were liable to be withheld in pursuance of the powers of the respondent-Bank under the applicable Gratuity Fund and Provident Fund Rules. A show cause notice dated February 18, 1998 was issued to the appellant to show cause as to why the financial loss caused to the Bank should not be recovered from the gratuity due to the appellant, in terms of Rule 8 of the Bank Officers' Gratuity Fund Rules, and from the employer's share of Provident Fund contributions, in terms of Rule 13(2) of the Provident Fund Rules. The appellant showed cause by his letter dated March 17, 1998. After considering his reply an order was made on May 17, 1998, by the

competent authority directing recovery of the financial loss from the gratuity amount payable to the appellant and from the Employer's share of the provident fund contribution to the extent of the said amount. Since the financial loss caused to the bank was a very large figure, the entire amount of gratuity and provident fund contribution of the bank were forfeited against the financial: loss. At the time of being posted abroad the appellant had executed a security bond undertaking that he would work for a minimum period of five years after returning to India in any post or branch as directed by the Bank. By a notice dated June 22, 1998 the appellant was informed that, as required under the security bond, he was liable to pay liquidated damages of Rs. 1,00,000/- for having committed breach of the undertaking in the said bond.

5. The appellant filed writ petition being Writ Petition No. , 1097 of 1998 in which he challenged his dismissal from service as confirmed by the appellate authority, the order imposing the penalty of forfeiture of gratuity and employer's contribution to the provident Hind and the proposal to encash the security bond to the extent of liquidated damages of Rs. 1,00,000/-. He also sought a direction to quash and set aside the security bond dated July 12, 1998.

6. Writ petition No. 1907 of 1998 was filed during the period when Appeal No. 478 of 1995 was pending before this Court. Since the principal ground on which the writ petition proceeded was sub judice before this Court in the said appeal, by consent of the parties, this Court directed that the appeal and the writ petition should be heard together.

7. We shall first take up Appeal No. 478 of 1995 which is directed against the judgment of the learned single Judge dated March 31, 1995. The major premise on which the appeal proceeds is that under the applicable service regulations an employee of the Respondent-Bank has an unfettered right to voluntarily retire from service. As a corollary, it is contended by the learned Counsel for the appellant that the moment the appellant gave the notice of voluntary retirement on July 3, 1992, the respondent- Bank was obliged to accept it and, irrespective of whether the bank accepted it or not, upon the expiry of the stipulated period of three months of the same notice, the appellant must be deemed to have retired from service. It was, therefore, urged that the letter dated September 16, 1992 by which the decision of the bank as to refusal to accept the voluntary retirement was conveyed, was illegal and deserved to be set-aside. Another corollary of the argument is that, once the stipulated period in the notice of voluntary retirement expired the appellant ceased to be an employee of the respondent-Bank and went out of its disciplinary jurisdiction and hence the order of suspension dated October 1, 1992 could not have been issued to him at all.

8. Mr. Sanglikar, learned Counsel for the appellant drew our attention to the judgment of the Supreme Court in Dinesh Chandra Sangma v. State of Assam MANU/SC/0320/1977 : (1978)ILLJ17SC , B.J. Shelat v. State of Gujarat MANU/SC/0347/1978 : (1978)IILLJ34SC , Union of India v. Sayed Muzaffar Mir AIR 1978 SC 176, Himachal Pradesh Horticultural Produce Marketing & Processing Corporation Ltd. v. Suman Behari Sharma AIR 1976 SC 1353, Power Finance Corporation Ltd, v. Pramod Kumar Bhatia 1997 xi LLJ 819, Dr. Baljit Singh v. State of Haryana MANU/SC/0528/1997 : (1997)IILLJ1070SC and the latest judgment of the Supreme Court in State of Haryana v. S.K. Singhal 1999 2 CLR 1148 .

