Gurmail Singh and Others

Vs

State of Punjab and Others

Civil Appeal Nos. 10519 of 1983

(S. Ranganathan, P.B. Sawant, N.M. Kasliwal JJ)

25.10.1990

JUDGMENT

RANGANATHAN J

1. The appellants were in service as tubewell operators in the Irrigation Branch of the Public Works Department of the Punjab State. The State took a decision to transfer all the tube wells in this branch to the Punjab State Tubewell Corporation (hereinafter referred to as 'the Corporation), a company wholly owned and managed by the State of Punjab. Consequent on this decision, a notification was issued on 30th November, 1982 to the effect that "the posts sanctioned for the Tubewell Circle, Irrigation Branch, Punjab, are no longer needed in the public interest." It was, therefore, ordered that all the permanent posts sanctioned for the above circle be abolished with effect from 1-3-1983 and that all temporary posts be discontinued with effect from the same date. A little earlier, on 31st August, 1982, the petitioners were served with notices in terms of S. 25-F of the Industrial Disputes Act (hereinafter referred to as 'S. 25F') terminating their services with effect from 30th November, 1982. These notices were, however, set aside as not being in consonance with Cl. (c) of S. 25-F. The State Government, therefore, issued fresh notices terminating the services of the petitioners with effect from March 1, 1983. These notices were also set aside by the High Court on the ground that they did not conform to the provisions of Cl. (b) of S. 25-F. Thereupon the State served fresh notices on the petitioners terminating their services in terms of S. 25-F with effect from August 31, 1983. The appellants once again approached the High Court contending that the decision of the State Government transferring the tubewells to the Corporation and terminating their services was invalid. It was contended: (a) that the impugned notices did not fulfil the requirements of Cls. (b) and (c) of S. 25-F; (b) that the notification by which the tubewells were transferred was mala fide, the only object of the transfer being to frustrate certain claims of the petitioners which had been judicially recognised; and (c) that, in case the action of the State is upheld, the respondent Corporation should be held to be under an obligation to employ the petitioners with continuity of service and under the same terms and conditions- which they were enjoying prior to their retrenchment from the service of the State.

2. These contentions were rejected by the High Court. It held that the notices did not suffer from any defect. It was pointed out that the writ petitions had been filed before the expiry of the date from which the retrenchment notice was to be effective, namely, 31st August, 1983. The retrenchment notice itself specifically mentioned that the retrenchment compensation, as admissible under the rules, will be paid before the notice of retrenchment took effect and that it could be collected personally from the respondent's Sub-Division/ Divisional Officers. At the instance of the Court, the State had filed an additional affidavit in which it was averred that drafts in respect of the amounts of compensation had been despatched to the Divisional Offices in the manner following:

Tubewell Division Between 25 to 27

Malerkotla August, 1983

Tubewell Division Between 19 to 24

Hoshiarpur August, 1983

Tubewell Division Between 19 to 24

Jullundur August, 1983

The relevant records showing the despatch of these drafts were also produced in the Court. The High Court was satisfied that the State had despatched individual bank drafts in respect of each of the employees well in advance of the date of expiry of the notice period and that the despatch of these drafts to the divisional offices constituted a good and valid tender of the compensation amount to the appellants. The Court held that this was sufficient compliance with the provisions of Cl. (b) of S. 25-F. So far as the provisions of Cl. (c) of S. 25-F were concerned, the High Court was satisfied that the requisite notice in the prescribed form 'P' was sent to the Secretary to Government, Labour Department and the Employment Exchange concerned by personal delivery duly acknowledged in the peon book of the Department. Pointing out that the requirements of Cl. (c) of S. 25-F were only directory and not mandatory, the High Court was of the opinion that the notices were not vitiated due to non-compliance with Cl. (c) of S. 25-F.

3. Turning to the allegation regarding mala fides, the contention of the appellants was this. They submitted that the tubewell operators in the Irrigation Branch of the PWD had filed a writ petition, being C.W.P. No. 3340 of 1972, in the Punjab High Court claiming parity of pay with the tubewell operators employed in the Public Health Department of the State Government. That petition was allowed on February 5, 1981 (reported in 1981 (1) Serv LR 512). But the respondent authorities failed to implement the directions contained in that judgment, thus forcing the petitioners to move a Contempt Application (No. 221 of 1981). Thereafter, the State authorities gave effect to the judgment and paid arrears to the petitioners in the writ petition but did not extend the benefit thereof to the tubewell operators other than the actual petitioners in the writ petition. The other tubewell operators, thus denied the benefits of the judgment, were constrained to file three more writ petitions seeking the extension of same relief to them. These writ petitions were allowed on 7-8-1981 in terms of the earlier decision dated 5-2-1981. The respondent authorities chose to file S.L.P. Nos. 9195 to 9197 of 1981 in the Supreme Court but these were dismissed on 19-2-1982. Still, the respondent authorities showed their reluctance to implement the judgments of the High Court compelling the petitioners to file three Contempt Petitions (Nos. 294 to 296 of 1981) against the defaulting authorities. However, before the disposal of these writ petitions, the State filed a letters patent appeal against the judgment in C.W.P. No.3340 of 1972 and obtained an order staying the operation of the said judgment. Consequent on this, the contempt applications had to be withdrawn and were dismissed as such on 8-4-1982. We are told that the letters patent appeals have been dismissed recently on 7-8-1990.

