Calcutta High Court
Smt. Nipa Dhar (Nee Ghosh) vs National Aviation Company Of ... on 10 December, 2010
Author: Pratap Kumar Ray

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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(ORIGINAL SIDE)

Present:

The Hon'ble Justice Pratap Kumar Ray.
And
The Hon'ble Justice Mrinal Kanti Sinha.

A. P.O No.94 of 2005
G. A. No.2645 of 2004
G. A. No.2696 of 2004
W. P. No.1636 of 2001
Smt. Nipa Dhar (nee Ghosh)
Versus
National Aviation Company of India Ltd. & Ors.

For the petitioner : Mr. L. C. Gupta, Sr. Advocate
Mr. Surojit Samanta, Advocate
Ms. Madhumita Ray, Advocate

For the respondents : Mr. Pradosh Mullick, Sr. Advocate

Mr. R. N. Majumdar, Advocate Heard On: 16.12.09, 23.12.09, 6.1.10, 13.1.10, 27.1.10, 3.2.10, 10.2.10, 1.3.10, 24.3.10, 19.4.10, 10.9.10.

Judgment On : 10th December, 2010.

Pratap Kumar Ray, J:

Assailing the order dated 20th January 2004 passed by the Learned trial judge in writ petition being W. P. No.136 of 2004 this appeal has been preferred. Impugned order of the Learned Trial Judge aforesaid read such :

> "The Court: This writ petition directed against an order of termination of service dated June 22, 2001. It appears that the service of the petitioner was terminated on the ground that she was overweight. She was an airhostess naturally working as a Cabin Crew. She was grounded due to her overweight in September 1997. In spite of lapse of four years since after her being grounded, she failed to make up the deficiency as a result her service was dispensed with by the employer. It further appears that clause 9(II)(b) of the letter of appointment was pressed into service in passing the 2 aforesaid order. Clause 9(II)(b) of the letter of appointment provides

that the appointment shall be liable to be terminated in the event the petitioner fails to maintain her weight within the prescribed weight limit.

The learned advocate appearing in support of the writ petition advanced the following submissions:

(a) Clause 9(II)(b) of the letter of appointment on the basis of which the termination was made is unconstitutional because it is draconian in nature and is thus violative of Article 14 of the Constitution and the Directive Principles laid down therein. In support of his submission, he relied on judgment in the case of CTWTC vs Brajannath Ganguly, reported in AIR 1986 SC 1571.

(b) The terms and conditions conditioned in the letter of appointment lost its force after the petitioner became a permanent employee.

(c) The order of termination was passed in violation of the principles of natural justice.

(d) It was submitted that it is not really the weight which was the problem, but the petitioner was in fact sick and she was suffering from "Phobic anxiety syndrome in relation to flying'. In this regard, he referred to page 8 of the affidavit-in-reply.

(e) The letter of termination was issued on June 22, 2001 at a point of time when the petitioner could have availed herself of the opportunity of joining the "flight kitchen supervisor's post" under the scheme dated June 19, 2001 copy whereof is annexure 'R' to the writ petition.

Mr. Mazumdar, learned advocate appearing for the respondent, submitted that the fact that petitioner was overweight is not in dispute. He further submits that the contract of employment provides that the in the event the petitioner fails to maintain her weight within the permissible limit, contract would be terminated. The fact that the petitioner gained weight is a breach of the contract which furnished the respondent with the right to terminate her service. But then, such a right was not exercised instantaneously, she was given four years' time to being herself within the permissible weight limit. When she failed to do so, the respondent had no option but to terminate the contract.

Mr. Mazumdar further submitted that the contract of employment is also a factor to be taken into consideration in terminating the service and in support of his submission he relied on the case of Uptorn-vs-Sammi, reported in AIR 1998 SC 1681 (Paragraph

9). The last submission made by Mr. Mazumdar was that after the service of the petitioner has been terminated, there is no question of any reinstatement; but in case

she applies against any vacancy and she qualifies therefor then her case can be considered.

The letter of appointment dated February 19, 1987 contains clause 9, which reads as follows:-

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"During the training period and on appointment as Airhostess. Your services are liable to be terminated under the following circumstances: i. in the event of you getting married within 4 years of service as Airhostess;

ii. in the event of-

(a) your failing to maintain the normal vision without glasses/contact lens.

(b) Your not maintaining weight within the prescribed limit.

(c) Your developing airsickness, and

(d) Your failing to being down your weighty to be prescribed limit with three times' time from 13-2-1987."

It would appear that maintenance of weight within the prescribed limit is a necessary precondition for the continuance of the contract. The petitioner was directed to show case by the letter dated April 30, 2001 as to why her service be not terminated in terms of clause 9(II)(b) of the letter of appointment. A copy of the show case notice is annexure 'O' to the writ petition. In reply to the aforesaid show case notice, the petitioner contended inter alia as follows:-

".....I was grounded since 1st September, 1997 for being marginally over-weight (500 gms)"

It would therefore appear that the petitioner was overweight and that she squarely brought herself within the mischief of clause 9 is not even in dispute. The respondent was, therefore, within its right to terminate the contract. The respondent, however, did not proceed to terminate the contract immediately after the petitioner was disqualified from flying on 1st September 1997. The petitioner was granted opportunity to improve herself. The respondent, in its affidavit-in-opposition, has disclosed letters dated 16th September 1997, 26th October, 1997, 25th November, 1997 and 2nd June, 2000 which are collectively marked annexure R-6. It appears from the aforesaid four letters that the petitioner was reminded time and again to reduce her weight.

Reference can also be made to a recent judgment of the Apex Court in the case of Air India Cabin Crew Association -vs-Yeshaswinee Merchant and others, reported in 2003(6) SCC 278 paragraph 51 wherein it was held as follows:-

"Air India is a travel industry. Pleasing appearance, manners and physical fitness are required for members of the crew of both sexes. The air hostesses have agreed to the early retirement age, as they need an option to go for ground duties after the age of 50 years. The arguments advanced on behalf of the respondent Association, therefore, cannot be accepted that the air hostesses are made to retire at an earlier than males because of their failing physical appearance and it is a practice derogatory to the dignity of women. For services on board an aircraft, both male and female members of the crew are expected to be smart, alert and agile". 4

It further appears from those letters that the petitioner was not found co-operating with the doctor in the matter of reduction of weight.

It would this appear that the petitioner committed breach of an essential condition of contract whereby the contract became voidable. B y the impugned order the contract was avoided. I fail to see any legal infirmity in me step taken by the employer. I am also supported in my view by a judgment of the Apex Court in the case of The Workmen of the Bangalore Woolen Cotton and Silk Mills Co. Ltd-vs-The Management of the Bangalore, Woolen, Cotton and Silk Mills Co. Ltd, reported in AIR 1962 SC 1363 in paragraph 8 it was held as follows:-

"It seems to us that a service cannot be said to be terminated unless it was capable of being continued. If it is not capable of being continued, that is to say, in the same manner in which it had been going to before, and it is, therefore brought to an end, that is not a termination of the service. It is the contract of service, which is terminated and that contract requires certain physical fitness in the workmen. Where therefore a workman is discharged on the ground of ill-health it is because he was unfit to discharge the service which he had undertaken to render and therefore it had really come to an end itself.

The submission that the terms and conditions contained in the letter of appointment ceased to be operative once the petitioner was made a permanent staff has not impressed me. The petitioner was appointed on those terms and conditions as a temporary employee. The only change which was made was that she was made a permanent employee but the terms and conditions remained the same. It is not even alleged that a new contract was entered into or that the original contract was rescinded. The alternation or modification if any is with regard to duration of the contract. Settled law under Section 62 of the Contract Act is that modification becomes in such a case part of the original contract. If any authority is needed reference can be made to the case of Juggilal Kamalapat-vs- N.V.Intermation, reported in AIR 1955 Calcutta 65. Therefore, the submission that the termination

could not have been made by resorting to clause 9(II)(b) is not acceptable to this Court.

The next submission that the petitioner was suffering from other ailments like the "phobic Anxiety Syndrome in relation to Flying', in my view goes against the petitioner rather than helping her. She is a member of the Cabin Crew. If she has developed phobia with regard to flying then that would being her within the mischief of clause 9(II)(b) also. I could not follow as to why was this ground taken which has only strengthened the order of termination of the contract.

The submission that there has been violation of the principles of natural justice is equally without any merit because the petitioner was directed to show case. In reply the petitioner has admitted that she is overweight and on that basis the contract has been terminated. There has been no infraction of the rules of the principles of natural justice. 5

The judgment relied upon by the learned counsel in the case of CTWTC-vs-Brajanath Ganguly (supra) has no manner of application for the simple reason that the question which fell for consideration before the Apex Court in that case was 'whether a clause enabling the employer to terminate the service just by giving three months' pay or three months' notice was valid?" The Apex Court held that such a clause was not valid. That judgment has not manner of application to the facts and circumstances of the present case.

The submission made by the learned counsel for the petitioner t hat clause 9(II)(b) unconstitutional because it is draconian, and for that reason offends Article 14 has not impressed this Court either. A contract of employment is a contract like any other contract. There is a promisor and a promisee. The employer needs employees in order to discharge certain duties and for the purpose of discharging those duties certain mental and physical conditions are or may be required. The employee by entering into the contract promises to maintain the requisite physical and mental condition in order to discharge the desired duty. If the promisor fails to fulfil the necessary condition, can the promisee be expected to be bound by the contract? Such an expectation is in fact contrary to Article 14.

The last submission of the learned counsel is equally without any merit. Paragraph 23 of the petition shows that the petitioner contemplated to apply in terms of annexure-'R' but there is nothing to show that she did not in fact apply. If she has not even applied for, how can any prejudice to be said to have been caused to her by the issuance of the impugned order?. All the arguments advanced by the leaned counsel have thus failed.

Considering the submissions made by Mr. Mazundar, the respondent is directed to consider the case of the petitioner sympathetically either for a post in terms of

annexure-R or in respect of any other vacancy which may be there, provided she is found eligible.

The petition is thus disposed of.

Urgent xerox certified copy of this dictated order be issued if applied for." An application for amendment of writ application registered as G. A No.2645 of 2004 filed in connection with present appeal A.P.O No. 94 of 2005, which was heard by the Division Bench (Corum: Justice Pratap Kumar Ray and Justice Manik Mohan Sarkar(as His Lordship then was). An order was passed on 9th April 2008 allowing the amendment application. The said order reads such:

" In this amendment application the writ petitioner has prayed for amendment of the writ application for consideration of the effect of the 6 concerned Act namely, the persons with disabilities (Equal opportunities, protection of Rights and Full Participation) Act, 1995 (hereinafter for brevity referred to as disability Act) on the reflection of the documents as relied upon before the Learned Trial Judge namely the medical certificate etc. this application has been opposed by the respondent nos. 1 to 4 by filing an affidavit-in-opposition on the grounds that at the hearing stage of the appeal, there is no scope to amend the writ application having regard to the provision of Order 6 Rule 17 of the Code of Civil Procedure, 1908 and more particularly proviso thereof as incorporated by amendment. Hence the only short question involved for consideration in this application whether at the appeal stage the amendment could be allowed. It is a settled legal proposition of law that amendment could be allowed if it does not change the nature and character of the proceeding. It appears that the writ petitioner in the writ application prayed for availability of the benefit for alternative job for which advertisement was made just two days after her termination from service by canceling order of termination on the premises that petitioner once became unable to work as airhostess due her ailments, namely altitude phobia. She was legally entitled to pray for annuity (which is called as survival allowance) as per the regulation of the organization for which she applied before her termination from service and alternative benefit of an employment. The fact of physical illness and disability thereof to perform the duties of air-hostess though termination order was on the ground of disqualification namely obesity factor as held by the respondent Indian Airlines Ltd. is the case made out for consideration in the writ application. It is contended that as she suffered from altitude phobia which made her disable to function as air-hostess, she ought to have been placed in alternative service and/or alternatively grant of annuity in terms of the service regulation. On the aforesaid factual matrix of the case as set up in the writ application now the writ petition in this appeal has prayed for consideration of those facts for application of the legal question about her right to remain in service by providing her an alternative job on the reflection of the Disability Act aforesaid. On the facts as pleased in the writ application and the affidavit in reply as made, now it is the stand of the writ petitioner to have the decision of this Court on reflection of those facts in the angle of

Disability Act, 1995 so far as its applicability of Section 47 of the said Act by allowing this amendment application. Section 47 of the said Act reads thus:

"47. Non-discrimination in government employment. (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service.

Provided that if an employee after acquiring disability is not suitable for the post he was holding could be shifted to some other post with the same pay scale and service benefits:

Provided that further that it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable 7 post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability;

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment by notification and subject to such conditions, if any , as may be specified in such notification, exempt any establishment from the provisions of this section."

In considering the amendment application this Court need not to consider whether on the facts as pleaded in the writ application and the opposition as taken to resist the writ application will justify the applicability of Disability Act or not which should be considered at the final hearing in the event amendment application is allowed. Now the question is on short premises whether at this stage the amendment of writ application could be allowed or not. There is no doubt that under the Civil Procedure Code in view of proviso of Order 6 Rule 7 no amendment should be allowed after the trial has commenced. The Court has to consider the impact of the said provision in a writ proceeding. It is a settled legal proposition of law that the civil procedure Code itself is a procedural law as held long back by the Apex Court in the case of Sangram Singh vs. Election Tribunal reported in 1955 SC 425 which has been followed in the case of Kailash vs. Nanhku reported in 2005 (6) SCC 705 while deciding the question as to whether time to file written statement in terms of the amended provision of the Civil Procedure Code is rigid one and under no circumstances the time limit not be extended or not. On considering the amended provision of Order 8 Rule 1 of the Civil Procedure Code where there is a bar imposed by the statute from granting any time in excess of the time as stipulated to file the written statement, the Court held that procedural law is not a master but a servant, not an obstruction but an aid to justice. It has been further held therein in the case of Ravi Kusum(supra) and Kailash (supra) following the judgment passed in the case of Topline shoes Ltd. vs. Corporation reported in 2002 (6) SCC 33 that procedural prescriptions are the handmaid and not the mistress, a lubricant not a resistant in the administration of justice. In that angle

even in the year 2007 the Apex Court held in the case of R.N. Brothers vs. Subhas Chandra reported in 2007 (6) SCC 420 that provision under Order 8 Rule 1 though is couched with a language negatively, but the Court on deciding the issue in the angle of procedural law, its effect and impact on the substantive justice may allow time. The similar principle could be applied so far as the amendment of pleading is concerned even if it is assumed that stricto sensu Order 7 Rule 17 of C.P.C. has its applicability in a writ proceeding. There is no doubt that as per the writ Rule framed by the High Couret at Calcutta under Clause 53 it is provided that provision of the Civil Procedure Code could be applicable in a writ proceeding but 8 under Section 141 of the said writ proceeding is not at all a legal proceeding under Civil Procedure Code. By incorporation under Rule 53 Civil Procedure Code has been made applicable. Still then Civil Procedure Code with its all vigour and strictness is not applicable but general principle / procedural aspect of the Civil Procedure Code could be applied with a tampering effect that the same should not be as rigorous as its applicability with reference to a civil suit. The general principle of law that amendment should be allowed to enable the parties to agitate real question of issue for a finality of the adjudication is within domain of public policy, with a ride that the question of prejudice of the other side should be looked into and could be taken care of by the Court while allowing such amendment by passing appropriate order namely sufficient compensation by cost or otherwise. Reliance may be placed to the judgment passed in the case of Narayan vs. Purushottam reported in 2000(1) SCC 712. The test prescribed in the said case of Narayan (supra) for allowing any amendment application on two principles; firstly by such amendment whether it will cause injustice to the other side and secondly whether it is necessary for the purpose of determining the real question in controversy between the parties. For such proposition in the case of Narayan (supra), earlier decision of Suraj Prakesh vs. Raj Rani reported in 1981 (3) SCC 652 was relied upon. Even in the post amendment stage of Order 6 Rule 17 of Civil Procedure Code with reference to a civil case the Apex Court considered the applicability of the same in the case of T.N.Alboy Co. Ltd. vs. T.N. Electrical Board reported in 2004 (3) SCC 392 by holding that there is no absolute bar to allow the amendment of pleading of a writ application. It is the consistence view of the Apex Court that amendment would be maintainable for ends of justice even up to the stage of Apex Court. Reliance may be placed to the case of Prabodh Verma & Ors. vs. state of Uttar Pradesh & ors. reported in 1984 (4) SCC 251. Even a new plea could be raised at appellate stage is also a settled legal proposition passed in the case of Ishwardas vs. State of Madhya Pradesh & Ors. reported in AIR 1979 SC

551. Beside such, additional point not pleaded would be raised by writ Court subject to providing of opportunity of hearing to the affected parties but it should be in rare cases when facts and circumstance require such. Reliance is placed to the judgment passed in the case of V. K. Majhra vs. Union of India reported in 2003 (8) SCC Page 40. Applying the aforesaid legal position, here effect of Disability Act could be applied by Court itself, even if the former amendment application is not allowed, or ends of

justice.

Having regard to the aforesaid legal position of law we are of the view that the amendment application to be considered in angle of aforesaid findings.

It appears from the application that no new facts have been placed before this Court for our consideration. But on the basis of the facts as already pleaded and the documents as already annexed thereof in the writ application the applicability of the Disability Act and its provisions on the factual matrix of the case as pleaded amendment of pleading and ground 9 has sought for to this effect that as due to physical illness namely suffering from altitude phobia the writ petitioner could not function the job of Air Hostess and due to medication for such ailment, the gained weight, disability act as the applicability with its vigour as National Aviation Company of India Limited is an establishment under the said Act.

Having regard to the fact that there is no change or variation of the factual matrix of the case as the amendment has been sought for relying upon the documents annexed to writ application as are already on record and the pleading as made thereof, we are of the view that the question of applicability of the said Act namely Disability Act could be tested in the final hearing by allowing the Amendment sought for. Beside such, the applicability of the Disability Act and its proposition more precisely Section 47 of the Act, may otherwise could be considered as a question of law involved on the admitted facts, if any, and on admitted facts the parties are at liberty even at the appeal state to agitate any question of law as will be cropped up from the facts on record and there is no embargo to allow it. Reliance is placed to the judgment passed in the case Tarini Kamal Pandit Vs. Prafulla Kr. Chatterjee, Decd. by legal representatives, AIR 1979 S.C 1165, Anil Kumar Sinha vs. state of Bihar : 1998(2) SCC 439.

Learned Advocate for the respondents has relied upon a judgment reported in AIR 2005 SC 3353 (Salem Bar Association vs. Union of India) to oppose this application. From the judgment as relied upon it appears that the question of jurisdiction and power of the Court the allowed the amendment at the appeal stage was not the subject matter of the decision. Accordingly we are of the view that that decision will not help us in adjudicating the present problem which has been cropped up seeking amendment of the writ application at the appeal stage for bringing the applicability of the Act on record, on the factual premises as existing on records. A question of delay to amend the writ for applicability of disability Act has been urged. No case made out that due to such delay or if amendment is allowed, the company will suffer any prejudice. It is a case of termination from service on the ground of over weight, which is under challenge by writ petitioner.