9. After perusing the judgment of the Supreme Court in State of Haryana (supra) it appears to us that all the earlier judgments have been carefully analysed and properly explained by the Supreme Court. Hence, we do not propose to expend time in attempting to duplicate the efforts of the learned Judge in the judgment of State of

Haryana (supra). Before we deal with the judgment, we may observe that in all matters which affect service, whether in public sector or private sector, the terms of service have to be ascertained on the basis of the applicable rules or regulations in each case.

10. The Supreme Court's observations in para 9 in the State of Haryana (supra) case are very material and need to be reproduced. Says the Supreme Court:

> "9. The employment of Government servants is governed by rules. These rules provide a particular age as the age of superannuation. Nonetheless, the rules confer a right on the Government to compulsorily retire an employee before the age of superannuation provided the employee has reached a particular age or has completed a particular number of years of qualifying service in case it is found that his service has not been found to be satisfactory. The rules also provide that an employee who has completed the said number of years in his age or who has completed the prescribed number of years of qualifying service could give notice of (say) three months that he would voluntarily retire on the expiry of the said period of three months. Some Rules are couched in language which results in an automatic retirement of the employee upon expiry of the period specified in the employee's notice. On the other hand, certain Rules in some other departments are couched in language which makes it clear that even upon expiry of the period specified in the notice, the retirement is not automatic and an express order granting permission is required and has to be communicated. The relationship of master and servant in the latter type of rules continues after the period specified in the notice till such acceptance is communicated, refusal of permission could also be communicated after three months and the employee continues to be in service. Cases like Dinesh Chandra Sangma v. State of Assam MANU/SC/0320/1977 : (1978)ILLJ17SC (supra), Shelatv. State of Gujarat MANU/SC/0347/1978 : (1978)IILLJ34SC (supra) and Union of India v. Sayed Muzaffar Mir AIR 1978 SC 176 (supra) belong to the former category where it is held that upon expiry of the period, the voluntary retirement takes effect automatically as no order of refusal is passed within the notice period. On the other hand H.P.M.C. v. Suman Behari Sharma MANU/SC/1170/1996 : (1996)IILLJ665SC belongs to the second category where the Bye-laws were interpreted as not giving an option "to retire" but only provided a limited right to "seek" retirement thereby implying the need for a consent of the employer even if the period of the notice has elapsed. We shall refer to these two categories in some detail."

The two categories into which all the decided cases can be subsumed are:

> (a) Where the rules provided for absolute option of the employee to voluntarily retire from service and this option is not made subject to acceptance by the employer or the voluntary retirement is made subject to acceptance within a stipulated period. In case there is no requirement of acceptance, or refusal to accept the voluntary retirement is not communicated to the employee within the stipulated period which has been laid down, then the retirement takes effect automatically. Dinesh Chandra Sangma v. State of Assam, B.J. Shelat v. State of Gujarat and Union of India v. Sayed Muzaffar Mir (supra) belong to this category of cases.
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> (b) Where the service rule merely gives a limited right to seek retirement, thereby implying the need for consent of the employer in such cases. In such cases, irrespective of expiry of the stipulated period of notice required to be

given by the employee, it has been held that the retirement is not automatic but subject to an express act of acceptance by the employer. H.P.M.C. v. Suman Behari Sharma (supra) exemplifies such a situation.

11. Dealing with the second category where the rule requires an order of acceptance of the notice to make the voluntary retirement effective, the Supreme Court has observed that what is conferred is not a right to retire but only a right to seek retirement which would necessarily imply that the employee, who fulfils the other stipulated qualifications, makes a request for being permitted to voluntarily retire, Hence, there cannot be automatic retirement or snapping of service or relationship on the expiry of the stipulated period and such an eventuality can only happen when the employer expressly accepts the retirement. Interpreting the concerned Rule 5.32 the Supreme Court in State of Haryana (supra) was of the view that the rule lent itself to the interpretation that what was stipulated was a notice to seek retirement and not notice to retire.