4. According to the appellants, the authorities took a decision to transfer the tubewells of the Irrigation Branch to the Corporation only with a view to deprive the appellants of the benefit they had gained as a result of the above litigation. It was pointed out that the Corporation had come into existence as early as 1970. Its main objects, as set out in the Corporation's memorandum of

association, were inter alia:

xxx xxx xxx

(2) To take over from the Government of Punjab the existing system of State owned irrigation and augmentation tubewells along with connected buildings, assets, works and any of their projects connected with the installation, maintenance and operation of the State owned tubewells, with the rights and liabilities of the Government of Punjab so far as they relate to such tubewells, buildings, assets, works or projects.

These assets shall be taken over by the Punjab State Tubewell Corporation Limited as contribution by the Punjab Government towards share capital.

> (19) To enter into any arrangement with the Government of India, Government of Punjab, or any other Government or State or local authority for the purpose of carrying out the objects of the company for the furthering its interests and to obtain from such Government or Authority or person any charters, subsidies, loans, indemnities, grants, contracts, licences, rights, concessions, privileges or immunities which the company may think desirable to obtain and exercise and comply with any such arrangements, rights, privileges and concessions."

Though the Corporation had been formed so long ago with the express object of taking over the tubewells of the irrigation branch and though it was operating a large number of tubewells on its own account since then no efforts had been made by the Government to transfer the tubewells belonging to the State to the Corporation till 1982. Even under the impugned notification only tubewells belonging to the irrigation branch were transferred but not those which were being operated by the Public Health Department of the same State. The appellants vehemently contended that all these facts clearly showed that the sudden decision in 1982 to transfer the tubewells to the Corporation was intended as a measure of victimisation of the appellants who were only fighting for their rights of equal pay with other tubewell operators in the State.

5. The High Court did not find any substance in this contention. It pointed out that the idea that eventually the tubewells belonging to the State should be transferred to the Corporation had germinated as early as in 1970. Though this was not implemented immediately, a decision to transfer the tubewells to the Corporation had been taken in the light of the recommendations of the Estimates Committee of the Punjab Vidhan Sabha made in the year 1977-78, that is, about three years earlier to the decision of the High Court dated 5-2-1981 in C.W.P. No. 3340 of 1972 (reported in 1981 (1) Serv LR 512). The authorities had placed before the Court the minutes of a meeting held under the Chairmanship of the Chief Minister of Punjab on October 18, 1973, wherein it had been decided that since irrigation from the State tubewells had not developed as expected and the State Government was running into a financial loss on account of the operation of these tubewells, the same be transferred to the Corporation. It had also been decided at the meeting that the Government would meet the loss that may be suffered by the Corporation on account of the operation and maintenance of these tubewells. In the light of these facts, the High Court held that there was no basis for the allegation of the petitioners that the impugned notification had been issued mala fide solely with a view to deprive the appellants of the benefits they had obtained from the Courts. It was pointed out by the High Court that the appellants had subsequently been given all the benefits which they had derived as a result of the writ petitions. That apart, it was also found that the Corporation had made an offer of re-employment to all the appellants effective from the date of expiry of the

notice of their retrenchment by the State Government. All this showed, according to the learned Judges, that the sole object of the issuance of the notification was to get rid of the tubewells which were the cause of a constant and ever increasing loss to the State exchequer and not any mala fide or extraneous reasons.

6. On contention (c), the High Court observed as follows:

> "So far as the alternative relief of reemployment with continuity of service and pensionary benefits in terms of the Punjab Civil Service Rules is concerned, the petitioners cannot be granted the same in view of the provisions of S. 25-FF (of the Industrial Disputes Act) as introduced on September 4, 1956. In this regard the petitioners have based their whole claim on certain observations made in two Division Bench judgments of the Bombay High Court, reported as New Gujarat Cotton Mills Ltd. v. Labour Appellate Tribunal, AIR 1957 Bom 111 and N. J. Chavan v. P. D. Sawarkar, AIR 1958 Bom 133. Besides there being dissimilarity of facts in those cases and the instant case, the same relate to a period prior to the insertion of S. 25-FF. In Anakapalle Co-operative Agricultural and Industrial Society Ltd. v. Workmen, AIR 1963 SC 1489, their Lordships of the Supreme Court after noticing the first judgment of the Bombay High Court referred to above, have held in categorical terms that such employees can make no claim against the transferee concern. Otherwise also we are of the view that the claim of the petitioners is not covered by S. 25-FF of the Act as it has nowhere been pleaded or established by them that the ownership or management of the tubewells has been transferred by the State Government to the Corporation either 'by agreement or by operation of law'. As already pointed out, the transfer of the tubewells in the instant case has taken place as a result of the unilateral decision by the State Government. Even if it is to be accepted to be a case of transfer of the undertaking by agreement as is suggested by the learned counsel for the petitioners, still the wording of the proviso and more particularly of Cl. (b) to S.25-FF clearly indicate that the transferee concern of the management can change the terms and conditions of the workman. Further on the facts of the case, we do not see how the petitioners can claim the benefits or rights of a civil servant while in the service of the Corporation and thereby force the Corporation to say good bye to its Rules and Regulations." In the result, the various writ petitions were dismissed and hence the present appeals.