Section 47 of said Disability Act was considered by the Apex Court and the jurisprudential concept has been dealt with in the case Kunal Singh vs. Union of

India, reported in (2003) 4 SCC 524 by the following observation: "Section 47 of the Act mandates that an employee who acquires a disability during service just be protected. If such an employee is not protected, he would not only suffer himself but also his dependants would also undergo suffering. Therefore merely granting him pension would not suffice, but there also be an attempt to secure him alternative employment". The same view was reiterated relying Kunal Singh (supra) in the case Bhagabandas & Anr. vs. Punjab State Electricity Board, reported in (2008) 1 SCC 579.

Considering all the legal principles, this Court is accordingly of the view that the amendment application should be allowed by imposing cost 10 assessed Rs. 5,000/- payable to the company as compensation. Hence this application is allowed with costs of Rs. 5,000/-aforesaid.

It is made clear that the applicability of Disability Act on the factual premises of writ would be subject matter of final haring when parties may advance arguments on that score.

Let complied copy of the writ application be filed by incorporating the amended portion and be served upon the respondents within two weeks from date. Affidavit-in-opposition, if any, to such amendment application could be filed by two weeks thereafter; re-joinder, if any, one week thereafter. All the documents namely affidavit-in-opposition, re-joinder to the opposition and the amended copy of the writ application, namely, the compiled copy of the writ application should be filed by the appellant by filing a supplementary paper Book annexing those within six weeks from the date of service of amendment application. Registry is also directed to take steps for incorporation of the amendment as per procedures. The matter will appear eight weeks hence for final hearing.

Stay as prayed for by the respondent company is refused. Let urgent certified copy of this order be supplied to the parties, if applied for, upon compliance of all requisite formalities." In terms of the order aforesaid, compiled copy of amended writ application was filed. An affidavit-in-opposition and reply thereof were filed by the respective parties. The appeal and amended writ application both were heard by us.

The said writ application was moved assailing the order of termination from service dated 22nd January 2001 passed by Regional Director (East) of the respondent National Aviation Company of India Limited, hereinafter for brevity referred to as "concerned respondent". The grievance raised in the writ application assailing the order of termination from service was on the premises that it was passed without considering the applications seeking necessary relief of annuity in terms of service condition stipulated in memorandum of settlement dated 10th January 1972 read with subsequent settlement dated 11th April 1996, being memorandum of settlement under Rule 58 of the Industrial Dispute 11 (Central Rule 1957), that respondent Aviation Company unfairly, unjustly, arbitrarily and unreasonably, terminated the

service taking resort to terms of service being Clause 9(II)(b) stipulated in the letter of appointment as trainee Airhostess which provides liability for being terminated due to failure to maintain prescribed body weight, though on records, it was the case of the petitioner that she was grounded from the flying duty due to her suffering from "Altitude phobia" and co-related "phobic anxiety syndrome" and was under prolong medical treatment consuming medicine as prescribed by panel Psychiatrist of said Company which resulted increase of body weight and in spite of seeking grant of "annuity" on ground of "medically unfit as cabin crew" before terminating the service, same was not considered.

A show cause notice dated 30th April 2001 was served which reads such:

"Ms. Nipa Dhar
Airhostess (Sr.)
Emp.No. 406261
IAL.IFS Deptt
Dum Dum

Ms. Nipa Dhar
Block GC, 220/5
Salt Lake City
Calcutta-700 091

Ref. No.CIR/DISO Dated 30.4.2001

Re: Show cause notice

Upon perusal of your service records, it is observed that you are not being rostered for flying duties since 01.09.1997 on account of your weight remaining in excess of the prescribed limit.

You were advised to undergo medical check up from time to time. However, on your own volition you did not do so in true earnest and also did not follow up the medical recommendation and treatment properly. Because of this non-cooperation from your end. You have not responded to the treatment. Accordingly, you are still over weight and not fit for flying duties. It is also observed that your past attendance records are very unsatisfactory. On several occasion you remained absent unauthorisedly 12 without any intimation/permission. It is accordingly, presumed that you are no more interested to continue with the service of this Company.

You are hereby called upon to show cause within 7 days from the receipt of this letter as to why your service shall not be terminated in terms of Clause 9(ii)(b) of the letter of appointment as Trainee Airhostess under reference No. CAI/PER/JBS/OPS/19/6129 dated 13.2.1987. You will be allowed personal hearing to explain your case, if you so desire. You are warned that if you fail to submit any reply to this notice within the stipulated date, if will be presumed that you have none to offer and orders will be passed accordingly without making any reference to you.

REGIONAL DIRECTOR(EAST)"

A reply to the show cause notice was filed by the present writ petitioner on 7th May 2001 which read such:

> "To The Regional Director (East), Indian Airlines Limited, 39, Chittaranjan Avenue, Calcutta-700 012 Sub: Reply to show cause notice.
>
> Dear Sir, This is in reference to the letter No. CIR/DISC/1672 dated 30.04.2001 I would like to inform you that though initially I was grounded since 01.09.1997 for being marginally over-weight (500 gms), I remained off roster due to a psychological ailment which prevented me from flying.
>
> This problem started from middle of 1997 (May / June) and when it became unbearable I was forced to consult on panel psychiatrist Dr. C.S.Mukherjee on November, 1997. Dr. C. S. Mukherjee advised me to stop flying. I subsequently applied for medical annuity as per Dr. C.S.Mukherjee's advice. Then our Indian Airlines' doctor Mrs. Roy advised me to consult another panel psychiatrist DR. D. Bhattacharya for treatment and advice. Dr. D. Bhattacharya sent me for psychometry-test and his treatment is continuing till date.
>
> I have submitted the report to Dr. Mrs.Roy from time to time and insisted on weight check but Mrs. Roy (our I.A doctor) felt weight check-up was of secondary importance and she insisted on the psychological treatment so, it is not true that I did not attend to weight checks on my own volition. There has been waxing and waning of symptoms without complete remission. It is also untrue that my past attendance was very 13 unsatisfactory, prior to this letter there has been no letters issued regarding my attendance or non-cooperation regarding medical treatment.
>
> I have repeatedly reminded my department regarding my medical annuity so, your presumption that I am no longer interested to continue my service is totally wrong.
>
> I would request you to overcome the communication gap with various departments before issuing such threatening letters. As you are now aware that I am suffering from phobic anxiety and this letter has increased it, so kindly go through the accompanying documents and please sanction my long over-due medical annuity. I have attached nine documents including Dr. C.S Mukherjee's medical advice, Dr. Bhattacharya's prescriptions, psychometry report, applications for annuity etc. etc. Thanking you, Yours faithfully, Nipa Dhar (Sr.

Airhostess) Emp. No. 406261"

P-129 and 130 (New).

Nine documents as were annexed in the reply of show cause notice, were as follows:

i) A letter dated 4th December 1997 addressed to the General Manager (OPS), Indian Airlines Ltd., seeking relief of annuity on ground of phobic anxiety in flying and Prescriptions of Dr. Chandra Shekher Mukherjee, Psychiatrist dated 18th November 1997 advising 'stop flying with immediate effect', due to illness phobic anxiety in flying.

ii) Letter dated 18th March 1998 of writ petitioner appellant addressed to the General Manager (OPS) Indian Airlines Ltd. praying to constitute Medical Board for grant of annuity.

iii) Prescription of Dr. D. Bhattacharyya, consultant Neuropsychiatries dated 13th June 1998, prescribing medicine tablet Survedor, capsule Fludac with diagnosis 'phobia related to flight' 14

iv) Prescription of said Dr. Bhattacharya dated 28th July 1998 changing medicine by prescribing Tablet Serlift 50 mg, tab Servector and tablet Trika 0.5 mg with advice for 'Psychometry Test and Observation' obsessive thought with phobia during air flight. A note was given 'she likes to leave job due to phobia'.

v) Prescription of Dr. Bhattacharya dated 23.10.2000 and 19.3.2001 prescribing medicine tab Serlift 25 mg, Trika 0.25 mg with observation 'occasional phobic anxiety'.

vi) Psychometry test report dated 23rd November 1998 of department of applied Psychology, University of Calcutta, which contained impression: Simple phobia (DSM-III R).

vii) Letter dated 13th July 1999 under the heading "medial report" from Deputy General Manager as served to writ petitioner/appellant and reply of writ petitioner/appellant by referring her illness of phobic anxiety in flying and treatment details.

viii) Letter dated 26.5.1999 addressed to Dy. Gen Manager (IFS) contending submission of all medical reports, praying annuity and expressing her economic distress condition as she was neither paid any salary nor any subsistence allowance for 21 months.

The contents of aforesaid letters annexed in the reply of show cause notice and the several correspondences as made by the writ petitioner/appellant with 15 the respondents and their officers as are on records, will give a proper picture about health condition of the petitioner at the material time.

The prescription dated 18th November, 1997 of Dr. Chandrasekhar Mukherjee annexed at page 113 of the paper book read such:

> "Dr. Chandra Shekhar Mukherji, DNB, MRCPsych, DHMSA Mrs. Nipa Dhar Phobic anxiety symptom in relation to flying.
>
> Adv. to stop flying with immediate effect.
>
> Sd/- Dr. CS Mukherji"

From the said prescription it appears that the writ petitioner was suffering from phobic anxiety syndrome in relation to flying and she was adviced to stop flying with immediate effect.

On 4th December, 1997, writ petitioner addressed a letter to the General Manager (OPS), Indian Airlines Ltd. praying annuity on the ground of her disability to perform flying duty due to Altitude phobia as detailed thereto. The said letter read such:

> "To The General Manger (OPS), Indian Airlines Limited, Eastern Region, Calcutta.
>
> I have been serving as Air-Hostess in your esteemed institution since 30.3.1987.
>
> I have recently developed an ailment which, specially on my flight duties or while travelling to work, I suffer from palpitation, choking sensation, dry mouth etc. I consulted Indian Airlines Medical Officer, Dr. 16 Partho Bhattacharya for the above mentioned problems. He kindly referred me to a consultant Psychiatrist, Dr. C.S. Mukherjee of I.A. panel.
>
> He (Dr. C. S. Mukherjee) has examined me thoroughly and has advised me not to undertake any further flight duties. His advice has been enclosed herewith for your kind consideration and perusal.
>
> May I request your kind self to permit me to proceed on to annuity to for this disability the earliest.

Thanking you, Yours faithfully, NIPA DHAR (Senior Air Hostess) EMP No. 406261"

On 15th December, 1997 General Manager(OPS) issued a letter to the Deputy General Manager (Med) under letter No.PS:CCA/PF/2949 enclosing the copy of medical certificate of Dr. Chandrasekhar Mukherjee on issue of claim of the appellant about annuity. The said letter read such:

"General Manager (OPS) Dy. General Manager(Med) ER, Calcutta IAL ER Calcutta CAL:OPS:CCA-PF/2449 15.12.1997 Sub: Annuity- A/H Nipa Dhar, Airhostees, EMP 406261 We are enclosing herewith a copy of letter dated 4.12.97 along with a copy of Medical certificate of Dr. Chandra Shekhar Mukherjeee, DNB, MRCPsych, DHMSA, Calcutta claiming annuity by the above Airhostess.

You are requested to convey your opinion on the subject.

Enclo: As above. General Manager (OPS) Calcutta"

On 18th March, 1998 the writ petitioner addressed a letter to the General Manager (Med) requesting to constitute a medical board for the purpose of grant of annuity as per the service condition namely the settlement. The said letter read such:

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" 18th March 1998

The General Manager(OPS)
Indian Airlines Ltd.
Eastern Region Calcutta
Respected Sir,

I would like to being to your notice that I have been ill for quite some time and had applied for annuity (Survival allowance) dated 4.12.1997 (RE No. 986) Kindly arrange for a medical board and my annuity to be sanction as early as possible.

Kindly endorse and obliged Thanking your Yours faithfully Nipa Dhar (Senior Airhostess) EMP No. 86261"

On 5th August, 1998 Manager(IFS) informed the writ petitioner to report to the Manager(Medical services) immediately on issue of annuity. The letter read such:

" Indian Airlines Limited

Mrs. Neepa Dhar
Calcutta

CAL:OPS:CCA-P:2819

Date : August 5th 1998

Sub: Annuity

This has reference to our letter No. CAL:OPS:CCA-PF:894 dated 30.6.98 and your subsequent reply dtd. 14.7.98 stating that you are still undergoing treatment through our medical services. You have not submitted any Medical Certificate to support your treatment. You are, therefore, advised to report to our Manager, Medical Services, immediately on receipt of this letter.

Manager(IFS) F: General Manager(Ops) CC: Manager, Medical Services (attn. Dr. Mrs. Roy) Kindly intimate us if she has reported to you and how long the treatment will take and kindly send her report for our necessary action. 18 Cc: Manager(Pers) PSU-This has reference to your letter No.CPSU:ANUTY:52:911 dtd. 27.7.98. We are enclosing herewith a duplicate ref. CAL:UPS:CCA-PF:2413 dtd. 30.6.98 addressed to Mrs. Neepa Dhar for your information."

On 7th August, 1998 Manager(Medical) IAL, ER, Calcutta informed the General Manager(OPS), IAL ER, Calcutta that the writ petitioner was referred to Dr. D. Bhattacharya, panel psychiatrist of IAL, on 6th May, 1998 and thereafter as per advice of Dr. Bhattacharya she was referred for psychometric test on 29th July, 1998 and she was going for that test on that date and final opinion about health condition would be considered by Dr. Bhattacharya after the psychometric report.

On 23rd November, 1998 psychometry test report was finalised by the department of Applied Psychology Service Programme, University of Calcutta The report read such:

> "Department of Applied Psychology Service Programme Unit University of Calcutta Rash Behari Shiksha Prangan 92, Acharya Prafulla Chandra Road Calcutta-700 009 A. Phy 2354 Dated, the 23.11.1998 Mrs. Nipa Dhar Age 35 yrs Sex F W/o Mr. Kamal Ranjan Dhar G.C 220/5 Sector-3, Salt Lake Calcutta-91 Ref. By Dr. D. Bhattacharyya Complaints 1. Altitude Phobia, 2. Lack of concentration, 3. Sleep disturbance Behaviour: almost cooperative, sometimes lack of concentration observed in her behaviour.

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Administered: 1. BG 2. DAP 3. TAT 4. RIBT Findings : Quantitative analysis of BG reveals that her Z score is 53 (normal range 60) which indicates that her visuo-motor gestalt functioning is not significantly impaired.

Qualitative analysis of BG reveals anxiety and insecurity producing compulsive tendency, conflict with authority figure.

DAP figures reveal poor impuls control tendency which may lead to pressure for motor activity. Need for dependency, immaturity and feeling of inadequacy are present. Somatic preoccupation, overt aggression and infatile social behaviour with regressive tendency are elicited. Environment is viewed as excessively constraining to her.

Rorschach psychograph reveal she sticks to practical everyday commonsense view of things. She expresses as overriding intellectual ambition without the ability to back it up. This may be because there are emotional interferences with her ability to sense to the essential interrelationship which do exits between the various facts of her experience. She exerts excessive control impulsive expression of emotionality and the socialized reponses trends to superficial. She is either being unable or unwilling to allow herself to strong emotional reaction even when situation wants to deep emotional response though has not stripped herself of her responsiveness to her own need and to reactivity to strong emotional impact from outside. Consequently she may be impersonal in occassions. She is withdrawn from reactivity to emotional impact from the environment, either because she is confused or threatened and withdraw as a difense.

Poorly structured TAT stories reveals she perceives her very much inadequate with relates to anxiety and uncertainty. She perceives temporary mule figure as strong, powerfull and aggressive and suffer from anxiety of heir employted by them. This feeling of in adequacy is also associated with her need for achievement though she attempts to over come with help from other. Her need for aggrassion associated with severe anxiety of loss which leads to depression. Her anxiety of loss of potency is mainly out of odedipal rivalry. She has tendency of self abusement and thus being rejected by contemporary male figure.

Impression: considering the case history and test data Mrs. Nipa Dhar suffering from anxiety disorder and can be put under the definite dygnostic category of simple phobia (DSM III-R).

A. Ghoshal In charge"

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On perusal of the said report it appears that an opinion was formed by the said authorities that the appellant/writ petitioner was suffering from "anxiety disorder" and was placed in the definite diagnostic category of simple phobia (DSN III-R).

In Dr. Bhattacharya's prescription dated 13th June, 1998 it was diagnosed with specific symptoms namely "phobia related to flying", "breathing distress", "palpitation", "low mood", "negative attitude". There is further noting that she was under psychiatric treatment and she was advised to report after three weeks. The prescription read such:

> "Dr. D. Bhattacharya MBBS DPM MD(Psy) Consultant Neuropsychiatrist 13.6.1998 Mrs. Nipa Dhar Phobia related to flying Breathing distress, Adv.
>
> ```
> Palpitation            1) Cap Fludac - 1 cap daily x 3 wks
> Low mood               2) Tab Serveeder- 1 tab at night
> -ve attitude                              x 3 days
> was under psychiatric
> treatment
>
> P-84/m/ulg
> BP110/70 m/ug
>                     To be reviewed after 3 wks."
> ```
>
> On 20th July, 1998 she reported for further check up to Dr. D.

Bhattacharya. There is a noting in the prescription that patient could not stand with medicine Fluxetine and Servedor combination. There is a further noting, she 21 like to leave the job due to phobia as and when require. The prescription read such:

> "Dr. D. Bhattacharya MBBS DPM MD(Psy) Consultant Neuropsychiatrist 20.7.1998 Mrs. Nipa Dhar Pt. could not stand with Adv.
>
> 'Fluxetine' 'Servedor' 1) Reftd. To Dept. of Applied Psychology combination (Science College) for psychometry started the medicines irregularly (including projective test and discontinued 3-4 days preferably) to exclude psychotic due to test if any due to give an H/o Obsessive thought imagination about the profile. With phobia during air flight - 1 yr Not yet responding to 2) Tab. Serlift 50 1 tab at night Medicine x 3 wk Behaviour therapy 3) Tab Servector 1 tb daily She likes to leave the job x 3 wk due to 'phobia'. 4) Tab. Trika 0.5 Â½ or 1 tab as needed."

On 30th November 1998 Dr. D. Bhattacharya checked up the writ petitioner/appellant and endorsement made in the prescription "psychometry done on 23rd November, 1998 suggesting simple phobia, at present patient feel better but

not free from phobic anxiety further medication prescribed." The prescription read such:

> "Dr. D. Bhattacharya MBBS DPM MD(Psy) Consultant Neuropsychiatrist 30.11.1998 Mrs. Nipa Dhar Psychometry done on 23.11.98 suggests simple phobia Adv.
>
> last review on 20.7.98 1) Tab. Servetor 1 tab daily x 6 wk at present pt feels better 2) Tab. Serlift 50 1 tab at night x 6wk but not free from phobic 3) Tab Trika 0.5 anxiety Â½ or 1 tab if needed."