12. Let us therefore take a look at applicable service regulation of the respondent-Bank and interpret it in the luminescence available from the aforesaid judgment. The relevant regulation is Regulation 19 which reads as under:

> "Rules regarding voluntary retirement for officer employees.
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> An officer employee may be permitted by the Competent Authority to voluntarily retire from Bank's service any time after the completion of 55 years of age or 30 years of total service as an officer employee or otherwise, whichever is earlier, after giving the Bank 3 months notice in writing, unless the requirement is wholly or partly waived.
>
> An officer employee may be allowed to withdraw a notice of voluntary retirement subsequently, only with the approval of the Competent Authority provided the request for such withdrawal is made before the expiry of the notice. An officer employee retiring voluntarily shall be entitled to all benefits under the normal retirement, as per the Service Regulations.
>
> The Competent Authority for the purpose of this scheme would be same as in case of 'Age of Retirement' Regulation 19."

13. A perusal of the aforesaid Rule indicates that, far from an absolute option being vested in the employee to retire voluntarily, the rule is so worded as to vest the discretion absolutely in the employer bank. The word "permitted" used in the Rule is significant. It suggests that unless the officer employee is "permitted" by the competent authority to voluntarily retire from the bank service, albeit upon stipulation of the condition of completing 55 years of age or 30 years of total service, whichever is earlier, and giving the bank three months' notice in writing, the voluntary retirement does not come into effect. Upon a fair construction of these rules, we are of the view that this Rule falls in the second category of cases considered by the Supreme Court in State of Haryana (supra) and is akin to the service regulations considered in the H. P. M. C. case (supra). We are, therefore, unable to accept the contention of Mr. Sanglikar that under the Rules of Service of the 1st Respondent-Bank, the appellant-employee had an absolute and unqualified right to voluntarily retire from service merely because he had the stipulated service and had given the stipulated notice. In our view, the voluntary retirement under this Regulation would not come into effect unless the employee officer is "permitted" to retire voluntarily by the Management of the Bank. We are, therefore, unable to hold that the service of the appellant came to an end w.e.f.

October 3, 1992 as the offer of voluntary retirement made by the notice of the appellant given on July 3, 1992 was specifically not accepted by the reply of the Respondent Bank given on September 16, 1992.

14. Mr. Sanglikar then contended that the word "may" used in this Regulation must be interpreted to mean "shall". He cited the judgment of the Supreme Court in State of Rajasthan v. Harishanker MANU/SC/0031/1965 : [1965]3SCR402 and Shri Rangaswami, The Textile Commissioner v. Sagar Textile Mills MANU/SC/0044/1977 : [1977]2SCR825 . In the State of Rajasthan case the Rule being interpreted was the Mineral Concession Rule 4. Rule 30 thereof deal with the period of lease and read: "A mining lease may be granted for a period of 5 years unless the appellant himself desires a shorter period." Interpreting the word "may" used in this Rule the Supreme Court was of the view that "the word "may" used in the main provision of the Rule must mean "shall" and makes the provision mandatory. This was obvious from the last portion of the provision. If the State Government had discretion to fix any period of the lease, the last portion of the provision would be redundant". The Supreme Court, therefore, held that the Government could fix the period of the lease at any period shorter than five years only when the applicant desires a shorter period and not when the Government so desired. This was a case where 'the Supreme Court was interpreting a particular Rule and deciding the connotation of word "may" arising from the collocation of the words in the Rule under consideration.

15. In Rangaswami (supra) the Supreme Court has stated the general principle by which the word "may" should be read as "shall" or "must" under certain circumstances. The Supreme Court in paragraph 2 of the judgment pointed out that it is well settled that the word "may" is capable of the meaning "must" or "shall" in the light of the context and where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed to mean a command. Considering the purpose of the relevant empowerment and its impact on those likely to be affected by the exercise of the power, it was held that the power conferred on the Textile Commissioner to issue directions was coupled with the duty to specify the particular period for which the directions shall be operative.