7. Before us, practically the same arguments have been addressed as were addressed before the High Court but with slight variations. It might appear at first sight that the appellants have really no cause of grievance inasmuch as, though retrenched by the State Government, their services have been taken over by the Corporation. We have also been informed that the scale of pay of the tubewell operators in the Corporation is identical with that of those employed by the State Government. Though at one stage the Corporation had taken the stand that the appellants will be taken as fresh appointees in the Corporation, it is now common ground that the Corporation has fixed them up at the same level of pay at which they were in Government service immediately before retrenchment and they are also being granted increments on that scale. Though these concessions were made during the pendency of the proceedings on interim applications made by the appellants, the learned counsel for the State and Corporation have stated before us that these benefits would be continued irrespective of the decision in these matters. Thus, in the result, so far as pay is concerned, the petitioners have suffered no detriment whatsoever as a result of the action taken by the Government. There are, however, two grounds of dissatisfaction which are consequent on the appellants being

treated as fresh appointees who have entered the service of the Corporation only on the dates of their respective appointments thereto with the result that all the appellants will be junior in service to the tubewell operators who had been engaged by the Corporation, on its own account, between 1970 and the dates on which the appellants joined the service of the Corporation. This by itself may also be much of a disadvantage to the appellants since many of them are senior in age to the other tubewell operators and may well retire earlier and we are also told that there are no avenues of promotion from the post of tubewell operators, with the result that the question of seniority may not be very material. The apprehension of the petitioners, however, is that their down-gradation in seniority will affect them in case the Corporation starts closing down some of the tubewells and discharging its staff, an apprehension which is stated to be not purely hypothetical but quite real. The second disadvantage is that many of the appellants have put in a large number of years in the service of the Government. By being treated as retrenched Government servants, they will be able to get terminal benefits and pension only on the basis of their present lengths of their service in the Government. On the other hand, if they were to continue with the Corporation under the same terms and conditions which they were enjoying under the Government, they would get the advantage of continuity of service and thus be entitled to substantially higher amounts of pension and other terminal benefits. On a rough calculation, it is stated that some of the appellants might stand to lose about Rs. 600 to Rs. 700 per month as a result of being deprived of the benefit of their long service in Government and by being treated as new recruits in the Corporation.

8. We have heard the learned counsel for the appellants as well as the counsel for the State and the counsel for the Corporation. We entirely agree with the reasoning of the High Court on contentions (a) and (b) earlier set out. We are also of the opinion that no alterior motives on the part of the Government have been established. It is no doubt true that there was some litigation between the appellants and the Government but this related to their pay scales and it is now common ground before us eventually the petitioners have had the benefit of the higher pay scales which were in vogue in the Public Health Department. It is no doubt true that the increased wage bill consequent on these decisions of the High Court must have made the tubewells in the irrigation branch more unremunerative than before and may thus have precipitated the decision to transfer the tubewells to the corporation. However, as pointed out by the High Court, the decision that there should be a Tubewell Corporation, that the Corporation should, in course of time, acquire the tubewells belonging to the Government and that the tubewells of the irrigation branch should be made over to the Corporation had been taken quite a long time back. The fact appears to be that the tubewells were not being operated profitably by the Government and the Government seems to have taken a decision that it would be more efficient, economical and prudent to have these tubewells run by the Corporation. There is no reason to doubt the bona fides or the genuineness of this arrangement. It is true that the tubewells in the Public Health Department do not appear to have been transferred to the Corporation. But we have no details before us regarding the magnitude of the State's problem vis-a-vis those tubewells and it is difficult to draw an inference, merely because the tubewells of the Public Health Department were not transferred to the Corporation, that the transfer of the tubewells in the irrigation branch was actuated by a desire to victimise the appellants. We, therefore, see no substance in this contention of the appellants.

9. We do not also see any force in the contentions regarding non-compliance with the provisions of S. 25-F of the Industrial Disputes Act. It is urged on behalf of the appellants that the State has not furnished the details of the amounts of compensationdetermined in the case of each employee and that the State had also taken no steps to deliver the payment in respect of each employee at his door by the relevant date. It is submitted that the tender of compensation under S. 25-F, in order to be valid, should be of the precise amount and should be made simultaneously with termination of the

service. This, of course, is correct but the High Court has satisfied itself by looking into the original records, that drafts in respect of individual employees were despatched in time so as to reach Divisional/ Sub-Divisional Offices by 31st of August, 1983. An attempt was made before us to suggest that there was some discrepancy between two affidavits filed by the State Government in this behalf. We have perused the said averments and we find no inconsistency as alleged. It is true that the amounts were not actually paid or tendered to the workers by the Corporation directly but the Corporation had evolved a method of disbursement of compensation in the interest of the workers' convenience. Instead of making the appellants, spread out all over the State, to come to the head office to collect the compensation and to avoid the inconvenience and difficulty of the Corporation making available the compensation at the doorstep of each employee, the Corporation made arrangements whereby the tubewell operators could go to the nearest Divisional/Sub-Divisional Office and collect the amount of compensation due to them. It appears that the appellants were not interested in taking the compensation amount. None of them appears to have ascertained whether these amounts had reached the Sub-Divisional Office and whether they were for the correct amounts. No instance has been pointed out to us to show that they were not for the correct amounts. We do not think we need elaborate further on this aspect since the relevant records were brought before the High Court and the High Court was satisfied that the individual compensation drafts were sent to the various subordinate offices ready for distribution to the concerned workers on or before the relevant date. In the circumstances of this case, we agree with the High Court that when individual drafts for the amounts of compensation due to the various tubewell operators were forwarded to the Divisional/ Sub-Divisional Offices, sufficiently in time to be available to be taken by them by 31st August, 1983, there was sufficient compliance with the provisions of Cl. (b) of S. 25-F.