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On 7th December, 1998 the petitioner wrote a letter to the General Manager(IFS) contending, inter alia, thereto that she had submitted all medical reports to prove illness to Dr. Mrs. Ray on 30th November, 1998. The letter read such:

> "Date 7.12.1998 The General Manager (IFS) Indian Airlines Ltd.
>
> Calcutta Dear Sir I do hereby inform you that I have submitted all the medical report to prove my illness as required by Indian Airlines medical department. All the medical report are submitted to Dr. (Mrs.) Roy on 30.11.98.
>
> Kindly do the needful.

Thanking you, Yours faithfully, Mrs. Nipa Dhar Senior Air Hostess."

On 26th May, 1999 the writ petitioner appellant addressed a letter to the Deputy General Manager(IFS), Indian Airlines referring her application for annuity dated 4th December, 1997 and prayed for necessary action to that effect on detailing submission of all papers, report of psychometry test etc. The letter dated 26th May, 1999 read such:

> " Date : 26.5.1999
> To
> The Dy. General Manager (IFS)
> Indian Airlines Limited
> Calcutta Base
>
> 23
>
> Dear Sir

I have developed a psychological ailment sometime in middle of 1997. I was referred to a psychiatrist Dr Chandra Sekhar Mukherjee (our panel doctor). He examined thoroughly and his suggestion was to stop flying immediately.

I applied for medical annuity on 04.12.1997 for my survival allowance. The Dr. Mrs. Roy our Manager Medical services of Indian Airlines sent me to another psychiatrist for second opinion. I was under Dr. D. Bhattachariya's treatment from 13.6.1998 to 30.11.1998. Psychometry was done on 23.11.1998. All the reports were submitted to Dr. Mrs. Roy on 30.11.1998.

Almost six months elapsed but my subsistence allowance has not been sanctioned. As I am without pay for last 21 months, kindly do the needful and relieve me of the increasing anxiety.

Thanking you, Yours faithfully Nipa Dhar Sr. Air Hostess Emp. No.406261"

By the letter dated 7th December, 1999 Deputy General Manager (IFS) informed the writ petitioner appellant to report to IAL, Medical Department along with medical papers. The letter read such:

" Indian Airlines Limited
Our reference CAL/IFS/CCA-7/3486 Date 7.12.99
Ms. Neepa Dhar
Sr. Airhostess
IAL ER Calcutta

You are advised to report to IAL Medical Department, Airlines House, Calcutta along with all Medical Papers at the earliest.

This is MOST URGENT.

f. Dy. General Manager (IFS) IAL ER Calcutta CC: Dy. G.M(Medical) IAL ER Calcutta"

On 4th May, 2000 writ petitioner wrote a letter to the concerned authority seeking sustenance allowance in the nature of annuity which read such:

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"

Dear Sir/Madam Dated 4th May, 2000 I have been suffering from phobia since September, 1997. On recommendation of Indian Airlines doctor, I reported to our panel psychiatrist. Who advised me to top

> flying immediately. For second opinion I was sent to Dr. Bhattachariya for treatment under who I have been treated since June 98 to April 2000. The psychomatric report from Raja Bazar Science College shows simple phobic anxiety.

As my mental state does not permit me to resume flying after sustained treatment for 2Â½ years, I have been also without pay for about 2Â½ years.

I therefore request you to start my sustenance allowance as per rules of Indian Airlnes and clear my backlog dues. This will enable me to tide over the financial crisis I am going through.

I have given a letter on 9th March 2000, to this effect, but I have not got any reply.

Thanking Yours faithfully Nipa Dhar (Sr. Airhostees) Emp.No. 406261. "

On 27th November, 2000 another letter was served to the concerned authority seeking for sustenance allowance in the form of annuity referring her ailments. The letter read such:

> "Dear Sir, I have been suffering from phobia since September, 1997. On recommendation I reported to our I.A. panel doctor (psychiatrist), who advised me to stop flying immediately Again for second opinion Dr. Mrs. Roy (our IA doctor) sent me to psychiatrist Dr. D. Bhattacharya, who is creating me since June 1998 to November, 2000. The psychomatric report from Raja Bazar Science College shows simple phobic anxiety.
>
> As my mental state foes not permit to resume flying duties for 3 years, I have been without pay for 3 years.
>
> I therefore request you to start my sustenance allowance as per I.A rules. This will enable me to tide over the financial crisis I am going through. I have given a letter on September 2000 to this effect, but I have not got any reply.
>
> Thanking you Yours faithfully Nipa Dhar (Sr. Airhostess) 25 Mrs. Nipa Dhar Emp No. 406261"

It appears that despite the aforesaid correspondences made regarding grant of annuity no response made by the said Company. The petitioner was treated further on 3rd April, 2000 by Dr. Bhattacharya. The prescription dated 20th December, 1999 and 3rd April, 2000 in one letter head paper of Dr. Bhattacharya read such:

"Dr. D. Bhattacharya MBBS DPM MD(Psy) Consultant Neuropsychiatrist 20.12.1999 Mrs. Nipa Dhar BP 120/80 MS-better Adv.

Mood-better 1) Tab Serlift 50- 1 tab twice daily x 60 day Phobia specific to same 2) Tab Servector Â½ tab daily x 40 day Situation/activity present

3) Tab Trika 0.25 1 tab sos if feels anxious 3.4.2000 MS better 1) Tab Serlift 50 1 tab at night Mood Stable (relatively) x 120 days Occasional anxiety/grievances Man worse 2) Tab Trika 0.25 1 tab or 2 tabs sos"

On 23rd October, 2000 Dr. Bhattacharya again prescribed medicine for four months and on 19th March, 2001 further prescription made prescribing medicine Serlift 25 mg and tab Zap 0.5 mg. The writ petitioner was directed to appear after four months i.e. 19th July, 2001. In this prescription it is noted occasional phobia anxiety. Those prescription read such:

"Dr. D. Bhattacharya MBBS DPM MD(Psy) 26 Consultant Neuropsychiatrist 23.10.2000 Mrs. Nipa Dhar At present MS-OK Adv.

Except occasional anxiety Tab Serlift -25 1 tab at night bonts/phobia x 4 months BP 100/70 mm/hg Tab Trika 0.25 P-84 m/ug 1 or 2 tabs if necessary.

19.3.2001

MS-OK Adv.
Occasional phobic anxiety Tab Serlift 25 1 tab at night
(Air crash/insecurity) x 4 months
otherwise no Tab Zap 0.5 1 tab at night
somatizati for 10-20 day as directed."

While the appellant was undergoing treatment for her illness from phobic anxiety in flying, all on a sudden, a show cause notice was served asking the appellant as to why her service would not be terminated. This notice dated 30th April, 2001 read such (again reproduced for necessary discussion):

"Ms. Nipa Dhar Ms. Nipa Dhar
Airhostess (Sr.) Block GC, 220/5
Emp.No. 406261 Salt Lake City
IAL.IFS Deptt Calcutta-700 091
Dum Dum

Ref.No. CIR/DISO Dated 30.4.2001

Re: Show cause notice

Upon perusal of your service records, it is observed that you are not being rostered for flying duties since 01.09.1997 on account of your weight remaining in excess of the prescribed limit.

You were advised to undergo medical check up from time to time. However, on your own volition you did not do so in true earnest and also did not follow up the medical recommendation and treatment properly. Because of this non-cooperation from your end. You have not responded to the treatment. Accordingly, you are still over weight and not fit for flying duties. It is also observed that your past attendance records are very unsatisfactory. On several occasion you remained absent unauthorisedly 27 without any intimation/permission. It is accordingly, presumed that you are no more interested to continue with the service of this Company.

You are hereby called upon to show cause within 7 days from the receipt of this letter as to why your service shall not be terminated in terms of Clause 9(ii)(b) of the letter of appointment as Trainee Airhostess under reference No. CAI/PER/JBS/OPS/19/6129 dated 13.2.1987. You will be allowed personal hearing to explain your case, if you so desire. You are warned that if you fail to submit any reply to this notice within the stipulated date, if will be presumed that you have none to offer and orders will be passed accordingly without making any reference to you.

REGIONAL DIRECTOR(EAST)"

The contents of the said show cause notice particularly the second paragraph of the notice is an admission about medical unfitness for flying duties on the part of the Airlines Authority namely the Regional Director (East), who issued the show cause notice, that as the appellant did not follow up medical recommendation and treatment properly there was little response of treatment and as such she was over weight and not fit for flying. As already discussed by referring the prescription of Dr. D. Bhattacharya dated 20th December, 1999 and 19th March, 2001 that she was still under treatment and next date of check up was fixed after 4 months i.e. 19th July, 2001. As such on the basis of admitted documents namely the prescriptions and the treatment reports which was conducted by the Indian Airlines Authority through their panel psychiatrist including the psychometry test, it is ex-facie proved that petitioner/appellant was suffering from phobic anxiety relating to flying, a psychiatric problem and was under medication even on the dates namely when show cause notice dated 30th April, 2001 was served and when order of termination passed on 22.6.2001. 28 Hence, the allegation of show cause notice that she was

negligent to follow the treatment had no factual foundation.

From show cause notice aforesaid it is also crystal clear that the petitioner's suffering from over- weight problem was not due to her voluntary action, namely willful consumption of food etc. but such was related with medicine used to cure her illness of phobic anxiety. From the aforesaid prescription it appears that the petitioner was treated with medicine "Serlift". I will discuss the chemical reaction of this medicine "Serlift" as well as other medicines consumed by the petitioner for long duration as per medical advice of the panel Doctor of Indian Airlines subsequently to co-relate the issue about effect of those medicine and contributory factor to increase body weight, by bio- chemical reaction of medicine stimulating the metabolic system of particular cell of human body.

The writ petitioner filed her reply of show cause notice on 7th May, 2001 contending, inter alia, about her illness by detailing all medical test reports and annexing nine documents as already discussed above. It was a positive case of the writ petitioner appellant that she was suffering from phobic anxiety relating to flying which may be called as "Altitude phobia" under medical term and such anxiety syndrome further increased due to inaction of the authorities to grant annuity on medical ground in terms of memo of settlement. The reply dated 7th May, 2001 read such(reproduce again for analysis):

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> "To The Regional Director (East), Indian Airlines Limited, 39,
> Chittaranjan Avenue, Calcutta- 700 012.
>
> Sub: Reply to show cause notice.

Dear Sir, This is in reference to the letter No. CIR/DISC/1672 dated 30.04.2001 I would like to inform you that though initially I was grounded since 01.09.1997 for being marginally over-weight (500 gms), I remained off roster due to a psychological ailment, which prevented me from flying.

This problem started from middle of 1997 (May / June) and when it became unbearable I was forced to consult on panel psychiatrist Dr. C.S. Mukherjee's on November, 1997. Dr. C.S.Mukherjee advised me to stop flying. I subsequently applied for medical annuity as per Dr. C.S.Mukherjee's advice. Then our Indian Airlines' doctor Mrs. Roy advised me to consult another panel psychiatrist. Dr. D. Bhattacharya for treatment and advice. Dr. D. Bhattacharya sent me for psychometry- test and his treatment is continuing till date.

I have submitted the report to Dr. Mrs. Roy from time to time and insisted on weight check but Mrs. Roy (our I.A doctor) felt weight check- up was of secondary

importance and she insisted on the psychological treatment so, it is not true that I did not attend to weight checks on my own volition. There has been waxing and waning of symptoms without complete remission. It is also untrue that my past attendance was very unsatisfactory, prior to this letter there has been no letters issued regarding my attendance or non-cooperation regarding medical treatment.

I have repeatedly reminded my department regarding my medical annuity so, your presumption that I am no longer interested to continue my service is totally wrong.

I would request you to overcome the communication gap with various departments before issuing such threatening letters. As you are now aware that I am suffering from phobic anxiety and this letter has increased it, so kindly go through the accompanying documents and please sanction my long over-due medical annuity. I have attached nine documents including Dr. C.S. Mukherjee's medical advice, Dr. Bhattacharya's prescriptions, psychometry report, applications for annuity etc. etc. Thanking you, Yours faithfully Nipa Dhar, (Sr. Airhostess) Emp.No. 406261 "

30

The relevant nine documents have already referred to. Without considering the question of grant of annuity and without considering the admitted position that over weight was due to consumption of medicine to cure illness of phobic anxiety and the relevant fact that petitioner was not negligent to cure herself following treatment regularly, a letter of termination of service was served on 22nd June, 2001. Said letter reads such(reproduced again for analysis):

"Ms. Nipa Dhar,
Airhostess(Sr.)
Emp.No. 406261
IAL, IFS Deptt.
Dum Dum

Ms.Nipa Dhar
Block G C,
220/5 Salt Lake City,
Kolkata -700 091

Ref. No. CIR/DISC/ 2424

Date: 22/06/2001

Sub: Termination of Service

This has reference to our letter No. CIR/DISC/1672 dated 30.04.2001 calling upon you to show cause as to why your service shall not be terminated in terms of Clause 9(ii)(b) of the letter of your appointment as Trainee Airhostess and your reply dated 07.05.2001 thereto.

I have carefully considered your above reply as well as all the records relating to your service. I find from the records that you were overweight even at the initial time of appointment as Trainee Airhostess in February 1987 and that you were advised to being down you weight to the prescribed limit within three months from 13.2.1987.

you were again advised to being down your weight to the prescribed limits vide the letter dated 10th April 1987 appointing you as Airhostess. I do not find any thing from the records that you could being down your weight within the prescribed limit. In view of your failure to bring down your weight, the airline has not been able to roster you for flights ever since September. 1997. The weight check conducted on 23.8.1999 revealed that you had exceeded the weight limit by 15 kgs. Your failure to being down your weight within the prescribed limits has resulted in your not being available to the airline for flying duties for nearly four years. 31

Your contention in your reply that you are undergoing treatment for your psychological problems and have sought for annuity are not relevant inasmuch as you were grounded on account of your having failed to maintain your weight within the prescribed limits for four years. Your further contention that in spite of your insistence to the contrary. You were advised by Dr(Mrs.) Roy, senior Manager (Medial) that your weight problem was of secondary importance, is not borne out of the facts on record.

Being a member of the Cabin Crew, this company is well within its right to expect that you take all steps to keep your weight within prescribed limits so that your service is available for the company. Your inability to do so has resulted in your services not being available to operate flights ever since September, 1997. Considering that your services have not been available for operation of flights for nearly four years on account of your failure to maintain your weight within the laid down limits the company can no longer afford to continue to retain your on its payroll, especially in this competitive aviation scenario.

Accordingly, in terms of Clause 9(ii)(b) of the letter of appointment as Trainee Airhostess under reference No. CAL/PER/JBS/OPS/19/6129 dated 13/2/1987 read with Clause 5(b) of the letter of your appointment as Airhostess under reference No. CAL/PER/JBS/OPS/19/179 dated 10.4.1987, your services are hereby dispensed with dispensed with. With immediate effect.

A cheque bearing No. 420475 dated 22.06.2001 drawn on S.B.I. Commercial Branch. Kolkata for Rs. 17, 199.00 is enclosed purely as a gesture of goodwill.

Your accounts will be settled after checking your commitments Sd/- Vikram Badshah Regional Director(East)"

From the said letter it appears that Indian Airlines authority considered that undergoing of treatment for psychological problem and seeking annuity therefor, were not at all relevant for consideration of the service termination issue. The over weight issue only was considered without taking note of contributory factors which caused over weight and phobic anxiety including the treatment thereof though in show cause notice allegation was non following treatment. The petitioner service was

terminated applying dry words of clause 9

(ii) (b) of the letter of appointment which provides that the service of Air Hostess 32 is liable to be terminated or may be terminated in the contingency of over weight. Clause 9(ii) (b) of the appointment letter as trainee read such:

> " During the training period and on appointment as Airhostess, your services are liable to be terminated under the following circumstances:-
>
> i) .....
>
> ii) in the event of -
> (a) .....
> (b) Your not maintaining weight within the prescribed limit; and"

> When the appellant was appointed on completion of training period, a letter of appointment dated 10th April, 1987 was issued contending the said clause of liability for termination of service being clause 5(b) which read such:
>
> " During the tenure of your service with Indian Airlines, your services are liable to be terminated if you-
>
> a) .....
> b) do not maintain weight within the prescribed limits;
> c) .....
> d) ....."

> The clause 9(ii) (b) of the appointment letter starts with the language that service is liable to be terminated. The word "liable to be terminated" under the service condition to be looked into on considering the last memo of settlement dated 11th April, 1996. In terms of Rule 58 of the Industrial Dispute (Central Rules), 1957, a memorandum of settlement dated 11th April, 1996, was reached by Indian Airlines Ltd. and Air Corporation Employees Union. Under the terms of settlement the provision for annuity due to medical unfitness for cabin crew, was provided. The writ petitioner/appellant, as Air Hostess, is covered under the said provision as cabin crew. It is provided that the amount of annuity as quantified by settlement would be provided to the cabin crew who would be declared 33 medically unfit for flying duties and such annuity would be payable till the cabin crew attains the age of 58 years or the date of superannuation whichever is earlier and the said provision was made applicable to

those cabin crew who would be declared medically unfit on 1st January, 1995 or afterwards. The relevant provision of memorandum of settlement read such:

"Indian Airlines (Rule 58 of Industrial Disputes (Central Rules 1957) Memorandum of Settlement Name of the parties :Indian Airlines Limited 113, Gurudwara Rakabganj Road New Delhi-110 001 & Air Corporation Employees Union Central Office Bombay Representing Employer Representing Workmen CAPL S.T.DEO A. R. Balasubramanian Dy. Managing Director President N.C. Ghosh President Director-Finance R. Ramanathan Gurdip Singh General Secretary Director, Personnel Short Recital of the case WHEREAS the Air Corporation Employees' Union (ACEU) a trade union registered under the Indian Trade Unions Act, 1926 (hereinafter called the Union) signed a Memorandum of Settlement on the 21st of July, 1989 regarding the wages of the employees for the period 1.10.1985 to 31.8.1990.

AND WHEREAS the Ministry of Labour vide their order No.L-11011/3/89-IR(Misc.) dated 7th of December, 1990 referred the matter with regard to wage structure and other allowances and the terms and conditions of employees for the period of five years w.e.f. 1.9.1990 to the National Industrial Tribunal at Bombay.

AND WHEREAS the Union submitted their Charter of Demands to the Management vide its letter No.ACEU/CO/I/93 dated 5th of February, 34 1993 and subsequent amendment vide their letter No.ACEU/CO/I dated nil;

AND WHEREAS the union signed a settlement regarding payment of interim relief pending final settlement when arrived at.