16. Even after considering the two judgments cited by Mr. Sanglikar, we are not inclined to agree with the contention of Mr. Sanglikar that the Regulation 19 of the Respondent-bank lends itself to such construction that the word "may" used in Regulation 19 has to be understood as "shall" or "must". The learned single Judge has given several reasons as to why such a provision, particularly in an organisation which renders public service, cannot be held to impose an obligation on the employer to forthwith accept the voluntary retirement. There may be several cases where it would be detrimental to public to permit an officer-employee to voluntarily retire merely because he has tendered a notice in the prescribed form for the stipulated period. The service of the officer may be required in public necessity: there may be a situation of emergency which might have to be handled by the officer and his presence may be indispensable: there may be serious suspicion that the officer has committed an irregularity which needs to be probed in depth. In all such and similar circumstances it is inconceivable that the employer, that too a public sector organisation, should be obliged to accept a notice of voluntary retirement the moment it is given. To read such an obligation into the applicable service regulation would result in serious detriment to public interest to subserve which alone is the raison d'etre of the organisation and the service of the employee. We pointed out to Mr. Sanglikar and gave him an example of, what was popularly known as "Y2K" problem which had assumed such menacing proportions that all bank officers and employees were prohibited from proceeding on leave for about 2 days preceding December 31, 1999, and probably for another 2 days

subsequent thereto. This was an emergency situation where the full dimensions of the emergency were not even known, though there were exaggerated apprehensions. In such a situation is it conceivable that a bank officer could tender a notice of voluntary retirement under the concerned Rule and walk-out, shrugging off his responsibility whatever be the consequences to the employer. We hardly think it would be in consonance with notions of public service. Nor does such a construction advance public interest for serving which the officer is employed. The interpretation suggested by the learned Counsel is also internally contradicted by the language used in the Regulation. It is inconceivable that on the one hand notice of voluntary retirement "shall be" accepted by the employer and the other hand the employer "permit" the employee to retire from service. For this reason also, we are not inclined to accept contention urged by the learned Counsel for the appellant. In our view, a fair reading of the Rule is that the Respondent-Bank has the discretion to permit or not to permit an employee officer to voluntarily retire even if he has completed the stipulated age or length of service and given the required notice. The discretion, of course, has to be exercised rationally and for reasons to protect the business interests of the bank. There may be number of cases where discretion might have to be exercised against the employee. It is neither necessary, nor feasible, to list out such cases under the name of guidelines as Mr. Sanglikar contends. We are, therefore, of the view that the discretion vested with the employer bank under the concerned Regulation does not compel the employer to always exercise it in favour of acceptance of the notice of voluntary retirement.

17. Mr. Sanglikar then contended that, if the rule is read in the manner that we have suggested, it would vest arbitrary discretion in the respondent-Bank which would violate Article 14 of the Constitution. This is an argument which we are not willing to countenance in this appeal. We notice that the writ petition, which is the subject of this appeal, was not directed to seek a declaration mat the rule in question was arbitrary and liable to be quashed as violative of Article 14, nor did the petitioner seek relief of striking down the concerned rule. On the other hand, the writ petition proceeded to canvass a construction favourable to the petitioner employee. It is no doubt true that as one of the arguments it was contended in the petition that considering the rule as vesting absolute discretion in the employer would render it unconstitutional. Reading the judgment of the learned single Judge, it does, not appear to us that it was canvassed before the learned single Judge that the Rule in question was hit by Article 14, nor was any such prayer made for striking it down. Hence, we are unable to accept this argument of Mr. Sanglikar.

18. Once we come to the conclusion that merely by giving notice of July 3, 1992 the petitioner did not cease to be in the service of the respondent-Bank, the major thrust of the writ petition fails. It is clear that the offer to voluntarily retire made by the notice of July 3, 1992 was specifically rejected by the reply dated September 16, 1992. The order of suspension has been issued to the appellant on October 1, 1992, on which date, in terms of the rule as interpreted by us, the appellant continued to be an employee and very much within the disciplinary jurisdiction of the respondent-Bank. This is precisely what was conveyed by the respondent's reply dated September 16, 1992. Hence, the order of suspension dated October 1, 1992 cannot be said to be without jurisdiction as contended by the appellant.