10. The contention based on Cl. (c) of S. 25-F is equally baseless. It has been verified that notices were sent to the Labour Department as well as to the employment exchange through the peon book. There is no reason to doubt the entries in these books. The suggestion is that they should have been sent by registered post. As rightly pointed out by the High Court, such a requirement can be treated only as directory and not mandatory and it would be erroneous to hold that, unless sent by registered post, the notices cannot be treated as complying with the statute. We, therefore, reject this contention as well.

11. This leaves for consideration the principal question in this case as to whether the circumstances such as these, the State is under an obligation to protect the terms and conditions of service of the tubewell operators. The State's case is that it had transferred its tubewells to the Corporation. The operators, therefore, became surplus and they were retrenched. Retrenchment compensation was duly paid to them. It is suggested that the State's obligation came to an end with this. It was under no obligation to find any fresh or alternative employment to the workers. However, being a welfare State, it did arrange for such alternative employment. It was obviously under the State's directions that the Corporation went out of its way to confer a favour on the appellants by agreeing to take them into its service. It is submitted that the Corporation had its own terms and conditions of service for its employees and could not change those terms and conditions of service for the benefit of these few employees whose services had been taken over as an act of commiseration. It would be unfair on the part of the Corporation to give the appellants benefit of their earlier service in the Government and make them senior to other employees who had been serving in the Corporation right from the beginning. It is, therefore, submitted that the two chapters of service of the appellants, one with the Government and the other with the Corporation are two separate and independent chapters. The first chapter has come to a close because the State Government was not able to continue to operate the tubewells by itself. The second chapter has commenced with a totally

independent offer by the Corporation to the erstwhile Government servants of an employment in the Corporation. This is a fresh employment subject to the normal Rules and Regulations of the Corporation. The appellants have no right to claim any continuity of service in the circumstances.

12. Shri Gujral, learned counsel for the appellants has contended before us that the approach which the State Government wants this Court to adopt is an unrealistic and purely technical approach. According to him, the Corporation is really nothing but a department of the Government. It is no doubt an independent entity in the sense that it has a separate legal existence with its own employees and its own finances to be looked after according to certain rules and regulations but, says Sri Gujral, in circumstances such as these, the "corporate veil" of the Corporation has to be torn as under and the basic identity of the Corporation as a department of the Government should be recognised and given effect to.

13. Alternatively, Sri Gujral argues, even if the Corporation be taken to be a separate legal entity, it is clearly a "successor" to the Government department. He points out that the very memorandum of the Corporation contemplates the taking over by it of the tubewells belonging to the Government together with all the rights and liabilities of the Government so far as they relate to such tubewells. The assets taken over are to be treated as contributions of capital by the Government to the Corporation. It is also common ground that in this case, while transferring the tubewells to the Corporation, the Government has assured the Corporation that, if it suffers any losses because of the transfer, the losses would be made good by the Government. The true and real essence of the transaction put through is that the tubewells, along with all appurtenances, rights and liabilities, including the liability to continue the services of the tubewell operators have been taken over by the Corporation. Having regard to the virtual identity of the Corporation and the Government, this is really a case of the Corporation having taken over a department of the Government though, in form, the Government has purported to retrench, and the Corporation to re-employ, the appellants. Shri Gujral submitted that both the irrigation branch of the State Government as well as the Corporation admittedly constitute an "industry" within the meaning of the Industrial Disputes Act. Indeed, retrenchment compensation has been offered to the appellants under the Industrial Disputes Act. In these circumstances, Shri Gujral vehemently contends, the problem before us should be looked at from the point of view of industrial law. One should ask oneself the question: if a similar transaction had been put through in the private sector by two industrial organisations, how would the Court have tackled the problem? This, according to Sri Gujral, is the proper test to be applied and, if that is done, he submits, there can be but one answer to the question in this case.

14. There is no dispute before us that the running of tubewells constitutes an 'industry' whether in the hands of the Government or in the hands of the Corporation. As pointed out by this Court in State of Bihar v. Industrial Tribunal, (1977) 51 FJR 371 : (1977 Lab IC 803)*, there is also no incompatibility in applying some of the provisions of the Industrial Disputes Act to persons in the service of the Government. We may, therefore, first examine what the position would be if the principles of industrial law were to be applied to a situation where one person succeeds to the business which is being carried on by another. Shri Gujral contends that there is preponderant authority for holding that, if those principles were to apply, the tubewell operators should have, in the Corporation, the same terms and conditions of service which they enjoyed when they were in the Government. In support of this proposition, Shri Gujral relies upon the decision of the Bombay High Court in New Gujarat Cotton Mills Ltd. v. Labour Appellate Tribunal, (1957) 2 Lab LJ 194 : (AIR 1957 Bombay 111). In that case, the business and undertaking of a cotton mill was taken over as a going concern by another company. The successor company, however, declined to continue in its employment some of the employees of the predecessor company. Thereupon, the applications

were filed by them before the Labour Court for an order against the successor company for reinstatement or re-employment. This application was rejected by the Labour Court but, on appeal. the Labour Appellate Tribunal held that the new company could not refuse to take them in. It observed (vide Ramjilal Nathulal v. Himabhai Mills Co. Ltd., (1956) 2 Lab LJ 244) :

(*As per citation the decision appears to be of Patna High Court and not Supreme Court .....Ed.)