AND WHEREAS this payment of interim relief was subject to the adjustment against the amount that may be due against final wage settlement effective 1.9.1990 and or the award of the National Industrial Tribunal as the case may be;

AND WHEREAS during the pendency of the Reference before the National Industrial Tribunal, the parties discussed the charter of demands submitted by the Union and have arrived at a settlement as detailed below;

TERMS OF SETTLEMENT This settlement is only in respect of categories of workmen in the under mentioned pay scales, excluding the technical categories of workmen represented by the Union. The Charter of Demands for the technical categories of workmen represented by the Union will be discussed separately.

Categories	Pay Scales

```
  Cabin Crew                    Rs. 1555-50-2105-60-2465
  Cabin Crew (Sr. Catg)         Rs. 1755-50-2105-60-2765
CABIN CREW
1555-2465            2480-50-2680-60-2800          3980-100-4680-
120-
               70-2940-80-3100-90-3280       5520-150-5970
               100-3480-125-3855
1755-2765            2680-60-2800-70-2940          4380-100-4680-
120-
               80-3100-90-3280-100           5520-150-6720
               3480-125-4480

ANNUITY ON MEDICAL UNFITNESS FOR CABIN CREW
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The parties agree that the quantum of annuity payable to the cabin crew declared medically unfit for flying duties, covered by this Settlement shall be revised as follows:-

Period of service as cabin crew quantum Continuous service of more than 70% of the basic pay plus DA 5 years but less than 10 years (DA being limited to Rs.80 p.m) Continuous service of 10 years 80% of the basic pay plus DA or more, but less than 15 years (DA being limited to Rs.80 p.m) Continuous service of 15 years 90% of the basic pay plus DA or more, but less than 20 years (DA being limited to Rs.80 p.m) continuous service of 20 years 95% of the basic pay plus DA or more (DA being limited to Rs.80 p.m) 35 The annuity shall be payable until the medically declared unfit cabin crew attains the age of 58 years or the date of demise whichever is earlier. This will be applicable to cabin crew declared medically unfit on 1.1.1995 afterwards.

The other terms and conditions relating to the payment of Annuity on medical unfitness shall remain unchanged.

GENERAL The Management recognises that the Union represents the employees, the Union recognises the right of the Management to manage the affairs of the Company and all negotiations must take place on the basis of mutual trust and undertaking.

The Management and Union agree to form Joint Consultative Committee consisting of representatives of the Management and the Union. This Committee will discuss matters, barring such matters as fall within the purview of collective bargaining. All unanimous decisions of the Committee will be implemented by the Management and the employees.

Except where otherwise provided the terms of the Settlement shall have effect from 1.9.1990 and shall remain in force till 31.8.1995 and thereafter until the settlement is terminated by either party by giving a minimum of two month's notice in writing of termination as provided under the Industrial Disputes Act, 1947.

During the currency of the settlement, neither party shall raise any dispute by recourse to the procedure under the Industrial Disputes Act, 1947 or otherwise with regard to any of the terms and conditions of service covered by or dropped in this settlement.

It is further agreed that existing benefits/obligations/agreements/awards/settlement etc. shall continue unaffected except in so far as the same are specifically modified by any of the terms of this settlement or under provisions of any law for the time being in force.

The settlement arrived at herein would not, in any manner, constitute any concession or waiver on the part of either party in respect of the terms of reference relating to party between the corresponding categories in Indian Airlines and Air India employees and inter-relativity within the organisation itself, pending before the NIT and other issues, rights and contentions of the parties before the NIT.

The union agrees that all the demands raised in the aforementioned Charter of Demands by the Union are fully and finally settled by this settlement and further agree that during the currency of this settlement, 36 they will not raise any further demands involving financial commitments directly or indirectly.

Consequent upon the signing of the settlement, the terms of reference No. 19 of the Terms of Reference pending before the National Industrial Tribunal at Bombay stands settled between the parties.

This settlement would be jointly filed by the parties before the NIT at Bombay with a prayer to pass an award in terms of this Settlement.

In view of the financial constraints of the company, it is agreed to defer payment of the arrears arising out of this settlement. The arrears will be paid in installments in consultation with the Union.

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         Signed on this 11th day of April 1996
         Signature of Parties
         Representing Management               Representing Union
         1. (CAPT.S.T.DEO)        1.(A.R. BALASUBRAMANIAN)

DY. MANAGING DIRECTOR            PRESIDENT

        2. (S.C. GHOSH)                  2. (R.RAMANATHAN)

  DIRECTOR (FINANCE) GENERAL SECRETARY
       3. (GURDIP SINGH)

  (DIRECTOR PERSONEL)
     WITNESS
     (KAPIL KAUL)         (SAMRESH BASU ROY)
     GENERAL MANAGER (IR) VICE PRESIDENT
     (A.K. SAXENA)        (P. JAYACHANDRAN)
     OFFG. GM (FIN)             VICE PRESIDENT

     Manager (IR)                (J.G. GHOSH)
                                 ASST. GENERAL SECY
                                       Sd/-
```

(W.T.S. DAVID)
REGIONAL SECY, MADRAS
(S.K. ELISHA)
REGIONAL SECY, HYD.
(C.D. SOMAN)
REGIONAL SECY, BOMBAY.
(ASHIM KUMAR SINHA)
REGIONAL SECY, Calcutta

Copy forwarded to:

cc. Asst. Labour Commissioner (Central). New Delhi cc. Regional Labour Commissioner (Central), New Delhi cc. Chief Labour Commissioner (Central). New Delhi cc. Secretary to the Government of India. Ministry of Labour, New Delhi" 37 Prior to this memorandum of settlement dated 11th April, 1996 as quoted above, there was another memorandum of settlement in terms of said Rule, which was existing when petitioner joined in service. This settlement was dated 10th January, 1972. Under this settlement, provision for annuity to medically unfit cabin crew, was provided under Clause 12 of the said settlement, which read such:

"12. ANNUITY FOR MEDICALLY UNFIT CABIN CREW:

(i) All Cabin Crew who are found medically unfit for flying duties will be paid Annuity at the following rates:-

Continuous service of- 65% of the total of basic pay plus DA More than 5 years but (DA being limited to Rs. 100 per month) less than 10 years Continuous service of 10 ;years 70% of the total of basic pay plus DA Or more but less than 15 years (DA being limited to Rs. 100 per month) Continuous service of 15 years 75% of the total of basic pay plus DA Or more but less than 20 years (DA being limited to Rs. 100 per month

(ii) The payment of Annuity will be subject to the following conditions:-

A/No annuity will be admissible if the total service of the Cabin Crew in the Corporation immediately prior to being declared medically unfit does not exceed five years as Cabin Crew.

B/The annuity will be payable until the age of 30 years or her marriage whichever is earlier, in the case of Air Hostesses and 55 years in the case of Flight Stewards. The Cabin Crew will have to produce life certificate or other suitable evidence acceptable to the Corporation as and when required.

C/The annuity will be paid monthly on normal salary disbursement day.

D/The payment of annuity will commence from the date of disablement due to personal injury, illness, disease or disability of the Cabin Crew which prevents him/her from attending to his/her occupation as a Cabin Crew as declared by the Medical authority prescribed by the Corporation, and as such taken off his/her flying

duties by the Corporation but only after he/she has exhausted all his/her flying duties by the Corporation but only after he/she has exhausted all his/her casual leave, sick leave, privilege leave and special sick leave standing to his/her credit.

38

Notwithstanding the provisions of clauses (I) and (ii) above, a Cabin Crew will not be entitled to the benefits contained therein if he/she is declared medically unfit for flying duties as a direct or indirect result of:-

A/ intentional self-injury B/ attempted suicide C/ provoked assault D/ chronic alcoholism or habitual taking of narcotic drugs E/ venereal disease A Cabin Crew after being granted benefits under clauses (I) and (ii) above in the event of regaining his/her medical fitness as certified by the prescribed Medical Board/Authority shall re-offer his/her services as a Cabin Crew to the Corporation who will then reinstate him/her in the grade and seniority held by him/her prior to his/her disablement. The payment of annuity to him/her will cease from the date he/she is so re-employed by the Corporation. Similarly, a medically unfit Cabin Crew will not be entitled to the annuity if he/she accepts a flying job outside the Corporation."

An award was accordingly passed.

Hence, when the petitioner joined in the service in terms of appointment letter dated 13th February, 1987, at that time there was provision for grant of annuity to the medically unfit cabin crew who would be unable for flying duties. The contractual term of appointment that service would be liable to be terminated in the event of non-maintaining the standard weight requirement, is a provision which to be looked into on considering the memorandum of settlement reached under the Industrial Dispute Act and the relevant rule thereof which provides that the cabin crew who would be unable to perform flying duties due to medical ground would be provided with annuity. Beside the annuity clause, which also is within the service condition of the cabin crew, the airlines authority keeping in view of the constitutional mandate for providing job to the person who are disable to work in a particular field, issued a circular letter of alternative job 39 and issued staff employment notice No.1 of 2001 on 19th June, 2001 which is prior to the date of termination of service dated 22nd June, 2001. The said staff employment notice of 19th June, 2001 further provided scope to file application on or before 10th July, 2001. Said employment notice reads such:

```
"                          Personnel Services Unit.
                           NSCBI Airport.
                           Dum Dum Kolkata-52
                           Date: 19.06.2001
Ref No. CPSU IFS 88 602
            STAFF EMPLOYMENT NOTICE No. 1 OF 2001
                  FLIGHT KITCHEN SUPERVISORS
```

Applications are invited from flying Cabin Crew who have either been declared unfit for flying duties or are desirous of taking a ground job to be deployed as Flight Kitchen Supervisors No of positions: 8 The board functions will be as follows:

a) Monitoring of the flight wise meal orders (Veg. & Non-veg & special meals etc)

b) Monitoring of day-to-day menus.

c) Monitoring of Quantity of Meals' items.

d) Random checks of Quantity of Meals' items.

e) Availability and cleanliness of the equipment

f) Inspection for Pre Set Tray.

The deployment will be for a period of 3 years extendable on requirement but which opinion.

The selection of Cabin Crew from amongst the applicants will be on the basis of interview. Preference will be given to Cabin Crew who have been declared unfit for flying duties broadly due to overweight followed by such of the cabin crew who are desirous of taking ground job. During the period of deployment the flight kitchen supervisors would retain their seniority in the parent cadre.

Cabin Crew deployed as Flight Kitchen Supervisors will be paid allowances related to the scale of pay and will continue to draw fixed productivity allowance based on the years of service except flying related incentive payments. Asstt. Manager (Intlight Services) and above will not be capable to apply for this post.

Cabin crew who are desirous to be considered may send their applications on plain paper mentioning particulars, as per format given below 40

i) post applied for ii) name iii) Existing Pay Scale IV) State Employment Notice No. V) I.A service record:

(from the date of initial appointment)

Designation	Deptt	Date of joining in IA	Date of entry in the present scale of pay	Details of posting if any	Date of birth	Remarks

VI) Education

Exams.	Univs Board	School college	Year passing	of Subjects	Percentage

vii) Whether grounded due to medical reasons/over-weight?

(Tick whichever is applicable) YES NO

viii) If grounded since when and reasons thereof.

ix) Any other information.

Signature.....

Name.....

Designation.....

Clock/Staff No.....

Region.....

The applications should be sent to the office of Dy. Manager (Pers), LAL NSCBI Airport. Dum Dum Kolkata-52, so as to reach him not later than 10th July, 2001.

(S.N. BHATTACHARYA) for GENERAL MANAGER (PERS) CC: General Manager (Personnel), ER, Kolkata CC: Dy. General Manager (IFS), Dum Dum CC: Dy. Manager (P). PSU, NSCBI Airport. Dum Dum CC: All Notice Boards. IAL, Kolkata"

From the said staff employment notice, it appears that preferential treatment was allowed to be given to the cabin crew who would be declared unfit 41 for flying duties particularly due to over weight fixing last date of application 10th day of July, 2001.

The clause 9 (ii) (b) as has been applied by the Airlines authority to terminate the service of the appellant requires an interpretation on the reflection of said employment notice. Letter of appointment as trainee reproduced again:-

> " During the training period and on appointment as Airhostess, your services are liable to be terminated under the following circumstances :-
>
> i) .....
> ii) in the event of-

(a) .....

(b) Your not maintaining weight within the prescribed limit and "

On completion of the training period the petitioner appellant was appointed in a permanent post of Air Hostess. The appointment letter read such:

> "Mis. Nipa Ghosh H6/5, Labony Estate, Salt Lake, Calcutta- 700 064 Ref. No. CAL: PKR:JBS:OPS:19:179 Date: 10th April, 1987 Sub: Appointment-Airhostess This is further to our letter No. Cal/per/jbs/ops/19/6/6129 dated 13th February, 1987 appointing you as Trainee Airhostess. In terms of the above mentioned letter and in view of your successful completion of training, we are pleased to appoint you as an Airhostess with effect from 30th March, 1987 in the pay scale of Rs. 600-30-750-40-950-50-1050 plus other allowances as admissible from time to time under the Indian Airlines Service Rules.
>
> You will be on probation for a period of six months initially. If, during such probationary period, your services are not found satisfactory, the period of probation may be extended or, alternatively, your services may be terminated. You will not be deemed to be confirmed in your post, even of expiry of the said period, unless a specific order is issued to this effect.

42

> During the tenure of your service in the Indian Airlines you will be governed by Indian Airlines Rules, applicable to the Flying Crew and standing Orders concerning discipline and appeals, as framed and amended by Indian Airlines from time to time.
>
> During the tenure of your service with Indian Airlines, your services are liable to be terminated if you-
>
> a) fail to maintain normal vision without glasses;
>
> b) do not maintain weight within the prescribed limits;
>
> c) develop air-sickness; and
>
> d) get married within 4 years of your appointment as Airhostess.
>
> In terms and conditions as stipulated in the letter appointing you as Trainee Airhostess, you are required to serve Indian Airlines for a minimum period of 36 months from the date of your appointment as Airhostess. Any unauthorized absence on your part will not reckon for calculation of the aforesaid 36 months of service and the said contractual period gets automatically extended to that extent.

e) your failing to bring down your weight to the prescribed limit within three months time for 13-2-1987.

REGIONAL DIRECTOR Eastern Region.

cc. Director of Operations, IA: HQrb., New Delhi.

cc. Operations Manager, IA: Dum Dum.

cc. Finance Manager, IA: Calcutta.

cc. Manager, Stores & Purchases, IA: Dum Dum.

cc. Transport Manager, IA: Dum Dum cc. Dy. Chief Medical Officer, Calcutta.

cc. Sr. Security Officer, I.A., Dum Dum.

cc. Asst. Finance Manager, Pay Roll Sec, IA, Calcutta. cc. P/file.

I, ----------, hereby accept the terms and conditions of service as given above.

Dated 15-04-1987 Signature"

It is accepted by the respondent Airlines Authority that appellant's service was confirmed, subsequently. On a bare reading of the appointment letter as a trainee Air Hostess and appointment letter in permanent post of Air Hostess, it appears that the airlines authority have used the word "service may liable to be terminated if somebody does not maintain weight within prescribed limit". From 43 the said appointment letter two points are very relevant namely (i) "service liable to be terminated" and (ii) "do not maintain weight". The words "do not maintain weight" is suggestive of the fact that somebody willfully is not maintaining the weight within the prescribed limit. Hence, as a corollary failure to maintain standard prescribed body weight if due to non-voluntary action for the reasons namely consumption of such type of medicine which increase body weight or for genetical reason of cell activity responsible for body weight, surely that cannot be considered as a voluntary action for non-maintaining weight within prescribed limit. For that reason in mind, possibly the airlines authority has used the word in the appointment letter that service is liable to be terminated. The word liable to be terminated provides a scope for consideration of the issue whether increase of body weight is due to voluntary action or non-voluntary action. Taking note of the condition of appointment letter along with memorandum of settlement providing annuity clause due to medical unfitness to perform flying duty and the employment notification providing preference to alternative job who are unfit for flying duty, it is clear that service of an air hostess may be terminated due to failure to maintain standard body weight, if and only if, such over weight is not caused due to any medical ground. The provision for grant of annuity accordingly provides eligibility condition as "medically unfit to discharge duty of cabin crew" which may be for any ailment including obesity factor due to application of medicine which stimulates the body cell to

increase body weight and for that reason naturally cabin crew will not be blamed, as it is non-voluntary action wherein the person concerned has no role to play or control. Further more if 44 somebody suffers from any illness and thereby becomes medically unfit for flying duties, the provision of annuity would be applicable. From the prescription of Dr. D. Bhattacharya and the psychometry test as well as medicine as was prescribed and consumed by the petitioner/appellant, it appears that suffering of the petitioner is from "phobic anxiety to flying" which was known to the authorities concerned and petitioner/appellant made out a case for fair consideration regarding grant of annuity, but the authority concerned did not refer her case to the medical board for due consideration of her claim. It further appears that while she was undergoing treatment, at that point, notice of termination was served and her answer detailing her suffering from phobic anxiety in flying duty was considered only to reject it by one word "irrelevant".

On the aforesaid factual matrix of the case the appellant challenged the order of termination. The learned trial judge did not grant any relief.

It appears from the order of the learned trial Judge dated 20th January, 2004 that the learned Trial Judge considered the issue in the angle of contractual term of clause 9(ii) (b) aforesaid and disposed the writ application by not interfering with order of termination of service, but directed the respondents to consider her case for post of Kitchen Supervisor sympathetically, if she was found suitable.

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On the aforesaid factual premises, the writ petitioner/appellant has urged the following points for our consideration:

> i) That when admittedly the appellant was suffering from phobic anxiety in relation to flying and admittedly when she was undergoing treatment, letter of show cause for termination of service, was bad in law and on breach of Article 14 and 21 of the Constitution of India as well as provisions of Disability Act.
>
> ii) That under the service condition when letter of appointment was required to be considered along with terms of settlement providing annuity to the cabin crew medically unfit for flying duty by providing alternative job in terms of employment notification, the aviation company did not consider it, which hit by just fair and reasonableness principle, facet of Article 14 of Constitution of India.
>
> iii) That when writ petitioner/appellant was undergoing treatment to cure "Altitude Phobia" and over weight was caused due to reaction of medicine "Serlift", the termination of service was per se arbitrary action, in terms of Article 14 of the Constitution of India and same is also against the social justice concept as well as an action, which is squarely attracted by 'malice in law' principle.

iv) That the authority concerned when was bound to consider the question of annuity prior to termination of service, which they did 46 not, on breach of terms of settlement, is attracted by principle "Malice in law".

v) That when the authority concerned granted annuity to other employees identically placed, who suffered problem to perform flying duties, non-consideration of the case of appellant, is discriminatory under Article 14 of the constitution of India.

vi) That the appellant petitioner was not provided with relief in terms of statutory provision "The persons with disabilities (Equal Opportunity, Protection of Rights, Full Participation) Act, 1995" for brevity earlier referred to as disability Act, which provides scope of an alternative job without dispensing with service.