19. Mr. Sanglikar then slightly shifted his sights and contended that the order of suspension was mala fide. The only ground on which this argument is urged is that, when the letter of voluntary retirement was forwarded, the Chairman of the respondent-bank was favourably inclined, but another Director objected to it and insisted on rejecting the offer. In fact, when we asked Mr. Sanglikar as to how he came to know the Chairman was favourably inclined the reply was that appellant learnt it

during a personal talk with the Chairman. No order can be made in a public institution like a bank on the basis of a personal conversation.

The application for voluntary retirement was in writing and as a responsible financial institution in public sector like the Bank had to respond to it in a corporate fashion. This, they did by the letter dated September 16, 1992. That is the only answer to the offer of voluntary retirement, and we recognise no personal communication with the Chairman of respondent-Bank, Even assuming there was difference between the Chairman and the Director on the issue as to whether the petitioner should be permitted to voluntarily retire, we recognise only the bank's action as mentioned in the letter dated September 16, 1982. All internal differences is a matter of internal democratic corporate procedure which cannot form the basis for an allegation of mala fides.

20. Mr. Sanglikar then attempted to impress upon us that there was an administrative circular or policy guideline which lays down the circumstances only under which suspension orders could be issued to officer employees. He offered to show the circular to us. We decline to look into any such circular, at this stage in appeal. We asked Mr. Sanglikar whether it was pleaded in the writ petition or in argument before the learned single Judge or even whether ground was raised in the appeal memo that the suspension order was bad for non-compliance with an administrative circular. The answer to all three queries was in the negative. We have, therefore, refused to look into any administrative circular and have merely looked at the regulations which were pleaded. We are not satisfied that there is any infirmity in the suspension order since, at the material time there were certain investigations going on in Singapore which were conducted by the Ministry of Finance Affairs and Company Affairs Department of Singapore Government with regard to several irregularities noticed in the functioning of the Singapore branch of the respondent-Bank. With these facts in contemplation the respondent-Bank was very much within its rights to suspend the appellant as disciplinary proceedings were perhaps contemplated against him.

21. For the aforesaid reasons, we find no reason to interfere with the well considered judgment of the learned single Judge in appeal. We find no merit in the appeal which is hereby dismissed.

22. Turning to the writ petition, the contentions raised by Mr. Sanglikar may be summarised as under:

> (1) The departmental enquiry held against the petitioner is in flagrant violation of Regulation 6(21) of the Bank of India Officer Employees' (Discipline & Appeal) Regulations, 1976.
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> (2) That neither the enquiry officer nor the disciplinary authority ever considered the defence of the petitioner delinquent and therefore the enquiry itself is bad for violation of Regulation 6.
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> (3) The order of the respondent-bank to forfeit gratuity and employer's contribution of provident fund is totally unauthorised. Inasmuch as an order of major penalty of dismissal has been passed, there could not have been passed, there could not have been an order of recovery of financial loss which can only be done by way of a minor penalty under Clause (g) of Regulation 4.
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> (4) That in any event proposed recovery of Rs. 1 lac as liquidated damages

under the security bond dated August 12, 1988 is illegal and unwarranted.