"12. Under the civil law, a person who is a successor to a business is not bound merely because of such succession by the debts or liabilities of the old business; and even if he has agreed with his transferor to be so liable, third parties, in the absence of a tripartite arrangement, cannot enforce such debt or liability against the transferor who alone continues to remain liable for such debts and liabilities to third parties ......

13. Unlike the civil law, however, the industrial law has naturally taken a different view with regard to the duties of a successor in business who has decided to run the same and in the case of employees of the old concern it has regarded the rights and obligations of the old concern as continuing and to be enforceable as against the new management and not to be affected by the substitution of the new management for the old, whenever justice of the case would require such enforcement.... The same principles have also been recognised as of general application by the Madras High Court in the case of Odeon Cinema, (1954) 2 Lab LJ 314 : (AIR 1954 Madras 1045), as shown by the observations of their Lordships at p. 319 where they remark: 'The industrial tribunal has cited a number of decisions of other industrial tribunals, in the course of which it has been held that where there is a transfer of business of one management to another, the rights and obligations which existed as between the old management and their workers continue to exist vis-a-vis the new management, after the date of the transfer. The learned counsel for the petitioners does not challenge the correctness of these decisions, which really are in application of the principle embodied in S. 18(c) of the Industrial Disputes Act ...."

This view was approved by the Bombay High Court. Speaking for the Court, Shah, J. observed (AIR 1957 Bombay 111, para 6):

> "In our view, in industrial matters, the Court is entiled and is indeed bound to modify contractual rights and obligations on considerations of equity and in the larger interests of the community, such as promotion of industrial peace and security of employment of workmen. Merely because under the law of contracts, a claim may not lie at the instance of the applicants to be reemployed or reinstated by the new company, the claim made by the applicants cannot be regarded as inadmissible. It appears to have been settled by a large number of decisions of the industrial and labour Courts that the industrial law takes a different view about the duties and obligations of a successor-in-business, and if a successor decides to run the same business which was carried on by his predecessor, the employees of the old concern are entitled to submit a dispute before the industrial tribunal regarding their rights and obligations in the business of the old concern, and those rights and obligations must be regarded as continuing and enforceable against the new management and not affected by the substitution of the new management for the old. In Odeon Cinema v. Workers of Sagar Talkies, (1954) 2 Lab LJ 314 : (AIR 1954 Madras 1045), it was observed by the Madras High Court (p. 319):
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> "��� Where there is a transfer of a business of one management to another, the

rights and obligations which existed as between the old management and their workers continue to exist vis-a-vis the new management, after the date of the transfer."

It is also implicit in Ss. 114 and 115 of the Bombay Industrial Relations Act that the rights and obligations of a management of an industrial undertaking are enforceable in proper cases against its successor. It appears from the terms of S. 18(c) of the Industrial Disputes Act that a successor to an old undertaking is liable to meet certain obligations of its predecessors. In our view, therefore, the absence of a direct contractual relation between the applicants and the new company is by itself not a ground for rejecting the claim made by the applicants."

15. Sri Nayar submits that the Bombay case was one in which the employees of the old concern had only sought "re-employment" in the successor concern, a concept quite different from the concept of continuity in service on the same terms and conditions and invited our attention to S.25H of the Act and to the decision in Indian Hume Pipe Co. Ltd. v. Bhimarao, (1965) 2 Lab LJ 402: (AIR 1966 Bombay 270). It is true that the Claim in the Bombay case appears to have been one for re-employment but the principle laid down in these decisions is in wider terms, as the passages underlined in the above excerpts will show. We may also refer in this context to the brief decision of this Court in Ban Nigam Karamchari Kalyan Sangh v. Divisional Logging Manager, (1988) 3 JT (SC) 22 (1). In this case, the petitioners were in the employment of U.P. Forest Corporation which was appointed agent for collecting tendu leaves. The Ban Nigam was appointed in place of the Corporation. Thereupon, the Corporation terminated the services of the workmen. This Court passed a brief order to the following effect :

"In the proceeding before the High Court, as also here, the State and the Nigam have not been impleaded as parties but learned counsel for the Corporation tells us that it was the understanding that the Nigam would takeover these 149 workmen on the same terms and conditions as were applicable when they were working under the Corporation. Since both the Corporation and the Nigam are Government concerns as learned counsel for the Corporation tell us that this was the understanding, we direct the Nigam to continue the 149 workmen in employment on the same terms and conditions as were applicable to them when the Corporation was the agent for collection of tendu leaves. The list of the 149 workmen is not on record. Learned counsel for the applicants has undertaken to provide the list within 24 hours."