In response to the contention made by the appellant, it is the submission of the respondent aviation company,

(i) That writ application is not maintainable on the grievance made as service was terminated in terms of contractual terms of appointment and there was no public element involved in the decision impugned.

(ii) Terms of settlement could not be implemented by the writ Court, which by raising an industrial dispute, could have been resolved. 47

(iii) The question of annuity could not be considered as never the appellant was declared medically unfit for flying duties by the medical board.

(iv) Disability Act has no applicability

(v) Termination was justified, as petitioner failed to maintain standard

body weight, a norm fixed as per service condition.

Having regard to the rival contentions and arguments made by the parties the following points emerge for our consideration:

i) Is the writ application maintainable on the factual premises admitted and on the legal questions canvassed?

ii) If the writ application is maintainable, whether order of termination may pass the test of Article 14 of Constitution of India, satisfying ingredients of reasonableness, non-arbitrary & non-discriminatory concept and also the concept of malice in law on factual and legal premises as pleaded and canvassed?

iii) Whether decision making process of termination of service is legal and valid by applying the terms of appointment, notification of 48 employment and terms of settlement and provision of alternative job under Disability Act, out come of constitutional mandate?

iv) What relief, if any could be granted by the Court?

For effective adjudication of aforesaid questions as framed, those are taken up for consideration analogously.

The terms of settlement under Rule 58 of the Industrial Dispute Central Rules, 1957, is also condition of service, whereby provision made that when a cabin crew would be declared medically unfit for flying duties, he/she would be entitled to get annuity as per quantum fixed by said settlement, till the date of superannuation or the date of demise whichever is earlier. The said memorandum of settlement has already been quoted earlier. The word annuity has been defined in Black's Law Dictionary, 8th edition by Bryan A. Garner, Editor-in-Chief as an obligation to pay a stated sum usually monthly or annually to a stated recipient. Settlement under said rule of Industrial Dispute Central Rules, is also terms of conditions of service. On bare reading of the annuity clause of settlement dated 10th January, 1972 read and subsequent settlement dated 11th April, 1996, it appears that medical unfitness for flying duties, is sine- qua-non for grant of annuity to the cabin crew.

It is true that an Air Hostess who is also a cabin crew, is appointed with the condition of maintaining standard body weight as per norms prescribed 49 through out the service carrier as Air Hostess. It is provided in the appointment letter that service is liable to be terminated if he or she fails to maintain standard body weight. In the letter of appointment dated 13th February, 1987, as trainee air hostess, clause 9(ii) (b) is that condition of maintaining weight within the prescribed limit. Subsequently when appointment was confirmed after completion of training period, by the letter dated 10th April, 1987, identical condition was incorporated in the appointment letter under clause 5 sub clause

(b) which provides that the service of the writ petitioner would be liable to be terminated if weight is not maintained within the prescribed limit. So far as imposition of such a term simpliciter subject to other constitutional safeguards to retain service by providing alternative job in the organisation in the contractual field of appointment for the cabin crew in general and more particularly for the air hostess, cannot be said as unjustified condition as the air hostesses are required to perform duties in the air craft while it is in motion in high altitude which naturally requires swift and careful movement. Such service condition of maintaining specified body weight except of those cases where increase of body weight for medical or genetical reason is not uncommon in service rule. There are so many services which require maintenance of physical standard for effective performance of duties. It is within the domain of employer to prescribe condition to engage a person in a particular job having regard to its peculiar feature and contingency involved thereto, as for example, military service, police service etc. The maintenance of physical standard as per norms prescribed is a valid condition of service, hence inclusion of that clause simpliciter casting liability of 50 termination of

Airhostess job with safeguard to retain service by alternative job provision in respect of air hostesses are concerned directing to maintain standard weight except on other contigency of medical or genetical factors, as specified, cannot be said as arbitrary or ultra vires to the constitution of India having regard to my discussion below.

Apex Court has also kept the point open for decision on issue of termination due to over weight in the case Sheela Jrshi vs. Indian Airlines Ltd. reported in (2010) 1 SCC 376.

The word "do not or fails to maintain weight within prescribed limit" pre supposes the situation where somebody voluntarily fails to maintain weight within the prescribed limit. If somebody fails to maintain weight within prescribed limit for the reason beyond his/her control as for example action of any particular gene namely "FTO", which acts to increase body weight responsible for disease "obesity" as has been recently discovered in the medical science or due to application of medicine to cure any ailment, the chemical composition of which, an organic substance, causes stimuli to the metabolic system of human body and thereby helps the cell responsible for weight gaining, to increase the body weight, surely it cannot be said as voluntary action attributing failure to the concerned person to maintain weight within the prescribed limit.

51

An article relating to responsibility of particular gene called FTO for obesity by Alice D as availabe from internet will highlight the said genetical factor which is reproduced here:

> " People who have two duplicates of a certain gene show a seventy percent higher risk to become overweight compared to those without two copies of that gene, according to British researchers. This study proved a strong connection between certain genes and obesity.
>
> The study, which involved 5,000 subjects suffering from diabetes, showed that variations of a gene called FTO are associated with increased body mass index (BMI).
>
> The results showed that people who have a single copy of the FTO variation, have a thirty percent higher risk to become overweight, compared to those without the FTO variation. People who have two copies of the FTO gene are almost seven pounds heavier, and have a seventy percent higher risk of obesity than people without any copies of that gene. Researchers say that among white Europeans, almost one of six people carry two copies of the FTO gene.
>
> The FTO gene was discovered by researchers while they studied the DNA of people with type 2 diabetes. Specialists found that one copy of FTO gene may increase the risk to develop type 2 diabetes with twenty-five percent, while two FTO allele may raise the risk by fifty percent.

Although the role of FTO gene is not completely understood, the study`s findings are important because, after further investigations, it may lead to solutions for treating type 2 diabetes, high blood pressure, or other diseases caused by obesity.

UK researchers have discovered a commonly occurring gene variant that may explain why some people become overweight while others do not. However, they point out that it is unlikely to be the cause of the global obesity epidemic.

The findings are published in Science, the journal of the American Association for the Advancement of Science.

A UK research team, led by Dr. Andrew Hatterseley of Peninsula Medical School in Exeter, have discovered a gene variant that occurs in over half of people of European descent that they think helps to regulate the amount of fat in the body.

The scientists discovered the gene, known as FTO, in a study of 2,000 diabetics when they were doing a genome-wide search for susceptibility to type 2 diabetes. They found there was a strong link between the FTO variant and body mass index (BMI).

So they conducted another study on 13 cohorts of 38,759 Britons, Finns and Italians aged 7 and above where they found a similar link between the FTO variant and body weight.

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The strength of the genetic influence depends on whether an individual has inherited one or two copies of the FTO gene variant.

A person with two copies of the FTO variant is likely on average to weigh 3 kilos (6.6 pounds) more than a person who does not have the FTO variant at all, and if they have only one copy they are likely on average to weigh 1.2 kilos (2.6 pounds) more.

About 16 per cent, or one sixth of Europeans are likely to have both copies of the variant, according to the study. And around half will have one or two.

This is not to be confused with the estimated genetic predisposition to severe obesity which is around 1 in 10,000 people.

Commenting on the study, the team said it reinforces findings from twin studies that suggest obesity is driven partly by genes. However, they added that lifestyle and environment are also strong factors. The genetics has not changed in the last 100 years, but lifestyle and environment has, they said.

> They are particularly excited by the fact this is the first study to identify a particular gene.
>
> The scientists want to find out if other ethnic groups outside of Europe also have the FTO variant. They are planning to study the DNA of South Asians and black Americans because diabetes and obesity are more prevalent in these groups than the general population.
>
> While the study did not help them work out the biological mechanism behind the FTO gene and wieght control, they suspect it has to do with fat regulation. FTO is known to play a role in the hypothalamus which regulates appetite.
>
> The World Health Organisation (WHO) estimates that about 2 billion people worldwide are obese or overweight, that is about one third of all people over the age of 15. It also estimates that about 20 million children under 6 are in the same category."

Under such a situation when increase of body weight is not due to fault of concerned employee employed as cabin crew, whether termination clause could be applicable in those cases, without providing alternative job or annuity as the case may be, is pivotal question on admitted facts, in the present case.

The obesity is now the major factor which is being looked into with special care all over the world by researchers and scientists in genetical field, namely 53 genetical scientists/technologists, molecular biologist etc. A research work is going on to control obesity in countries of Europe continent where it is now a major problem. Now it has been established that obesity results from the action/stimulation of particular gene, present in the human body being FTO. If obesity is a disease due to genetical factor or for application of such type of medicines which help to increase body weight, the service of an air hostess surely should not face termination, but her placement in other alternative suitable job available in the organization will be a real remedy on the constitutional mandate. The respondent aviation company is not unmindful of that situation which is reflected from their own employment circular dated 19th June, 2001 issued prior to the order of termination dated 22nd June, 2001. The employment circular dated 19th June, 2001 is already quoted earlier. But for analysis of the same, relevant portion of that is quoted further which reads to this effect " selection of cabin crew from amongst the applicants will be on the basis of interview. Preference will be given to cabin crew who have declared unfit for flying duties particularly due to over weight followed by such of the cabin crew who are desirous of taking ground job." (Underline is of mine).

The employment circular of 19th June, 2001 further states that "cabin crew who have either been declared unfit for flying duties or are desirous of taking ground job to be deployed as flight kitchen supervisor." (underline of mine.) 54 On a conjoint reading of said condition of employment circular with termination clause due to over weight of appointment letter, it is clear that it has diluted/modified the condition of liability for termination of service in the event of non-maintaining standard weight during service tenure as cabin crew, as stipulated under clause 9(ii) (b) of the

appointment letter as Trainee Air Hostess and clause 5(ii) (b) of the appointment letter as air hostess. The said appointment circular further provides that the applicant for the job should mention particulars under clause 7 to this effect "whether grounded due to medical reasons/over weight". This circular letter was issued by General Manager(Personnel) and a wide circulation was intended to be made by notification. Hence, even if it is assumed that it is a case of over weight simpliciter means a voluntary action of the cabin crew for non-maintaining his/her weight during service tenure, still then the termination clause straight way was not applicable without considering scope of alternative job, in view of condition of staff employment notice No.1 of 2001 providing benefit of alternative job to those cabin crew who would be grounded from flying duties due to over weight simpliciter and invitation to apply before 10th July, 2001. This employment notification circular was not at all taken into consideration when the order of termination was issued by the concerned authorities, which clearly speaks out a case of unjust, unfair, unreasonable and arbitrary exercise of power as well as 'malice in law' by not considering the application of alternative job right as already provided to the cabin crew grounded due to over-weight. Non- consideration of this alternative employment benefit, a service condition, which 55 made the condition of "termination of service", changed or modified, when ought to have been taken note of, but was not taken care of, while the order of termination was issued by the respondent aviation company, goes to the very root of the matter about the arbitrary, unfair, unjust and unreasonable action of the respondent company.

Employment notification provided a right to the cabin crews grounded for over weight for being considered to an alternative job. Hence, without giving any opportunity to the writ petitioner/appellant to file application before last date i.e. 10th July, 2001 seeking alternative job and taking away her right to have consideration for that particular job in terms of notification, is nothing but non- performance of duties and responsibilities vested upon the concerned authorities and it is a deliberate act due to disregard to the rights for consideration of application to alternative job of the cabin crew suffering from weight problem. The action is squarely covered under 'malice in law'. "Legal malice" or "malice in law" means "something done without lawful excuse". In other words, it is an act done wrongfully and willfully without reasonable or probable cause and not necessarily an act done from willfully and spite, it is a deliberate act in disregard to the rights of others". The above words are quoted from paragraph 12 of the judgement passed in the case State of A.P vs. Gobordhan Lal Pitti reported in (2003) 4 SCC 739 which has been relied upon in the case West Bengal State Electricity Board vs. Dilip Kumar Ray reported in (2007) 14 SCC 568. The same view about conceptual theory of malice in law and its perspective analysis, has been noticed by the Apex Court recently in the case Kalabharati Advertisement 56 vs. Hemant Vimal Nath Nari Chania & ors. reported in (2010) 9 SCC 437 in para 25 which read such:

> "25. The State is under obligation to act fairly without ill will or malice-in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for "purposes foreign

> to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. (Vide ADM, Jabalpur v. Shivakant Shukla, S.R. Venkataraman v. Union of India and W.B. SEB V. Dilip Kumar Ray)."

So long I have discussed the issue assuming that the appellant was responsible for her over-weight by not voluntarily maintaining standard weight prescribed, due to reason of over eating and not for the reason of medical ground or genetical factor and thereby I have pointed out the duties and responsibilities of the appointing authority who terminated the service on the ground of over weight, to take care of other rights of the appellant and his action failing to take care of the rights of the appellant in terms of employment notification which practically changed and modified the service condition of termination of service simpliciter on the ground of over weight simpliciter by providing scope of consideration of any alternative job to those cabin crew who would be grounded for over weight simpliciter with special condition "of preferential treatment in employment to select them".

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It is a settled legal position of law that every action of any authority under article 12 of the Constitution of India, is considered by chiseling their action under the anvil of Article 14 and 21 of the Constitution of India which mandates reasonable, fair and unarbitrary action. Reasonable and fairness doctrine has gained its strong ground in the Indian judicial field far to say about U. K. & U.S.A legal field. It is a basic principle of administrative law by expanding its scope in the service jurisprudence that every action of any authority to be decided under the anvil of reasonableness and fairness principle, every action should be justified by reflection and application of principle of reasonableness and fairness. Acting fairly is an additional weapon in the armory of Court. Unreasonableness exercises of power vitiates Article 14, 19 & 21.

The fairness and reasonableness doctrine discussed in depth in the case Smt. Maneka Gandhi v. Union of India reported in AIR 1978 SC 597 a judgement of constitution bench. Para 56 of which read such:

> "Now, the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activists magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in E.P Royappa v. State of Tamil Nadu (1974) 2 SCR 348: (AIR 1974 SC 555) namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the

> rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". Article 58 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as pholosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.
>
> How far natural justice is an essential element of procedure established by law."

In the field of each and every administrative action fairness and reasonableness principle is required to be followed and there are plethora of cases wherein the Apex Court considered this issue and its applicability thereof. Reliance is placed to the judgements passed in the case State of West Bengal v. Anwar Ali Sarkar & Anr. reported in AIR 1952 SC 75, S.J. Jaisinghania v. Union of India & Ors. reported in AIR 1967 SC 1427, E. P. Rayappa v. State of Tamilnadu reported in (1974) 4 SCC 3, Mahindra Singh Gill v. Chief Election Commissioner reported in (1978) 1 SCC 405 a judgement of constitution bench, Union of India v. Tulsi Ram Patel reported in (1985) 3 SCC 398 M/s. McNally Bharat Engineering Co. Ltd. v. State of Bihar & Ors. reported in (1990) 2 SCC 48 & Dev Dutt v. Union of India reported in (2008) 8 SCC 725.

Applying the principle of fairness doctrine which mandates 'just decision' a Division Bench of this Court wherein one of us Pratap Kumar Ray, J was the presiding Judge, delivered the judgement considering it in details, in the case Reserve Bank of India & Ors. v. Mihir Chakraborty (M.A.T No.2631 of 2007 59 decided on 10.12.2008) reported in Monu/WB/0591/2008. Paras 21 and 22 read such:

> "A new horizon has been opened in the administrative law by evolving the principle of doctrine of fairness and reasonableness in all governmental function in the case Maneka Gandhi v. Union of India: (1978) 2 SCR 621, a basic case and duty to act fairly and reasonably has now got a deep root in administrative action. Statutory provision under Section of the said Cooperative Act to give reasons mandatory and in absence of such reasons, the condition precedent of passing any administrative decision and/or quasi judicial decision by complying with the principle of fairness and reasonableness doctrine renders the action arbitrary and unreasonable exercise of power, which otherwise attracts the constitutional provisions of Article 14, 19 and 21. Reliance may be placed to the judgement passed in the case The State of West Bengal v. Anwar Ali Sarkar & Anr. : 1952 CriLJ 510, S.G. Jaisinghani v. Union of India & Ors., Maneka Gandhi (supra), Mohinder Singh Gill(supra), Union of India and Anr. v. Tulsiram : (1985) IILLJ 206 SC. So acting fairly is an additional weapon in the armory of the Court to identify an issue. Acting fairly is within the domain of natural justice principle.

> However, it appears from the judgement of the courts of United Kingdom that the Court intended to distinguish the fairness doctrine, fairness of procedure and the natural justice under different pedestal by holding that acting fairly would apply within the domain of procedure by making a distinction of procedural law and substantive law. The Apex Court of India looked into the matter in the case Management of M.S. Nally Bharat Engineering Co. Ltd. : (1990) IILLIJ 211SC being a case wherein the government on an application by a dismissed workman transferred his case from one Labour Court to another Labour Court without issuing a notice or giving opportunity to the employer. The Court while setting aside the order invoked the doctrine of 'acting fairly'. The relevant paragraph reads such:
>
> Fairness, in our opinion, is a fundamental principle of good administration. It is a rule to ensure the vast power in the modern State is not abused but properly exercised. The State power is used for proper and not for improper purposes. The authority is not misguided by extraneous or irrelevant considerations. Fairness is also a principle to ensure that statutory authority arrives at a just decision either in promoting the interest or affecting the rights of persons. To use the time hallowed phrase "that just should not only be done but be seen to be done" is the essence of fairness equally applicable to administrative authorities. Fairness is thus a prime test for proper and good administration. It has no set form or procedure. It depends upon the facts of each case. As Lord Pearson said in Pearlberg v. Varty (at p. 547), fairness does not necessarily require a 60 plurality of hearings or representations and counter-representations. Indeed, it cannot have too much elaboration or procedure since wheels of administration must move quickly."

Scope of judicial review has been considered in depth dealing with depth of intensity of judcial review by one of us Pratap Kumar Ray J. sitting in the Division Bench, in the case Municipal Commissioner, Kolkata Municipal Corporation & Ors. v. Kedarnath Bansal reported in (2008) 4 CLT 275 (H.C). Relevant paragraphs read such "18. The meaning of "unreasonableness" which could be a ground to interfere with any such order/decision by exercising the power of judicial review, was explained in the language of Lord Denning M.R in the case Secretary of State for Education and Science v. Metropolitan Borough of Tameside, reported in (1976) 3 All. E.R 665(HL) by the language to this effect:

> " It is one thing to say to a person: 'I think you are wrong. I do not agree with you'. It is quite another thing to say to him: 'You are being quite unreasonable about it.' I know it is often done. It is common place in argument to say to your adversary: 'You are being very unreasonable' when all your mean is ' I think you are wrong'. Such hyperbole is excusable in ordinary mortals but not in those who have to consider and apply Acts of Parliament. N one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view."