23. We may recount that the petitioner came to India on or about March 7, 1992 and thereafter he was on leave upto May 12, 1992 and he further extended his leave upto June 10, 1992. He sought to retire voluntarily by his letter of July 3, 1992 which was rejected by the bank's letter dated September 16, 1992. Since we have already held that the petitioner continued to be in service even after September 16, 1992, the bank was very much within its powers to transfer the petitioner to Bhopal by its order of October 1, 1992. The petitioner did not comply with this order. In the meanwhile, the petitioner was suspended from service. The petitioner moved writ petition No. 2568 of 1992 before this Court and obtained an. ad-interim injunction order restraining from proceedings being taken against him. This order came to be vacated later by this Court. Thereafter, the petitioner was charge-sheeted on December 14, 1993 and called upon to attend the enquiry. Though the petitioner filed a detailed reply on May 14, 1995, he refused to attend the enquiry when the enquiry was scheduled. We may mention here that enquiry was entrusted to an officer of the Central Vigilance Commission, an outsider and had nothing to do with the working of the bank. Though the petitioner raised a number of issues in his detailed reply dated May 14, 1995 addressed to the enquiry officer, the petitioner made no attempt whatsoever to prove any of the issues by placing any material before the enquiry officer. The enquiry thereafter was conducted ex-parte. Several documents were exhibited in the enquiry, several witnesses were examined and, finally, the enquiry officer made a report dated November 26, 1995 holding some of the charges were proved and that five of the allegations were not proved.

24. The contention of Mr. Sanglikar is that even after the enquiry proceeded ex-parte, there is an obligation under Regulation 6 of the Conduct Regulations to conduct the enquiry in a particular manner and that the enquiry officer failed to do so. Our attention is drawn to Regulation 6(21) which reads as under:

> "6(21)(i) On the conclusion of the inquiry the inquiring Authority shall prepare a report which shall contain the following:
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> (a) a gist of the articles of charge and the statement of the imputations of misconduct or misbehaviour; ..
>
> (b) a gist of the defence of the officer employee in respect of each article of charge;
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> (c) an assessment of the evidence in respect of each article of charge;
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> (d) the findings on each article of charge and the reasons therefore,

Mr. Sanglikar contends that a perusal of the enquiry officer's report dated November 26, 1995 does not show that a gist of each charge and a gist of the defence of the petitioner employee in respect of each of charge was^ incorporated in the report. Hence, he contends that even though the enquiry was ex-parte it was in violation of Regulation 6(21)(i) and, consequently, illegal.

25. With the assistance of the learned counsel, we have perused the applicable Regulations which are styled as "Bank of India Officer Employees' (Discipline and Appeal) Regulations, 1976." Regulation 6 deals with the procedure for imposing major penalties. This Regulation requires that whenever a major penalty in Clause (e), (f), (g) or (h) of Regulation 4 is to be imposed, then a certain prescribed procedure has to be

followed. The prescribed procedure is that a definite and distinct charge should be framed on the basis of the allegations against the officer employee; the articles of charge, together with statement of allegations, on which they are based, should be communicated in writing to the officer employee, who shall be given 15 days for replying thereto. On receipt of the "written statement" of the delinquent employee, or if no such written statement is received within the time specified, an enquiry may proceed ex-parte. After traversing the stage from sub-regulation Nos. 1 to 20, sub-regulation 21 enjoins upon the Enquiry Officer that he shall make a report which shall, inter alia, contain the gist of the articles of charge and statement of imputations of misconduct or misbehaviour and gist of the 'defence' of the officer employee in respect of each article of charge. In a situation like one before us, can it be said that there was any 'defence' of the employee presented to the enquiry officer at all. The "written statement" of the petitioner, which was filed, was an attempt to explain away the charges against him so that, upon perusal of the said explanation the disciplinary authority may drop all further proceedings. Once the disciplinary authority applies its mind to the facts of the case and the explanation tendered by the petitioner and decided to conduct the enquiry, presumably, if not satisfied, the stage arises for leading of evidence in support of the charge after recording of which there is a stage for the defence of the delinquent employee. Since the petitioner refused to participate in the enquiry, the enquiry was conducted ex-parte from day one. In other words, the petitioner by his conduct, led the enquiry officer to believe that he had no defence whatsoever to offer. In the circumstances, it is not possible to accept the contention of Mr. Sanglikar that there is contravention of Regulation 6(21) of the applicable Regulations by the enquiry officer in making his report.