There was no doubt an understanding in this case but even without this, counsel says, the position would be the same. It appears that the broad issue as to the rights of such workmen against a successor-in-business was raised but not decided in Workmen v. Dahingeapara Tea Estate, (1958) 2 Lab LJ 498: (AIR 1958 SC 1026), a case which came up before a five Judge Bench of this Court. The High Court has, however, referred to the decision of this Court in Anakapalla Co-op. Agricultural and Industrial Society Ltd. v. Its Workmen, (1963) Supp 1 SCR 730 : (AIR 1963 SC 1489) and taken the view that the principle enunciated in the judgments quoted earlier is not valid after the enactment of S. 25FF of the Act. This section provides that where there is a transfer of an undertaking by agreement or operation of law, an employee who loses his job because of such transfer will have a right to compensation from the predecessor, except where he gets the benefit of uninterrupted service with the new employer on no less favourable terms than before and will be entitled to compensation in case he should be retrenched later by the new employer. It has been construed in the Anakapalla Society case to say that in such a situation the employee can at best

claim retrenchment compensation from the predecessor on the basis of a notional retrenchment but will have no right to claim re-employment, much less on the same conditions as before, from the successor. It is necessary to extract here certain observations from judgment in the Anakapalla case, (AIR 1963 SC 1489) (supra) which, if we may say so with respect, clinch the issue. Gajendragadkar, J., speaking for a five-Judge Bench of the Court summed up the earlier legal position thus (para 11):

> "That takes us to the question as to what would be the nature of the appellant's liability to the employees of the Company. Before S. 25-FF was introduced in the Act in 1956, this question was considered by industrial adjudication on general considerations of fair play and social justice. In all cases, where the employees of the transferor concern claimed re-employment at the hands of the transferee concern, industrial adjudication first enquired into the question as to whether the transferee concern could be said to be a successor-in-interest of the transferor concern. If the answer was that the transferee was a successor-in-interest in business, then industrial adjudication considered the question of re-employment in the light of broad principles. It enquired whether the refusal of the successor to give re-employment to the employees of his predecessor was capricious and unjustified, or whether it was based on some reasonable and bona fide grounds. In some cases, it appeared that there was not enough amount of work to justify the absorption of all the previous employees; sometimes the purchaser concern needed bona fide the assistance of better qualified and different type of workers; conceivably, in some cases, the purchaser has previous commitments for which he is answerable in the matter of employment of labour; and so, the claim of re-employment made by the employees of the vendor concern had to be weighed against the pleas made by the purchaser concern for not employing the said employees and the problem had to be resolved on general grounds of fairplay and social justice. In such a case, it was obviously impossible to lay down any hard and fast rules. Indeed, experience of industrial adjudication shows that in resolving industrial disputes from case to case and from time to time, industrial adjudication generally avoids - as it should - to lay down inflexible rules because it is of the essence of industrial adjudication that the problem should be resolved by reference to the facts in each case so as to do justice to both the parties. It was in this spirit that industrial adjudication approached this problem until 1956 when S. 25-FF was introduced in the Act. Sometimes, the. claim for re-employment was allowed, or sometimes the claim for compensation was considered. But it is significant that no industrial decision has been cited before us prior to 1956 under which the employees were held entitled to compensation against the vendor employer as well as re-employment at the hands of the purchaser on the grounds that it was a successor-in-interest of the vendor."

The Court then referred to the insertion of S. 25-FP in 1956, the inadequacy of its language in view of Hariprasad v. Divikar, 1957 SCR 121 : (AIR 1957 SC 121), the effect of its retrospective amendment in 1957 and then concluded :

> "......and, therefore, in all cases to which S. 25FF applies; the only claim which the employees of the transferred concern can legitimately make is a claim for compensation against their employers. No claim can be made against the transferee of the said concern.
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> .. By amending S. 25FF, the legislature has made it clear that if industrial

undertakings are transferred, the employees of such transferred undertakings should be entitled to compensation, unless, of course, the continuity of their service or employment is not disturbed and that can happen if the transfer satisfies the three requirements of the proviso."

16. The Supreme Court was dealing with a case of genuine transfer between two parties - a predecessor and a successor - at arms' length where the principles of the law of contracts clearly held the field. The employees of the predecessor had no privity of contract with the successor and could make no claims against him. The industrial law, however, safeguarded his interests by inserting S. 25FF and giving him a right to compensation against his former employer on the basis of a notional retrenchment except in cases where the successor, under the contract of transfer itself, adequately safeguarded them by assuring them of continuity of service and of employment terms and conditions. In the result, he can get compensation or continuity but not both. The present case before us raises an allied, but sometimes more important issue, as to whether there cannot be situations in which the Court or industrial adjudicator, should, in the interests of justice, fairplay and industrial peace, hold the employee entitled to continuity with the successor without being compelled to be satisfied with compensation from the predecessor. The Supreme Court itself has visualised such a case and made it clear that if a transfer is fictitious or benami, S. 25FF has no application at all. Of course, in such a case, "there has been no change of ownership or management and despite an apparent transfer, the transferor employer continues to be the real employer and there has to be continuity of service under the same terms and conditions of service as before and there can be no question of compensation". A second type of cases which comes to mind is one in which there is in form, and perhaps also in law, a succession but the management continues to be in the hands of the same set of persons organised differently such as in Bombay Garage Ltd. v. Industrial Tribunal, (1953) 1 Lab LJ 14 (Bom), and Artisan Press v. L.A.T., (1954) 2 Lab LJ 424 (Mad). In such cases, the transferee and transferor are virtually the same and the overriding principle should be that no one should be able to frustrate the intent and purpose of the law by drawing a corporate veil across the eyes of the Court. (see, Palmer, Company Law, 23rd Edn., pages 200-201, paras 8 and 10 and the decision in Kapur v. Sheilds, (1976) 1 WLR 131, cited therein). These exceptions to the above rules, we think, would still be operative. But it is not necessary here to decide whether this principle will help us to identify the corporation with the State Government in the present case for the present purposes, particularly as there is a catena of cases which do not approve of such identification (see Accountant and Secretarial Services P. Ltd. v. Union of India, (1988) 4 SCC 324 : (AIR 1988 SC 1708) and the cases cited therein.). Leaving this out of account then, we may turn to a third category of cases, which we think would also fall as an exception to the principle behind S. 25FF. This is where, as here, the transferor and/or transferee is a State or a State instrumentality, which is required to act fairly and not arbitrarily (see the recent pronouncement in Mahabir Auto Stores v. Indian Oil Corporation, (1990) 3 SCC 752: AIR 1990 S C 103 1), and the Court has a say as to whether the terms and conditions on which it proposes to hand over or take over an industrial undertaking embody the requisite of "fairness inaction" and could be upheld. We think that, certainly, in such circumstances it will be open to this Court to review the arrangement between the State Government and the Corporation and issue appropriate directions. Indeed, such directions could be issued even if the elements of the. transfer in the present case fall short of a complete succession to the business or undertaking of the State by the Corporation, as the principle sought to be applied is a constitutional principle flowing from the contours of Art. 14 of the Constitution which the State and Corporation are obliged to adhere to. We are making this observation because it was attempted to be argued on behalf of the State and the Corporation that only certain assets of the State 'industry', viz. the tubewells, were taken over by the latter and nothing more. We do not quite