19. The unreasonableness in the language of Prof. H.W.R Wade is a generalize rubric covering not only sheer absurdity or caprice but it contends different category of errors described as "irrelevant consideration, mistakes, misunderstanding", which could be classified further as self- misdirection or addressing oneself to the wrong question. As per judgement passed in R v. Secretary of State for the Home Department, ex parte Daly, reported in (2001) 3 All. E.R 433 disproportionate decision in the angle of unreasonableness and proportionality tools could be identified by three tests depending upon the intensity of such judicial review. Those tests formulated as (i) Wednesbury test; (ii) 'Heightened scrutiny test'- when fundamental rights are in issue; (iii) "proportionality test"- where European community or European Human Rights Law is in issue. In the said case of 61 Secretary of State for the Home Department, ex parte Daly at para 32, accordingly, it is observed:

> "I think that the day will come when it will be more widely recognized that the Wednesbury case was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation."

20. Having regard to the judgement of said English cases it is clear that as yet proportionality doctrine has not been made closer to the Wednesbury test and practically in the case R v. Secretary of State for the Home Department, ex parte Brind, reported in 1991 All. E.R 720 (HL), House of Lords rejected the proportionality doctrine as a part of English Law. In India though the English principles are being considered but a standard has been maintained by identifying the scope of judicial review applying the proportionality doctrine and a level of scrutiny, which is a common feature in Indian Courts since 1950.

21. The concept of primary and secondary review by Courts has been discussed by Lord Bridge in Secretary of State for the Home Department, ex parte Brind (supra), which has been discussed in para 39 in the case Om Kumar & Ors. v. Union of India reported in (2001) 2 SCC 386, which reads such:

> "In a famous passage, the seeds of the principle of primary and secondary review by Courts were planted in the administrative law by Lord Bridge in the Brind case. Where convention rights were in question the Courts could exercise a right of primary review. However, the Courts would exercise a right of secondary review based only on Wednesbury principles in cases not affecting the rights under the Convention. Adverting to cases where fundamental freedoms were not invoked and where administrative action was questioned, it was said that the Courts were then confined only to a secondary review while the primary decision would be with the administrator. Lord Bridge explained the primary and secondary review as follows:

The primary judgement as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgement by asking whether a reasonable Secretary of State, on the material before him, could reasonably make the primary

judgement."

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> 22. In para 67 of the said report of Om Kumar & Ors. (supra) the Court held that Wednesbury test would be the test when any action is challenged as arbitrary under Article 14. Para 67 reads such:
>
> "But where an administrative action is challenged as 'arbitrary' under Article 14 on the basis of Royappa (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is 'rational' or 'reasonable' and the test then is the Wednesbury test. The Courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in this primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. [In G. B. Mahajan v. Jalagaon Municipal Council (SCC at p.111] Venkatachalia J (as he then was) pointed out that "reasonableness" of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules. in Tata Cellular v. Union of India (SCC at pp. 679-80), Indian Express Newspapers Bombay (P) Ltd. v. Union of India (SCC at p. 691), Supreme Court Employees' Welfare Assn. V. Union of India (SCC at p. 241) and U.P Financial Corpn. v. Co Cap (India) (P) Ltd. (SCC at p.307) while judging whether the administrative action is 'arbitrary' under Article 14 (i.e. otherwise then being discriminatory) this Court has confined itself to a Wednebury review always."

Hence an authority when is bound holding a position to decide the rights of other, naturally a duty is casted heavily upon him to safeguard the rights and interest of concerned person whose service would be affected by order of termination, by finding out alternative, if any. In the instant case the dismissing authority of the aviation company, failed to discharge his constitutional and statutory duties of considering the situations, applying the principle of fairness and reasonableness doctrine, and also taking care of employment circular providing consideration of an alternative job to the cabin crew grounded only due to over weight, prior to discharging her from service applying the termination clause of contract, which at that time stood modified. The issue raised by the writ 63 petitioner appellant in her pleading of writ application as well as in the memorandum of appeal is breach of Article 14 and 21 of Constitution of India by not adhering to principle of fairness and reasonableness, the rights of alternative job by providing preferential treatment, right of consideration for annuity benefit and non-consideration of the issue raised that the over-weight was due to application of medication prescribed by the panel Doctor of the aviation company to cure the appellant from her disease of altitude phobia. Hence it is clear that a case of breach of Article 14 and 21 has been properly grounded as foundational facts of the writ application, for consideration by the writ Court.

The over-weight simpliciter which is not contributed due to consumption of any medicine or for any genetical factor responsible for changing the metabolic system of the body to those suffering from a particular ailment has been considered as ground for termination of service as per service contract, but it was diluted/modified further by changing and modifying that condition by way of keeping them in service providing alternative job with preferential treatment in terms of employment notification.

The appellant writ petitioner's case is not a case that she willingly/voluntary did not maintain the standard weight prescribed by the aviation company during her service as air hostess. It was her case that due to medication to cure 'phobic anxiety', the chemical as consumed was the contributory factor of over weight. It was her further case that settlement under 64 the Industrial Dispute Central Rules, being the condition of service and she got a right for fair and just consideration of her case for annuity due to her medical unfitness to perform flying duties due to suffering from 'altitude phobia' and the authority did not consider her case, but terminated the service. A positive case has been made out by foundational facts that the authorities discriminated in their treatment in considering the grant of annuity by referring the cases of other air hostesses and cabin crew who were benefited or privileged by such grant. A case of Article 14 in the angle of discriminatory attitude has been properly founded by referring the issue. In reply to the show cause notice it was the case of the appellant as it appears from the records that she was suffering from phobic anxiety which is termed as altitude phobia and the panel Doctor of the aviation Company namely Dr. D. Bhattacharya adviced "stop flying". The appellant submitted psychometry test report and all prescriptions, but unfortunately the concerned authority while passing the order of termination impugned in the writ application rejected those contentions by commending that those were not relevant for consideration while deciding the issue for termination of service. In terms of settlement which is the condition of service, petitioner was legally entitled for fair and just consideration of her case regarding grant of annuity before her service was terminated, as she was medically unfit for flying duties. A stand has been taken by the respondent Company that there was no such opinion by the medical board that she was medically unfit to perform flying duties. Reference of an employee suffering from such illness to a medical board to provide annuity facilities, is within the duties and responsibilities of the 65 organisation. An employee by his own will/volition cannot appear before any medical board. Unless a medical board is constituted and he or she is directed to appear before medical board for consideration of his or her case there is no question of opinion of medical board. From the representation of the writ petitioner/appellant it appears that although from the very first date when she was grounded and she was treated by Dr. Bhattacharya who adviced to stop flying duties, she prayed for annuity. On 18th November, 1997 Dr. Chandrasekhar Mukherjee advised stop flying with immediate effect. On 4th December, 1997, the appellant applied for necessary order to proceed on annuity due to disability to perform flying duties. This matter was referred to by Deputy General Manager (Medical) to the General Manager (OPS) annexing the medical certificate of Dr. Chandra Sekhar Mukherjee. On 18th March, 1998 further representation made for arranging a medical board. On 5th August, 1998 again prayer made about grant of annuity and Manager, IAFS had informed the other Manager of Medical Service, by referring the application of the appellant where the appellant submitted all medical reports and psychometry test report. By the letter dated 7th August, 1998 informed the Manager, General Manager (OPS) about illness of the present appellant's, treatment by panel psychiatrist Dr. D. Bhattacharya and further psychometry test as

would be conducted. This letter is already annexed. Thereafter psychometry test was conducted and appellant submitted those reports. On 21st June, 1999 Manager (IFS) had informed wrongly, as it appears on scrutiny of records, that appellant was not following treatment of Dr. Bhattacharya since 13th November, 1998. Dr. D. Bhattacharya 66 had informed the authority concerned that the appellant was not taking appropriate steps as per his advice, but from the prescriptions of Dr. Bhattacharya, as are already quoted above, it appears that the appellant continued her treatment by attending his chamber on 19th March, 2001 who prescribed medicine and adviced her to report after four months i.e. on 19th July, 2001. Before 19th July, 2001, her service was terminated following notice of show cause dated 30th April, 2001. From the prescription of Dr. D. Bhattacharya dated 19th March, 2001 which is noted in the same prescription dated 23rd October, 2000, it appears that appellant was continuing treatment under Dr. Bhattacharya. From the series of prescriptions as already discussed and noted above, it appears that since the year 1997 till the year 2001, the appellant visited Dr. Bhattacharya, consumed medicine, appeared for psychometry test and submitted different representations to the concerned officers of the aviation company and prayed for constituting a medical board so that annuity could be granted in her favour on the ground that she was medically unfit for flying duties. Unfortunately those were not considered by the aviation company. Even in the reply to the show cause the appellant categorically referred nine documents about her illness from altitude phobia and of Doctor's advice "stop flying", but concerned authority rejected the same by one word "not relevant".

Having regard to the aforesaid documents as annexed and already quoted above namely the prescription of Dr. Chandrasekhar Mukherjee and Dr. D. Bhattacharya, psychometry report and from the documents namely 67 representations praying annuity, it appears that the respondent aviation company and its concerned officers were aware that appellant was suffering from "altitude phobia" and panel doctor of company advised her to stop flying. Hence from said documents, namely prescriptions, psychometry test report and representations, which are not chamelion, that would change its colour, it could be safely concluded as proved fact, even if no medical board was set up, that appellant was suffering from altitude phobia and as a resultant effect she was medically unfit for flying duties.

Dr. D. Bhattacharya psychiatrist prescribed tablet Servectra on 3rd June, 1998 and it was continued till 2001 even after termination of service. Said Doctor further prescribed Tab Serlift along with Servectra and other medicine Trika, which were consumed by the appellant for a longer period.

What is Bio chemical effect of those drugs? Whether it caused, cell stimulation responsible for weight increase? Those are now being considered. From the book Advance Drug Review, 5th Issue dated 6th March, 2007 published by Arora Medical Book Co. Pvt. Ltd., Lucknow, it appears that Serlift contains the chemical "sertraline". It states such:

> "The genetical name of the medicine is sertraline which is a potent sedative sereotonine re uptake inhabitor (SSRI). It reduces seroline turn over in brain. It is used in treatment and prophylaxis of depression and it is also used in anxiety stress like obsessive compulsive disorder and panic disorder. It has adverse drug reaction similar to SSRI".

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There are different brand of medicine available with the chemical sertraline. From the drug information hand book Psychiatry, 4th edition by Mathew A. Puller Pharma D. and Martha Sajatovic M.D the drug sertaline causes adverse reaction in human body. It is stated that this medicine has an adverse effect on weight gain. The hand book of medicine in Psychiatry edited by Peter Manu, M.D, Raymond E Suarer M.D, Barara J. Berned M.D published by American Psychiatry Publisher Inc. Washington DC, London, England defined obesity and its causes in page 49 of the said book, written by Stuart Morduchowitz, M.D. It deals with adverse effect and reason of obesity due to use of anti-psychotic and anti-depressant drugs.

Having regard to those suffering of the petitioner from phobic anxiety due to altitude phobia, which is admitted and proved, she was compelled to stop flying. Hence, a clear case made out by the appellant that she was medically unfit for flying duties and despite psychometry test and prolong treatment under a psychiatrist namely Dr. D. Bhattacharya, who was a panel Doctor of the aviation company, the case of the appellant was not referred to before medical board and grant of annuity was not considered. From the records as produced by the aviation company, it appears from the letter dated 31st October, 2000 issued by one Meena Bhalla, Assistant Manager(Personnel) that the cases of Neepa Dhar the present appellant Senior Air Hostess and Mrs. Bulbul Dagman, Senior Air Hostess were considered. About the present appellant it was noted that she was not reporting to follow up check since 30th November, 1998. (From record it is 69 proved now that it was not real state of affairs as it appears from the medical service report and prescription issued by Dr. D. Bhattacharya). So far as B. Dagman was concerned a medical board was constituted, who opined to take steps for weight reduction by proper exercise. The letter dated 31st January, 2000 read such:

> "To Mr. R.SAMADDAR Ols(SG0 PERSONNEL SERVICES UNIT NSCBI AIRPORT.DUM DUM Calcutta-52 Ref No: CPSU: NR: 13:94 Sub: Absence from duty due to overweight: Cabin Crew This has reference to the Notesheet bearing no CAL/IFS/CCA- 7/3440 dated 03.12.99 on the above subject from Dy GM(IFS), Indian Airlines Ltd. ER. Calcutta on persual of the records of the following cabin crew, details found are as under Ms. Nipa Dhar, Sr, Airhostess, Emp.No. 406261 Ms Nipa Dhar joined as Trainee Airhostess on 13.02.1987 and successful completion of training she was appointed as Airhostess on 30.03.1987. She was promoted as Airhostess (Sr. Category) on 30.06.1993.
>
> In 1994 Ms. Dhar remained absent for 65 days without prior permission/intimation. A show cause was issued by GM(Ops).vide memo no CAL/PER/OPS/DISC/35/1040 dated 02.02.1995. Again during the period 01.01.1996 to 30.06.96 Ms. Dhar remained absent for 44 days without prior permission/intimation. Another showcase was issued by GM(Ops), vide memo No. CPSU/DISC/35/1320 dt. 22.08.96. A lenient view was taken and she was advised by GM(Ops) to improve her attendance and informed that her attendance would be monitored vide memo nNo.CPSU/DISC/35/1521 dt, 19.09.96. During the period 1.7.96 to 31.12.96 she again remained absent for 27 days on 12 occasions and a show cause was issued by

GM(Ops) to her vide memo No. CPSU/DISC, 35;301 dated 13.3.97.

Ms. Dhar has been off the roster since 01.9.97 due to over weight on which date she was found over weight by 10.5 kgs. She is still not fit to fly.

On 04.12.97 a request was received form Ms. Nipa Dhar to proceed on annuity as she was medically advised not to do flight duties. She had consulted the I.A.L Medical Officer who referred her to a Consultant Physician. By Manager(IFS)'s letter No. CAL/OPS/CCA-PF/894 dt. 6.4.98 she was advised to report to Manager(Medical) I.A.L at Airlines House, 70 Calcutta to come with all her medical reports to review her case for annuity.

Her weight check on 7.8.98 revealed that she was 16.5 kgs over weight. On 07.12.98 she submitted her medical papers. As per St. Manager(Medical) she was diagnosed to be suffering from simple phobia which is amenable to treatment. However, she visited the psychiatrist only on three occasions and dropped form follow up since 30.11.98. Due to non-cooperation from her side she has not responded to treatment. By Dy.G.M(IFS)s letter No. CAL/OPS/CCA-PF/1891 dt. 21.6.99 she was also advised to follow up the medical recommendation and treatment as advised. She was also intimated that she did not report for the follow-up check since 30.11.98. Her last weight check on 23.8.99 revealed that she was over-weighed by 15 kgs By Dy.G.M(IFS)'s letter No. CAL/IFS/CCA-7/3480 dt. 7.12.99 she was again advised to report our Medical Deptt. Airlines House, Calcutta at the earliest but she has not reported till date.

Ms. Bulbul Dagman, Sr. Airhostess. Emp. No. 406571:

Ms Dagman joined Airlines Ltd. as Trainee Airhostess on 18.2.87 and on successful completion of training she was appointed as Airhostess on 30.06.87 she was promoted as Airhostess (Sr. category) on 30.06.1993. During the year 1994 Ms. Dagman remained absent for 50 days without prior permission/intimation. A show cause was issued by GM(Ops), vide memo No. CAL/PER/OPS/DISC/35/1037 dated 2.2.95. Her reply was found unsatisfactory, but a lenient view was taken and she was advised by GM(Ops) to improve her attendance, vide memo No. CAL/PER/DISC/35/1183 dated 22.3.95.

Mrs. Bulbul Dagman has been 'Off the roster since 23.3.97 due to her over weight. She is still not fit to fly. On 29.7.97 she requested for a ground job due to medical reasons. Vide Manager(IFS)'s letter No. CAL/OpS/CCA- PF/1893 dt 8.8.97 she was advised to report to Manager(Medical) for treatment. On 4.2.98 a request was made by her for annuity as she was medically unfit due to over weight. Vide letter No. CAL/OPS/CCA/PF/2375 dt 25.6.98 she was advised to appear before the IAL Medical Board at Airlines House, Calcutta with all her medical papers. When she reported for weight check she was found over weight by 19 kgs on 07.08.98 and by 11 kgs. On 9.12.98 she last reported for weight check on 5.8.99 when she was found overweight by 20 kgs.

In response to her appeal for annuity a Medical Board was formed which submitted its report on 18.9.98. The decision of the Medical Board was conveyed to her vide CAL/IFS/PF/2889 dt 30.9.99. she was informed that after going through all the medical reports and after her physical assessment

the Medical Board is of the opinion that apart from obesity, her ailments are at present under control by medication and cervical spine exercises. The medical board was of the opinion that weight reduction by proper exercises and diet control is imperative for her to lead an active healthy life in future. This was for her information and guidance. She was, 71 therefore, advised to follow the recommendation and instructions of the IA Medical Board.

On 7.12.99 she was again advised to report ot I A L Medical Deptt, Calcutta, with Bulbul Dagman Submitted please. (Nina Bhalla) Sr. Manager(P). NTA.Dum Dum Asstt. Manager(Personnel) Dy General Manager(p) General Manager(p)"

Having regard to the aforesaid factual premises and the documentary evidences, it appears that though the appellant made out a case for consideration about grant of annuity but the authorities did not respond and without considering that application, though admittedly she was suffering from altitude phobia and undergoing treatment under psychiatrist, a letter of termination from service was issued. From the show cause notice it appears that the authority had the knowledge about her illness of that nature and as such in the show cause notice it became a major ground contending that due to her negligence to follow the medical advice properly she was still over weight. In the second para of show cause notice dated 30th April, 2001 the authority accepted that she was a patient of phobic anxiety but placed responsibility upon her that she was not following the treatment and as a resultant effect she was over weight and not fit for flying duties. The paragraph 2 of the show cause notice is reproduced again, which read such:

> " You were advised to undergo medical check up from time to time. However, on your own volition you did not do so in true earnest and also did not follow up the medical recommendation and treatment properly. Because of this non-cooperation from your end. You have not responded to the treatment. Accordingly, you are still over weight and not fit for flying duties. It is also observed that your past attendance records are very unsatisfactory. On several occasion you remained absent unauthorisedly 72 without any intimation/permission. It is accordingly, presumed that you are no more interested to continue with the service of this Company."