26. The matter can be looked at from another angle also. The written statement given by the Petitioner on May 14, 1995 contains the factual bases for his explanation. These factual bases are either admitted by the management of the Bank, or if not admitted, had to be proved by the petitioner who raised the defence. We have been taken through the material portions of the reply dated May 14, 1995. The petitioner insisted in this reply that the practice in the bank was that whenever there was a Chief Dealer, he was directly dealing with the Foreign Exchange transactions and that the petitioner as Chief Officer was in no way concerned with them as the Chief Dealer would be directly dealing with the Foreign Exchange transactions and report directly to the Head Office of the bank. It is obvious that this is a matter of factual evidence. There is no material on record to suggest that the enquiry officer, not a person from banking circles, was aware of the general banking transactions or, in particular, the banking practice in the 1st Respondent-Bank. Secondly, there is no material shown to us from which we could hold that the details of the banking practice referred to in the "written statement" of the petitioner were admitted as correct by the Respondent-Bank. In the circumstances, the onus of establishing each and every circumstance alleged in the written statement dated May 14, 1995 was squarely on the petitioner. The petitioner not only failed to discharge this onus, but avoided the enquiry and gave up valuable rights which had been given to him. In the circumstances, we agree with the disciplinary authority that the petitioner having given up his rights, cannot complain that his rights were not granted to him by the enquiry authority or the disciplinary authority.

We are, therefore, not inclined to accept the contention of the petitioner that the enquiry was held contrary to the provisions of the Regulation 6(21) of the Disciplinary Regulations. Even though this Court is not required to sit in appeal over the conclusions of the enquiry officer, we requested Mr. Sanglikar to show if there was any part of the defence which could be sustained on the material on record, so that we might evaluate it even by sitting in judgment over the enquiry officer's findings. Petitioner having not led evidence in defence, Mr. Sanglikar was unable to show us any such material. Hence,

also, we are of the view that the contention, that the enquiry officer failed to refer to the gist of the defence of the petitioner in the enquiry report is futile as it would have been merely an empty formality. We are not inclined to accept Mr. Sanglikar's contention. Mr. Sanglikar referred to the judgment of the Supreme Court in the Imperial Tobacco Co. of India Ltd, v. Its Workmen MANU/SC/0401/1961 : (1961)IILLJ414SC . The Supreme Court in this judgment says that even if an enquiry is held ex-parte, it has to be held in accordance with the applicable service rules/standing order. There is no doubt about this proposition. This judgment does not carry the matter further, since, in our view, the ex-parte enquiry was held in conformity with the applicable Regulations.

27. Finally, we deal with the argument of Mr. Sanglikar pertaining to forfeiture of gratuity and employer's contribution of provident fund.

28. The second proviso to Rule 8 of the Bank of India Gratuity Fund Rules (hereinafter referred to as "Gratuity Rules") clearly contemplates that there could be no forfeiture of gratuity for dismissal on account of misconduct in cases where such misconduct causes financial loss to the Bank, to that extent only.

Similarly the Bank of India Provident Fund Rules 13(2) ("Provident Fund Rules") empowers the Bank to forfeit the employer's contribution to the provident fund to the extent of loss or damage caused by the misconduct of the employee who has been dismissed from service. That the power exists, is therefore beyond cavil. The question is, has this power been exercised in a reasonable manner.