agree with this contention but, in view of the approach we propose to adopt, this aspect is not very material and need not be further discussed.

17. Looking at the facts of this case in the above perspective, it appears to us that the State Government has acted arbitrarily towards the appellants. It is true that the State Government was incurring losses and decided to transfer the tubewells to the Corporation. This decision would have been the most unexceptionable, prudent and perhaps the only decision that the Government could have taken, if it had decided to completely cut itself off thereafter from any responsibility or liability arising out of the operation of the tubewells. But that the Government did not do. As pointed out earlier, the. State Government, although transferring the tubewells, undertook to recoup any losses that the Corporation might incur as a result of the transfer. The result, therefore, was that, despite the transfer of tubewells to the Corporation the Government continues to beat the losses arising from this activity. But, while doing so, it has abridged the rights of the appellants by purporting to transfer only the tubewells and retrenched the appellants from service as a consequence. A grievance has been made that, while several other members of staff belonging to the irrigation department such as engineers, clerks, etc. have been sent on deputation to the Corporation, the State has only chosen to retrench the services of as many as 498 tubewell operators. This differential treatment may not amount to discrimination as contended by the appellants because those others belonged to categories of Government staff which could come back to Government service in the event of the Corporation finding their services unnecessary at a future date, for one reason or another as they were persons with general qualifications who could be fitted into the other work of the irrigation branch. The tubewell operators, however, could not have been sent on deputation because there was no possibility at all of their being fitted into the irrigation branch later, in case the Corporation could find no use for them because, once the tubewells had been transferred for good to the Corporation, the Government could find no openings for them in the service. While, therefore, we do not agree with the appellant that the State Government discriminated against the appellants as compared with the other members of the staff by sending them on deputation but not the appellants, we think that this treatment meted out to the other staff shows that the Government did not hesitate to burden the Corporation with the liability of their salary etc. while serving on deputation which would only augment the losses, if any, that the Corporation would incur by operating the tubewells. But when it came to the case of the appellants, the Government has considered it fit to retrench their services, simultaneously making some arrangement or issuing some directions enabling the Corporation to absorb them as if they were fresh recruits. The assurance that they would be paid according to their original scales of pay and at their original levels of pay came as a later development only because of the pending litigation. It was very fair on the part of the State Government to decide that, as the tubewells would be operated by the Corporation, it would be prudent to run them with the help of the appellants rather than recruit new staff therefor and that the Government should bear the burden of any losses which the Corporation might incur as a result of running the tubewells. But having gone thus far, we are unable to see why the Government stopped short of giving the appellants the benefit of their past services with the Government when thus absorbed by the Corporation. Such a step would have preserved to the appellants their rightful dues and retirement benefits. The conduct of the Government in depriving the appellants of substantial benefits which have accrued to them as a result of their long service with the Government, although the tubewells continue to be run at its cost by a Corporation wholly owned by it, is something which is grossly unfair and inequitable. This type of attitude designed to achieve nothing more than to deprive the employees of some benefits which they had earned, can be understood in the case of a private employer but comes ill from a State Government and smacks of arbitrariness. Acting as a model employer, which the State ought to be, and having regard to the

long length of service of most of the appellants, the State, in our opinion, should have agreed to bear the burden of giving the appellants credit for their past service with the Government. That would not have affected the Corporation or its employees in any way - except to a limited extent indicated below - and, at the same time, it would have done justice to the appellants. We think, therefore, that this is something which the State ought to be directed to do.