On scanning, show cause notice, following points are clear admission on the part of the aviation company that (i) the appellant was suffering from illness "altitude phobia" (ii) she was under treatment of the doctor (iii) she was not fit for flying duties due to over weight as she was not following advice of Doctor. Para 2 of the show cause notice is the main and major ground for asking the appellant as to why her service should not be terminated. In response to that, the appellant submitted that she duly attended the panel psychiatrist Dr. D. Bhattacharya, had undergone psychometry tests for her treatment, she was undergoing treatment regularly and she annexed 9 documents as proof of those, which are already earlier discussed. Though said second paragraph of show cause notice is the main and major allegation whereby the aviation company alleged that appellant was negligent to take proper medical advice, but when the appellant replied by refuting those allegation, by referring prescriptions of Doctor and other medical reports and asserted positively that she was undergoing treatment diligently and sincerely, the authorities considered that point in the third para of order of termination to this effect "Your contention in your reply that

you are undergoing treatment for your psychological problems and have sought for annuity are not relevant inasmuch as you were grounded on account of your having failed to maintain your weight within the prescribed limits for four years." It is on record that Bulbul Dagman was granted 'annuity' though she was grounded for over weight.

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It appears from the letter of termination that factual point of undergoing treatment for psychological problem and seeking of annuity, all were considered as irrelevant. The Regional Director(East) simply applied clause 9(ii) (b) of the letter of appointment as Trainee Air Hostess, to terminate the service. The said officer did not consider the right of appellant about fair consideration of her prayer for grant of annuity in terms of said settlement, which was a service condition and also did not consider the employment notification existing on that date which provides that the cabin crew grounded due to over weight, should be provided with alternative job. Beside such, allegation made in show cause notice alleging negligence to take proper care of medical advice for treatment, which though was rightly answered with documentary evidence as unsustainable, was not considered, only on the ground that it was not "relevant". Hence, it is proved that said officer failed to consider relevant facts. On comparative analysis of show cause notice and the termination letter ex-facie it is explicit that Regional Director failed to discharge his constitutional duties in terms of mandate of constitution under Article 14 and 21 which speaks about application of fairness and reasonableness principle in administrative action by way of considering the employment notification which diluted the service condition of termination of service due to over weight and by not considering the settlement which is the condition of service under Industrial law providing annuity benefit. Regional Director (East) acted in breach of reasonableness and fairness principle which is a facet of Article 14 of the Constitution of India and action is attracted by malice 74 in law also for non-consideration of rights of alternative employment facilities as well as grant of annuity prior to issuance of order of termination. Hence, the order of termination assailed with factual foundation made in the writ application, goes to the root of the matter due to a positive case of breach of Article 14 and 21. Another ground of discrimination under Article 14 also has been led with proper foundation by contending that when similarly placed Airhostess was allowed annuity, her case was not at all considered by the Regional Director.

Having regard to the aforesaid findings I am of the view that the writ application is maintainable as a positive case made out on breach of Article 14 and 21 by making necessary factual foundation of breach of reasonableness and fairness doctrine, foundation of malice in law and non-consideration of rights available under settlement including the discriminatory action under Article 14 of Constitution of India regarding grant of annuity. The Regional Director did not at all consider the terms of settlement which is a condition of service regarding grant of annuity on the said factual premises and also did not consider the employment notification providing job to the cabin crew grounded for over weight by according preferential treatment and did not even considered the relevant fact refuting major allegation of show cause notice. As such he breached Article 14 of Constitution of India, in decision making process. Since there is breach of Article 14, a constitutional breach and statutory breach of settlement/award, writ is 75 maintainable. Hence, the question as framed about maintainability of writ application is answered against the respondent aviation

company.

On the basis of aforesaid factual premises it appears that the Regional Director had the knowledge that the appellant was suffering from altitude phobia and she was under going proper treatment under Dr. D. Bhattacharya, a panel psychiatrist of the aviation company, that she had undergone psychometry test and she applied for annuity. Without referring her case to the medical board, her service was terminated though cases of other cabin crew concerned as already discussed above were referred to the medical board and decision was taken for grant of annuity. In the case of the appellant, even no medical board was set up to deal with the issue denying just, fair and reasonable action in administrative field.

From the foundation of facts and also from the admitted documents, it is proved that there was breach of Article 14 and 21, hence the contention raised that for implementation of the terms of settlement, Industrial Dispute ought to have been raised and that the breach of service condition since within the contractual field, writ was not maintainable, is not legally sustainable in this case. It is true that the appellant is coming under the definition of workman under the Industrial Dispute Act, but it is not a case of breach of mere service condition simpliciter, but it is a case for breach of Article 14 and 21 of Constitution of India by making foundation of breach of reasonableness and 76 fairness doctrine, action which is malice in law and action which is discriminatory under Article 14 aforesaid. So Industrial Dispute, has no applicability herein and writ is maintainable on that foundation. Reliance is placed to the judgement passed in the case Rajasthan SRTC v. Mukund Baiswa(2) reported in (2009) 4 SCC 299.

In the said judgement Mukunda Barwi(2) supra the Apex Court considered the issue about maintainability of the civil suit in labour matter. In respect of employee/workman of an organisation which State under Article 12 of the Constitution of India as well as an industry under Industrial Dispute Act. An apparent conflict was existing between Krishna Kant case (1995) 5 SCC 75 and Falharmal case (2006) 1 SCC 59 which was noticed in Mukunda Barwi(1) case reported in (2007) 14 SCC 41. This conflict was about maintainability of civil suit of an organisation which is industry under Industrial Dispute Act as well as authority under Article 12 of the Constitution of India by holding that jurisdiction of Civil Court is not completely ousted. The apex Court held that if the dispute arises out of rates and obligation absolutely under Industrial Dispute Act or sister law like Industrial Employment (Standing Orders) Act, 1946, civil Court jurisdiction is barred but if the dispute pertains to matter like non-observance of principle of natural justice or constitutional provision, civil suit is maintainable and civil Court has jurisdiction to direct reinstatement of service with back wages in case State action is violative of constitutional provision or statutory provision of law.

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Having regard to the aforesaid settled legal position of law as discussed in Mukunda Barwi(2) case the action of the writ petitioner/appellant by filing an writ application since action not concluded relating to disputes out of rates and obligation under Industrial Dispute Act or sister law but it is an action against the aviation Company which authority under Article 12 of the Constitution of India

for non-performance of their constitutional and statutory duties as discussed above for which writ application is maintainable.

The respondent aviation company has resisted the appeal and writ application, both on the ground that seeking relief under the settlement following the industrial rule regarding grant of annuity and challenge of action of termination which is within the contractual field. Learned Trial Judge answered the point in favour of the respondent by holding, inter alia, that the termination was out come of service condition stipulated in the service contract. The respondent has relied upon the judgement passed in Uptron India Ltd. v. Shammi Bhan & Anr. reported in AIR 1998 SC 1681 to contend that settlement under industrial rules was a contractual obligation and within the domain of contractual field. Reference of case National Highway Authority of India Limited v. M/s. Ganga Enterprise reported in AIR 2003 SC 3823 for the proposition that in contractual matter writ Court would not interfere has been made. Reference has been made to the case Bareilly Development Authority & Anr. v. Ajoy Pal Singh & Ors. reported in AIR (1989) SC 1076 to contend the same proposition. 78 Those cases are distinguishable having regard to the factual grounds as made in the pleading of the writ application and as well as in the amended writ application wherein as discussed above, a case of breach of Article 14 and 21 in the field of arbitrary action, unjust, unfair and unreasonable action and in other field of discriminatory action, has been made out. When there is breach of Article 14 satisfying the two facets of arbitrary action as well as discriminatory action, there is no doubt that the intensity of judicial review has some preferential edge namely in case of arbitrary action a secondary judicial review concept would be applied to scan the decision making process, whereas in the action of discrimination under Article 14 a primary judicial scrutiny level should be applied to test the factual parameter about satisfaction of the issue by the Court regarding discrimination in treatment. As discussed above the writ petitioner appellant has made out a positive case of non-consideration of application seeking grant of annuity on being medically unfit for flying duties and non- consideration as well as non-giving any opportunity to apply for alternative job in terms of employment notification for which the writ petitioner atleast accrued a right for being considered having regard to the factual parameter of her grounding from flying duties, even if assumed for weight factor and such action of the authority attracted by principle of unjust, unreasonable and unfair action, facet of Article 14.

As discussed above discrimination in treatment of grant of annuity to other Airhostess also has been made out who are identically situated and grounded for 79 the same reason. Even writ application is maintainable to enforce a contractual obligation of the State or instrumentalities when there is breach of Article 14 of the Constitution of India. Reliance is placed to the judgement passed in K. N. Guruswamy v. The State of Mysore & Ors. reported in AIR 1954 SC 592. Para 20 of the said report read such:

> " The next question is whether the appellant can complain of this by way of a writ. In our opinion, he could have done so in an ordinary case. The appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else. Here we have Thimmappa, who was present at the auction and who did not bid-not that it would make any difference if he had, for the fact remains that he made no attempt to outbid the

appellant. If he had done so it is evident that the appellant would have raised his own bid.

The procedure of tender was not open here because there was no notification and the furtive method adopted of settling a matter of this moment behind the backs of those interested and anxious to complete is unjustified. Apart from all else, that in itself would in this case have resulted in a loss to the State because, as we have said, the mere fact that the appellant has pursued this writ with such vigour shows that he would also at stake, namely the elimination of favouritism and nepotism and corruption: not that we suggest that that occurred here, but to permit what has occurred in this case would leave the door wide open to the very evils which the legislature in its wisdom has endeavoured to avoid. All that is part and parcel of the policy of the legislature. None of it can be ignored.

We would therefore in the ordinary course have given the appellant the writ he seeks. But, owing to the time which this matter has taken to reach us(a consequence for which the appellant is in no way to blame, for he has done all he could to have an early hearing), there is barely a fortnight of the contract left to go. We were told that the excise year for this contract (1953-54) expires early in June. A writ would therefore be ineffective and as it is not our practice to issue meaningless writs we must dismiss this appeal and leave the appellant content with an enunciation of the law. But as he has in reality won his case and is prevented from reaping the full fruits of his victory because of circumstances for which he is not responsible, we direct that the first respondent, the State of Mysore, and the fourth respondent Thimmappa pay the appellant his costs here and in the High Court. The other respondents will bear their own costs."

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On arbitrary and unlawful action of public authority invested with statutory power to take any action could be the subject matter of writ application under Article 226 of the Constitution of India is the view expressed in the case EPO v. Ram Saheli Singh reported in (1973) 3 SCC 864 which followed K. N. Guruswamy(supra).

There is no doubt that if any action is purely contractual within the domain of contractual field, writ application is not maintainable and ordinarily writ Court will not interfere, but when any action having public law element done by an authority under Article 12 of the Constitution of India, writ application is maintainable for judicial scrutiny of the Court applying the principle of fairness, justness and reasonableness principle. Reliance is placed to the judgement passed in the case Life Insurance Corporation of India Ltd. v. Escorts Limited reported in (1986) 1 SCC 264. The same view about maintainability of writ in contractual field if the action is on issue of having public law element within the domain of public law field under Article 14 of the Constitution of India, has been considered in the case ABL International Limited v. Export Credit Guarantee Corporation of India Ltd. reported in (2004) 3 SCC 513. ABL International (supra) which has been followed subsequently

in the case Food Corporation of India & Anr. vs. SEIL Ltd. & Ors. reported in (2008) 3 SCC 440. Para 21 of said report read such:

> "21. Jurisdiction of the High Court to entertain a writ application involving contractual matter was considered by a Bench of this Court in ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.

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> wherein upon referring to a large number of decisions, it was held : (SCC p.570, para 23) "23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ Court can issue suitable directions to set right the arbitrary actions of the first respondent."

The appellant has made out further case about breach of said Disability Act, 1995. Suffering from altitude phobia is also within domain of "mental illness" due to its originating zone at psychological field stimulating motor censory nerves, in terms of said Disability Act. The said act is a social welfare legislation. The employee suffering from different ailments resulting disability to perform a particular job may be considered for alternative job. The conceptual philosophy of this act has been considered by the Apex Court in different judgements. Reliance is placed to the judgement passed in the case Kunal Singh v. Union of India & Anr. reported in (2003) 4 SCC 524, Steel Authority of India Ltd. v. Shri Ambica Mills Ltd. & Ors. reported in (1998) 1 SCC 465, Bhagwan Dass & Anr. v. Punjab State Electricity Board reported in (2008) 1 SCC 579, S. Pushpa & Ors. v. Sivachanmugavelu & Ors. reported in (2005) 3 SCC (J) P-1.

To apply the aforesaid judgements on "disability Act", 1995, the statutory provisions of the said Act require to be discussed. Section 2 of the said Act is a definition clause wherein the "mental illness" has been defined as disability. 82 Mental illness has been defined under Section 2(q), means any mental disorder other than mental retardation. The appellant by referring the history of treatment to cure her ailment of altitude phobia or phobic anxiety in flying, has established that her suffering was within the category of mental illness and not in the category of mental retardation. Mental retardation has been defined in the said Disability Act under Section 2(i) which read such:

> "'mental retardation' means a condition of arrested or incomplete development of mind of a person which is specially characterized by subnormality of intelligence."

From the medical report it appears that appellant suffered a psychological problem. The phobia is a term which used by the psychiatrist and it is within the subject psychiatry. From the book psychiatry by Ian Gregory, M.D & Donald J. Smeltzer, M.A published by P G Publishing Pte Ltd., New Delhi by special arrangement with Little Brown & Co., Inc., Edition 1984, phobia has been discussed in page

18 of the said book which read such:

> " Phobias are obsessive and unrealistic but intense fears of specific external objects or situations, resulting in avoidance behavior. According to psychoanalytic theory, the phobia arises through displacement of fear originating in internal(unconscious) conflict onto an external object symbolically related to the conflict. A large number of specific names for different varieties of phobia have been derived from Greek roots (e.g., acrophobia, a fear of heights; agoraphobia, a fear of open spaces; and claustrophobia, a fear of closed spaces), but most of these terms are now seldom used. The term phobia should be reserved for specific, focused, unrealistic fears and not used as a synonym for all kinds of fear."

Phobic disorder (phobic neuroses) has been discussed at page 286 of the said book wherein acro phobia i.e. fear of high places has been discussed. The relevant portion read such:

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" Phobic Disorders(phobic Neuroses) Phobic disorders are characterized by intense, persistent, and irrational fear of some specific object, activity, or situation, leading to avoidance behaviour. Since avoidance or escape from the frightening situation or stimulus results in reduction of fear, negative reinforcement tends to perpetuate the behaviour. Systematic desensitization and other forms of behavioral treatment attempt to disrupt this patern.

Psychoanalytic therapy of persons with phobic disorder is based on the assumption that the fear originates internally (as a fear of punishment for forbidden sexual or aggressive impulses), and that ego defenses operate to conceal the inner danger (which is intolerable) by symbolically transforming it to an external danger (which can then be avoided). The characteristic defense mechanism employed in this process of externalization is displacement.

A great many words for specific phobias have been coined from Greek roots, such as acrophobia (fear of high places) and zoophobia (fear of animals), but most of this abstruse terminology is unimportant. DSM-III categorizes all fors of phobias into three groups:

1. Agoraphobia literally is fear of the street or open places, but the term is used in the slightly different sense of fear of leaving the familiar setting of one's home. It is usually accompanied by other phobias such as fear of crowds, heights, or closed spaces. It is described in the next section.

2. Social phobias involve excessive fear and avoidance of situations that require possible interaction with or scrutiny by other people(such as public speaking, or using a public restroom).

3. Simple phobias are specific phobias involving neither of the preceding characteristics-for example, fear of animals(Particularly dogs, snakes, insects, and mice) fear of closed spaces(claustrophobia), or fear of heights."

Phobic anxiety disorder also has been discussed in the book Psychiatry by by A. Venkoba Rao, K. Kuruvilla published by B.I. Churchill Livingstone Ltd., New Delhi, re-printed edition 1998, at page 99, under the general heading of anxiety disorder in chapter-11, which read such:

" Phobic Anxiety Disorder(F 40) Phobias (derived from the Greek word 'phobos' meaning fear, dread or flight) are fears that are persistent, intense and out of proportion to the demands of stimulus situation. The fears are beyond one's control and cannot be explained or reasoned away. The phobogenic stimuli(objects or 84 circumstances) are avoided or endured with dread. Mere contemplation of entry into such situation may generate anticipatory anxiety. The phobic anxiety disorder are classifiable into agoraphobia, social phobias and specific (isolated)phobias.

Agoraphobia(F 40.0) This is a fear of being in a place or situation(crowded, lonely and unfamiliar) with no easy escape or in which help might not be available in the event of panic feelings. Consequently the patients restrict their social and work activities thereby becoming housebound. A cluster of phobias related to leaving home is common. Travel in bus, train, plane or shopping or moving in crowded areas may precipitate phobia and hence stalled. The thought of collapsing and being rendered helpless outside and hence thereby being glued to the safe place namely one's house is most debilitating. Agoraphobia may be accompanied by features of depression, obsession, compulsion and social phobias of mild degree. Women suffer more often and the onset is in early adult life."

Flying phobia is a recognised anxiety disorder. The Current Psychiatry Reports, Volume No.VIII, Nos.3 & 4, June & August, 2006 published by JP Brothers, a review on the subject "The Assessment and Treatment of Specific Phobias", has been made by Daniel F. Gros, M.A and Martin M. Antony, Ph. D wherein it is contended that exposure therapy is effective for treating phobias of flying including the other phobia. Relevant portion read such:

> "Numerous studies have shown exposure therapy to be effective for treating phobias of spiders (15-17), snakes (18), thunder and lightning (19), water (20), heights (21), flying (22, 23), enclosed places (24), choking (25), dental treatments (26), and blood (27). In fact, a single session of in vivo exposure lasting 2 to 3 hours has been shown to lead to clinically significant improvements in some phobias (15, 23)."

Having regard to the aforesaid definition of phobia, the category of flying phobia and its treatment particulars, it appears that this phobia could be graded under definition of mental illness in terms of disability Act. Section 47 of the said Act provides that no establishment will dispense with any employee who acquires 85 disability during his services and provision should be made for alternative job. Section 47 of the said Act read such:

> " Non-discrimination in government employment-(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

> Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:
>
> Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.
>
> (2) No promotion shall be denied to a person merely on the ground of his disability:
>
> Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

Under sub Section 2 of Section 47, the aviation company is not exempted as an establishment from the provision of this section. Learned Advocate for the respondent aviation Company also did not submit to that effect and they have not denied about applicability of the Act but they have argued on the point that appellant was not suffering from mental illness in terms of definition of the said Disability Act.

As already noticed and discussed that there is report of Applied Psychology Service Programme Unit, University of Calcutta, dated 23rd November, 1998, which is already quoted identifying the appellant's illness as of simple phobia. 86 Hence, it has been proved that the petitioner was suffering from phobic anxiety which is within the category of mental illness. Though there is no report of medical board of aviation company, but the panel Doctor of the said company identified the disease of appellant by noting the same in the prescription, "phobia in flying", and the treatment proceeded on that basis by the panel psychiatrist of aviation company prescribing medicine.