29. By a notice dated February 18, 1998 the petitioner was specifically informed that he had been dismissed from service by the penalty order dated April 26, 1997 and that his appeal has been rejected. On July 11, 1997 the petitioner was informed that the Bank had suffered a huge financial loss due to his misconduct, which had been quantified in the charge-sheet, and that the charges were held proved against him. It was indicated that a total sum of US Dollars 3,10,000 and US Dollars 10,346.80 was the financial loss caused to the bank as a result of the serious misconducts alleged against the petitioner in the charge-sheet, and later proved against him in the domestic enquiry. Consequently, the petitioner was called upon to show cause as to why the entire amount of gratuity payable to him, and the bank's share of the provident fund, should not be forfeited, since the total financial loss was very much larger than the aggregate of the aforesaid two amounts. The petitioner showed cause by his letter dated March 17, 1998 against the said action. After considering his reply, an order was made on May 30, 1998 by which it was directed that both the amount of gratuity as well as the employer's share of provident fund contribution be forfeited since the total loss caused to the bank due to misconduct of the petitioner was far larger. We may mention here that neither the Gratuity Rules nor the Provident Fund Rules contemplated holding of an enquiry before forfeiture. Perhaps the show cause notice dated February 18, 1998 was given to comply with the provisions of natural justice. We see nothing illegal or irregular in the action taken by the bank in forfeiting the aforesaid two amounts to do which it was fully competent. Mr. Sanglikar contended that there was no actual quantification of the financial loss by a separate enquiry. In our view a separate enquiry is not necessary. The disciplinary enquiry held against the petitioner has specifically computed the financial loss caused to the bank as a result of the petitioner's misconduct. The said quantified amount of the financial loss has been specified in the charge sheet itself. A detailed enquiry was held into it and the enquiry officer has held charge No. 1 (which specifies financial loss) as proved against the petitioner. Though the enquiry officer acquitted the petitioner of charge No. 1(iv), the disciplinary authority reversed the said finding and held the said charge also as proved. It was therefore, not necessary for a separate enquiry to be conducted for recovering the financial loss suffered by the bank.

30. Mr. Sanglikar's argument that withholding of monies can only be by way of minor penalty under Regulation 4(d) and that, having imposed a major penalty by way of dismissal, the respondent was incompetent to recover the financial loss from the provident fund, leaves us unimpressed. In the first place, it must be remembered that the minor penalty contemplated under Regulation 4(d) is recovery of the financial loss caused to the bank from the pay or the other amount that may be found due to the employee while in service. In the instant case, the right to demand gratuity and provident fund could arise only after the petitioner was dismissed from service when he would be out of purview of bank's disciplinary jurisdiction. Therefore, this contention of Mr. Sanglikar has no merit and needs to be rejected.

31. Finally, Mr. Sanglikar contended that the bank erred in calling upon the petitioner to pay liquidated damages payable in terms of the security bond dated August 12, 1988. This argument is also not sound. It cannot be gain said that a foreign posting to an employee entails extra financial burden on the bank, for the bank has to pay not only regular pay and allowances of the employee, but certain additional allowances, that too in foreign exchange. In order to ensure that employees do not use the foreign posting as a jumping board for obtaining a job elsewhere, the bank requires such employees to execute a security bond in the sum of Rs. 1,00,000/- as liquidated damages in case they do not serve the employer for a period of five years after being repatriated to India. In the present case, the petitioner came back to India some time in March 1992, and was on leave till June 30, 1992. When he was transferred to Bhopal, he declined to go there as a result of which he was suspended from service and later subjected to disciplinary enquiry. Since the enquiry was itself pending for some time and the service was terminated only by the order dated April 26, 1997. The contention is that the period of five years contemplated by clause 8 of the security bond having expired by April 26, 1997, there was no warrant for calling upon the petitioner to pay the liquidated damages of Rs. 1,00,000/-stipulated in Clause 1 of the security bond. This argument is too facile to hold any merit. The security bond required that when the employee came back of India, he would "serve" the employer for a period of 5 years thereafter, In our view, the act of the petitioner-employee in declining the transfer order was itself a breach of the terms of security bond dated August 12, 1988 for which the respondent-bank is justified in invoking the liquidated damages clause. At any rate, if the respondent-Bank has invoked the liquidated damages clause under the bond, we find no fault with its action.

32. We are of the view that there is no substance in the writ petition and it is hereby dismissed. Rule discharged.

33. Considering the facts and circumstances of the case, we are not inclined to award any costs.

34. Personal Assistant is permitted to issue an ordinary copy of the order to the parties.

35. Certified copy expedited.