18. We would, however, like to clarify that the sole purpose and object of our above direction is that the appellants should be entitled to count their past service with the Government for the purpose of computation of their salary, length of service and retirement benefits with the Corporation. This, however, should not result in the appellants' claiming any seniority over the staff which the Corporation has otherwise engaged right from its commencement in 1970. To permit such a claim would result in injustice to those employees whose seniority is based on their terms and conditions of service with the Corporation which had been entered into a long time before the present transfer proposal came to be implemented. Though, as we have mentioned earlier, seniority in service is not of much importance in this case as there is no avenue of promotion to tubewell operators, the question of seniority still becomes crucial in case the Corporation should close down any of the tubewells or decide on the retrenchment of its staff by reorganising the operation of tubewells in such a way that some of the staff may become surplus. In such an event, if the appellants are given the benefit of their length of service with the Government for all purposes, some of the present employees of the Corporation may become liable to be retrenched as junior in length of service to some of the appellants. Clearly, this should not be allowed to happen and the Corporation staff should not suffer merely because the appellants, who have been subsequently inducted into the Corporation, are given all the benefits of the length of their service with the Government. There can be no question of any of the appellants being considered senior to such operators on the Corporation's establishment. In fact we cannot give such a direction without giving such operators an opportunity of being heard. We would, therefore, like to make it clear that, while the appellants will have for purposes of computation of their salary, length of service and retirement benefits the advantage of counting the period of their service with the Government, this will not enable them to claim any seniority over the former employees of the Corporation.

19. At the same time there is the apprehension of the appellants that if they are treated as juniors to all the Corporation's employees, they may be sent out first in case there is any retrenchment. It is prayed that it should be ensured that such an eventuality does not affect the present appellants as a result of their being treated as juniors to the former employees of the Corporation. We are told that this eventuality is not merely hypothetical but real. This is a situation that cannot be helped, being one in which the equities in favour of the appellants will be counterweighed by those in favour of the Corporation's direct employees. The only solution to this difficulty which we can see, is. for the Corporation not to retrench the services of any of the appellants as far as possible whether due to the closure of some of the tubewells or otherwise. We are informed that a circular was issued by the Corporation on 13-7-87 and 19-8-87, directing, inter alia, that no fresh appointments of tubewell operators will be made in the Corporation against vacancies caused due to retrenchment, resignation or death of an existing incumbent. Such a direction became necessary because many of the tubewells of the Corporation had been installed in the fifties and they had outlived their optimum lives and it became necessary to cut down on the staff. The continued adoption of this policy for some more time will help the appellants tide over the crisis envisaged above. We have already pointed out that most of the appellants, who have now joined the Corporation, have rendered long years of service with the Government and will be retiring from service in the next few years. The Corporation can perhaps manage to continue them in service without retrenching any of them on the ground that some of the tubewells have to be closed down or that some of these operators for some

other reason have become surplus for its needs. If this could be done, it will be most equitable as it will achieve the following ends :

> (1) it will enable the present appellants to continue in service till they retire in normal course;
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> (2) it will protect the interests of the erstwhile operators of the Corporation who have been serving in the Corporation from the beginning;
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> (3) it will not cause any financial prejudice to the Corporation because of the assurance already given that any losses incurred by running the tubewells would be borne by the Government itself; and
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> (4) it will ensure that the Government acts fairly and equitably fulfilling the legitimate expectations of its employees.

20. For the reasons discussed above, we declare that the appellants will be entitled to add their service in the Government to their length of service in the Corporation for purposes of computation of their salary, length of service and retirement benefits. The Corporation is also directed to ensure, as far as possible, that none of the appellants are retrenched as surplus on account of any closure of tubewells or other like reason until they retire or leave the service of the Corporation voluntarily for any reason.

21. To sum up, even before the insertion of S. 25FF in the Act, the employees of a predecessor had no right to claim re-employment by the successor in business save to exceptional circumstances. Even where available, that claim was not a matter of absolute right but one of discretion, to be judicially exercised, having regard to all the circumstances. An industrial tribunal, while investigating such a claim, had to carefully consider all the aspects of the matter. It had to examine whether the refusal to give re-employment was capricious and industrially unjustified on the part of successor in business or whether he could show cause for such refusal on reasonable and bona fide grounds such as want of work, inability of the applicant to carry but the available work efficiently, late receipt of the application for re-employment in view of prior commitments or any other cause which in the opinion of the tribunal made it unreasonable to force the successor-in-interest to give re-employment to all or any of the employees of the old concern. This discretion given to industrial Courts is no longer generally available because of the insertion of S. 25-FF. But in a case where one or both of the parties is a State instrumentality, having obligations under the Constitution, the Court has a right of judicial review, over all aspects of transfer of the undertaking. It is open to a Court, in such a situation, to give appropriate directions to ensure that no injustice results from the change-over. In the present case, the parties to the transfer are a State on the one hand and a fully owned State Corporation on the other. That is why we have examined the terms and conditions of the transfer and given appropriate directions to meet the needs of the situation. We, therefore, direct the State Government and the Corporation - which is but a wholly owned State instrumentality bound to act at the behest of the State - to carry out our directions above, the Corporation being at liberty to amend its rules and regulations, if necessary, to give effect to the same.

22. We have been given to understand that none of the appellants has taken the compensation amounts tendered by the State and that the monies are now in deposit with the Corporation. We have already pointed out that the appellants can claim either compensation or continuity of service but not both. We should, therefore, like to make it clear that in case any of the appellants have been paid

any compensation, that amount will have to be refunded by them before this order can be given effect to qua them.

23. The appeals stand disposed of accordingly. There will be no order regarding costs.

Order accordingly.

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