It has been argued by the respondents that such suffering from aquatic phobia since was not identified by medical board by assessing the percentage of disability, there was no scope of the application of the said Act. From the prescriptions and the medical reports, it appears that petitioner/appellant was not fit for flying duties due to suffering from phobic anxiety in flying. If somebody suffers from phobic anxiety in flying, there is no question of further assessment of disability by quantifying ratio of percentage, under disability Act, as it is 100% disability of a cabin crew when cabin crew is unfit for flying duties due to phobic anxiety in flying. The panel psychiatrist of aviation company accordingly adviced 'stop flying'. When there is such advice of stop flying and identification of the disease as phobic anxiety in flying, there could not be any doubt that percentage of disability so far as performance of flying duties are concerned was 100%. Hence, the argument advanced that there was no such categorization/specification or measurement of disability percentage by any medical board, the appellant is not entitled to get the benefit of disability Act, has no basis.

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As already discussed that document is not a chameleon, who will change its colour at different time. Documents relating to medical treatment by panel psychiatrist of aviation company and Psychometry report are more than sufficient for conclusion of this Court about applicability of disability Act by holding that appellant suffered 100% disability to perform flying duties. Hence, disability Act has full applicability.

The authorities concerned before applying the clause of termination of service, were bound to consider said Disability Act and its safeguards, as prescribed, protecting interest of disable employees on social justice concept, which framed, restraining termination by the language that no establishment should dispense with the service of an employee acquired Disability during service career. The dismissing authority who terminated the service of appellant failed to consider the said statutory right accrued by the appellant/petitioner having regard to the mandatory provision of section 47 of disability Act.

Having regard to the conceptual idea of said Disability Act and the definition clause thereof defining Disability factors, the appellant had made out a case for consideration. It appears that aviation company practically accepted the said provision of alternative job to the cabin crew unable for flying duties due to over weight by issuing the employment notification as already discussed above, but did not apply it in the case of appellant.

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Once the authority has accepted this, the strictness or rigorous edge of termination clause under service contract due to over weight, was diluted absolutely and modified to a changed form of providing alternative job and not an order of termination from service. This issue was not considered and dealt with by the Regional Director, Eastern Region. When there was provision for alternative job by taking decision by said authority on factual elements of over weight contingency, aviation company was duty bound to consider that by choosing a path which was beneficial to workman having regard to social justice concept of Constitution of India.

Judicial review is a basic feature of the constitution and it is discretionary remedy. Access to justice is within concept of human right. Reliance is placed to the judgement passed in the case Bhagubhai Dhanabhai Khalashi v. State of Gujarat reported in (2007) 4 SCC 241. On ground of "error apparent on the face of the record" judicial review is permissible and it covers inter alia, a case where a statutory authority exercising its discretionary jurisdiction, did not take into consideration a relevant fact or based its decision on holding irrelevant factors. Reliance is placed to the judgement passed in the case N. Karnadasan v. Ajoy Koshok reported in (2009) 7 SCC 1. "Error in law" provides a scope of judicial review. Error in law includes giving of reasons that are bad in law or inconsistent, unintelligible or substantially inadequate. Reference is made to para 33 of the case S.N. Chandrasekhar v. State of Karnataka reported in (2006) 3 SCC 208. On error of fact also judicial review is maintainable. Reliance is 89 placed to the judgement passed in the case E. v. Secretary State for Human Department reported in 2004 (2) WLR 1351 (CA).

As discussed earlier, in the instant case, the Executive Director concerned who terminated service, came to a decision based on "error of fact". In the show cause notice, the allegation was that the appellant/writ petitioner was negligent to treat her properly and for that reason she became over weight, but as discussed earlier quoting from prescription of Dr. Bhattacharya that even on the date of show cause notice and also on the date when order of termination was passed, the appellant was undergoing treatment diligently. Hence there is a factual error to conclude a decision in decision making process whereby termination decision became the result. "Error of law" concept is also applicable as the said officer assigned reason which are bad in law and not with reference to the allegation of show cause notice. Concept of "Error apparent on the face of record" is also applicable herein, as the relevant facts namely the prolong illness from altitude phobia and treatment thereof and pendency of the prayer for annuity were not at all considered, though those were clearly mentioned in the reply of show cause notice with documentary evidence.

Even we assume that the appointment and termination of service is within the contractual field still then action of an authority under Article 12 of the Constitution of India, must be a reasonable action. Otherwise it will face the wrath of Article 14 of the Constitution of India. Reliance is placed to the 90 judgement passed in the case Bank of India v.K. Mohandas reported in (2009) 9 SCC 313 wherein earlier case Bank of India v. O. P. Swarnakar reported in (2003) 2 SCC 721 and Heavy Engineering Corporation Voluntary Retire Employees Welfare Society v. Heavy Engineering Corporation Ltd. reported in (2006) 3 SCC 708 were relied upon. Here the action of the said Executive Director, is per-se unreasonable and on breach of Article 14.

Scope and amplitude of writ remedies has been discussed in details in the case Secretary, Cannanore District Muslim Educational Association, Karimbam v. State of Kerala & Ors. reported in (2010) 6 SCC 373. The relevant paragraphs read such:

> "33. Almost a century ago, Darling, J. quoted the observations in R.v. Denbighshire (Justice of), in R. v. Revising Barrister for the Borough of Hanley, which explains the wide sweep of mandamus. The relevant observations are/Revising Barrister case, KB p. 529) "..... Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable."
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> 34. At KB p. 531 of the report, Channell, J. said about mandamus: (Revising Barrister case) " ..... It is a most useful jurisdiction which enables this Court to set right mistakes."
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> 35. In Dwarka Nath v. Ito a three Judge Bench of this Court commenting on the High Court's jurisdiction under Article 226 opined that this article is deliberately couched in comprehensive language so that it confers wide power on the High Court to "reach injustice wherever it is found". Delivering the judgement Justice Subba Rao (as His Lordship then was) held that the Constitution designedly used such wide language in describing the nature of the power. The learned Judge further held that the High

Court can issue writs in the nature of prerogative writs as understood in England; but the learned Judge added that the scope of these writs in India has been widened by the use of the expression "nature".

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36. The learned Judge in Dwarka Nath made it very clear that the said expression does not equate the writs that can be issued in India with those in England but only draws an analogy from them. The learned Judge then clarifies the entire position as follows: (AIR p.85, para 4) "4..... It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."

37. The same view was also expressed subsequently by this Court in J.R Raghupathy v. State of A.P. Speaking for the Bench, Justice A. P. Sen, after an exhaustive analysis of the trend of administrative law in England, gave His Lordship's opinion in para 29 at p. 1697 thus: (SCC p. 386, para 30) "30. Much of the above discussion is of little or academic interest as the jurisdiction of the High Court to grant an appropriate writ, direction or order under Article 226 of the Constitution is not subject to the archaic constraints on which prerogative writs were issued in England. Most of the cases in which the English courts had earlier enunciated their limited power to pass on the legality of the exercise of the prerogative were decided at a time when the courts took a general rather circumscribed view of their ability to review ministerial statutory discretion. The decision of the House of Lords in Padfield case marks the emergence of the interventionist judicial altitude that has characterized many recent judgements."

38. In the Constitution Bench judgement of this Court in LIC v. Escorts Ltd. reported in (1986) 1 SCC 264 this Court expressed the same opinion that in Constitutional and Administrative Law, law in India forged ahead of the law in England (SCC p.344, para 101).

39. This Court has also taken a very broad view of the writ of mandamus in several decisions. IN Comptroller and Auditor General of India v. K. S. Jagannathan reported in (1986) 2 SCC 679 : 1986 SCC (L&S) 345: (1986) 1 ATC 1 : AIR 1987 SC 537, a three-Judge Bench of this Court referred to Halsbury's Laws of England, 4th Edn., Vol.I, para 89 to illustrate the range of this remedy and quoted with approval the following passage from Halsbury about the efficacy of mandamus: "89. Nature of mandamus.- ... is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal 92 remedy, for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of rederss is less convenient, beneficial and effectual." (See SCC p.692, para 19 of the report).

In SCC para 20, in the same page of the report, this Court further held: (K. S. Jagannathan case, p. 693) reported in (1986) 2 SCC 679 : 1986 SCC (L&S) 345: (1986) 1 ATC 1 : AIR 1987 SC 537 "20. ... and in a proper case, in order to prevent injustice resulting to the parties concerned, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

40. In a subsequent judgement also in shri Anadi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V. R. Rudani reported in 11 (1989) 2 SCC 691: AIR 1989 SC 1607 this Court examined the development of the law of mandamus and held as under: (SCC p.701, para 22) "22. ... mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: 'To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract'. (Judicial Review of Administrative Action 4th Edn., p 540). We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirement of variable circumstances. Mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities shoud not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition." (emphasis supplied) (See AIR p. 1613, para 21)"

In the instant case it appears that the appellant joined in the service of Airhostess and she became a permanent staff of the respondent Company. Before terminating her service the concerned authority did not take care of her other rights as could be available on the admitted position of her suffering from phobic 93 anxiety to flying and increase of body weight due to adverse reaction of medication, to cure it. It is true that right to work is not a fundamental right, but once a person is appointed to a post/office, be it government or private, right has to be dealt with as per public element. This is the view expressed by three Judges Bench of Apex Court in the case Air India Statutory Corporation v. United Labour Union & Ors. reported in AIR 1997 SC 645. Paragraph 50 of the said report read such:

> "It would, thus, be seen that all essential facilities and opportunities to the poor people are fundamental means to development, to live with minimum comforts, food, shelter, clothing and health. Due to economic constraints, though right to work was not declared as a fundamental right, right to work of workman, lower class, a middle class and poor people is means to development and source to earn livelihood. Though, right to employment cannot, as a right, be claimed but after the appointment to a post or an office, be it under the State, its agency instrumentality, jurisdic person or private entrepreneur it is required to be dealt with as per public element and to act in public interest assuring equality, which is a genus of Article 14 and all other concomitant rights emanating therefrom are species to make their right to life and dignity of person real and meaningful. The democracy offers to everyone as a doer, an exerter and developer and enjoyer of his human capacities, rather than merely as a consumer of utilities, as stated by Justice K. K. Mathew, in his "The Right to Equality

and Property under the Indian Constitution" at page 47-48. These exercises of human capacity require access to the material resources and also continuous and sufficient instake of material means to maintain human energy. Lack of access to the material resources is an impediment to the development of human personality. This impediment as a lack of access to means of labour, if we take labour in its broadest sense of human resource requires removal only under the rule of law. To the workmen, right to employment is the property, source of livelihood and dignity of person and a means to enjoy life, health and leisure. Equality, as a principle of justice, governs the distribution of material resources including right to employment. Private property ownership has always required special justifications and qualifications to reconcile the institution with the public interest. It requires to thrive and, at the same time, be responsive to social weal and welfare. St. Thomas Acquinas, in 94 his "Selected Political Writings" (1948 Edn.) at page 169, has stated that the private rights and public needs are to be balanced to meet the public interest "the common possession of things is to be attributed to natural law, not in the sense that natural law decrees that all things are to be held in common and that there is to be no private possession, but in the sense that there is no distinction of property on the grounds of natural law, but only by human agreement, and this pertains to positive law, as we have already shown. Thus, private property is not opposed to natural law, but is an addition to it, devised by human reason. If, however, there is such urgent and evident necessity that there is clearly an immediate need of necessary sustenance, if , for example, a person is in immediate danger of physical privation, and there is no other way of satisfying his need, then he may take what is necessary from another person" goods, either openly or by stealth. Nor is this strictly speaking fraud or robbery." Property is a social institution based upon a economic need in a society organised through division of labour, as propounded by Dean Rosco Pound in his "An Introduction to Philosophy of law" (1954 Edn.) page 125, at 129. M. R. Cohen in his "Property and Sovereignty" (13 Cornell Law Quarterly page 8 at 12 had stated that "the principle of freedom of personality certainly cannot justify a legal order wherein a few can, by virtue of their legal monopoly over necessities, compel others to work under degrading and brutalizing condition." If there is no property or if one does not derive fruits and means of one's labour, no one would have any incentive to labour in the broader sense. Social progress receives set back without equality of status, fraternity would not be maximised. Edward Kent in his "property, Power and Authority" Prof. Herald Laski in his "Congress Socialist" dated April 11, 1936, had stated that "those who know the normal life of the poor will realise enough that without economic security, liberty is not worth living". Brooklyn Law Review page 541 at 547 has stated that "In modern translation public officers and others who promulgate policies designed to increase unemployment or to deny or diminish benefits to the poor are accountable for the consequences to free human personality." It would, thus, be clear that in a socialist democracy governed by the rule of law, private property, right of the citizen for development and his right to employment and his entitlement for employment to the labour, would all harmoniously be blended to serve larger social interest and public purpose."

Here in the instant case it was a question of livelihood of the appellant, a workman, as per Industrial Dispute Act and once she was appointed in the Aviation Company, an authority under Article 12 of the Constitution of India, her 95 case was required to be dealt with on the reflection of the public law elements by adhering to Article 14 and 21.

Considering the aforesaid principles of law and points discussed and my findings and observation above, writ is maintainable and I hold that there is breach of Article 14 and 21 of the Constitution of India. The order of termination accordingly is not legally sustainable and it is set aside and quashed. Impugned judgement and order of Learned Trial Judge, except the order of consideration for alternative job, stand set aside and quashed.

From the documents, it has been proved that the appellant was suffering from phobic anxiety in flying and accordingly disable to perform flying duty.

In view of said admitted fact, after nine years, I have to deal with the relief as could be granted to the appellant on the basis of records available considering the suffering of the appellant from altitude phobia, scope of the employment notification and annuity clause under settlement, a condition of service.

Order of termination now has been quashed and set aside by us. As a resultant effect she will be deemed in service continuously. Now another question is to be dealt with whether the appellant should be granted with all back wages due to quashing of order of termination from service and restoring of her service status. This Court is not unmindful of the fact that earlier concept of grant of 96 back wages as automatic as and when order of termination from service is quashed, now has suffered a sea change. The back wages are required to be dealt with and considered independently and it is not an automatic process and grant of back wages, depends upon the fact of each case. Reliance is placed to the judgement passed in Novartis India Ltd. v. State of West Bengal reported in (2009) 3 SCC 124 wherein the Apex Court considered the earlier views expressed in different cases. Very recently the apex Court has also considered that principle and held that adequate compensation could be granted. Reliance is placed to the case Ashok Kumar Sharma v. Oberoi Flight Services reported in (2010) 1 SCC

142. Same view has been echoed by the Apex Court in the case Senior Superintendent Telegraph Traffic, Bhopal v. Santosh Kumar Singh reported in (2010) 6 SCC 773.

Having regard to those principle in law now I have to determine the issue about back wages. From the documents as annexed in the writ application and the records as produced by the respondent company, it is explicitly proved that the appellant was and is suffering from phobic anxiety syndrome in the category of "simple phobia" whereby she suffered embargo to perform flying duties. It appears from the records that during her service period prior to termination, she was not paid her wages for long so many years and even sustenance allowances was not paid. In view of suffering from illness she even could not join in any organisation as Airhostess. Her disability has been determined 100% disability to perform flying duties. Considering pleading of economic suffering and 97 consequences as she has suffered, the mental agony as she had sustained, the back wages in

the nature of compensation could be a reasonable order directing the respondent aviation company to pay full back wages considering her in service from the date of termination till the date of their decision of providing any alternative job or annuity as per direction, given in this judgement. The respondent company has not argued that she was gainfully employed elsewhere and that she is not suffering from said phobia at the present moment. Having regard to the situation and the special facts of this case and for ends of justice, I am of the view that appellant is entitled to get all arrears salary allowances/wages and service benefits in nature of compensation and damages, and it is ordered accordingly. Such amount to be paid within two months from this date.

The aforesaid direction for payment of full salary, wages and service benefit/back wages and seniority in service considering the service as continuous service, has been passed having regard to the constitutional breach of Article 14 and 21 of the Constitution of India and having regard to the principle of social and economic justice as enshrined in the directive principle of State policy of the Constitution of India. The preambular concept as enshrined in the Constitution also has been taken care of. The cases where full back wages were denied by the Apex Court in the aforesaid judgements were the cases of retrenched workmen and in some cases status of employment was not permanent. As already discussed that grant of back wages practically has no rigid formula/parameters, 98 but it depends upon case to case. Here a lady admittedly was suffering from "altitude phobia" and thereby became disable to perform her duty as Airhostess. The termination of service has caused injury to her constitutional rights and the statutory rights as discussed. In view of gravity of the breach as noticed and taking note of constitutional goal, the direction of payment of full salary, allowances and service benefit is justified in my view. Before parting with that issue I am tempted to quote two paragraphs from the judgement Harjinder Singh v. Punjab State Warehousing Corporation reported in (2010) 3 SCC 192, being paras 30 and 31 which read such:

> "30. Of late, there has been a visible shift in the courts' approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalisation and liberalisation are fast becoming the raison d'etre of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganised workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment/engagement of the workman/employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment. The courts have readily accepted such plea unmindful of the accountability of the wrong doer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood.
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> 31. It need no emphasis that if a man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic

> justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the courts must be compatible with the constitutional philosophy of which the directive principles of State policy constitute an integral part and justice due to the workman 99 should not be denied by entertaining the specious and untenable grounds put forward by the employer-public or private."

The respondents are directed to set up a medical board for grant of annuity to the appellant and as per decision of that medical board, she will be granted appropriate relief of annuity following the terms of settlement and on the basis of quantum as fixed. Such medical board to be set up within a month from this date and appropriate decision to be reached and communicated to the appellant within two months from this date. The medical board as to be constituted will consider all documents as relied upon by the appellant in this Court proceeding as well as other documents as to be placed by the appellant and aviation Company relating to health condition of appellant. If, medical board decides in favour of appellant, annuity should be granted forthwith and such grant will continue as per settlement.

The aviation company is also at liberty to provide any alternative job protecting pay scale/wage of appellant as on this date in lieu of grant of annuity, in favour of the appellant, in the event the appellant do qualify for such alternative job. In the event she is not entitled to alternative job or she is not provided such due to non-availability of post, annuity be provided on considering her present wages and allowance etc. as per settlement norms. 100

Till the consideration of annuity and/or alternative job issue, the aviation Company will continue to pay full salary/wage and allowances and other service benefit to the appellant.

The writ application is accordingly allowed. Appeal is also allowed accordingly.

(Pratap Kumar Ray, J.) I agree, (Mrinal Kanti Sinha, J.) LATER:

Stay as prayed for is refused. Records as produced be returned to the learned Advocate for the respondents.

(Pratap Kumar Ray,J.) I agree, (Mrinal Kanti Sinha, J.)