A.K. Bindal & Anr vs Union Of India & Ors on 25 April, 2003

Equivalent citations: AIR 2003 SUPREME COURT 2189, 2003 (5) SCC 163, 2003 AIR SCW 2625, 2003 LAB. I. C. 2140, 2003 (7) SRJ 267, 2003 (5) ACE 114, 2003 (4) SCALE 313, 2003 (3) SLT 361, (2003) 7 ALLINDCAS 94 (SC), (2003) 4 JT 328 (SC), (2003) 3 SCR 928 (SC), (2003) 4 ALLMR 1160 (SC), (2003) 3 JCR 146 (SC), 2003 SCC (L&S) 620, (2003) 2 LABLJ 1078, (2003) 2 PUN LR 470, (2003) 3 ALL WC 2243, (2003) 2 CURLR 535, (2003) 2 LAB LN 1112, (2003) 114 COMCAS 590, (2003) 102 FJR 876, (2003) 98 FACLR 1, (2003) 2 SCT 957, (2003) 3 SERVLR 460, (2003) 3 SUPREME 669, (2003) 4 SCALE 313, (2003) 3 ESC 265, (2003) 6 INDLD 335

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Bench: S. Rajendra Babu, G.P. Mathur

CASE NO.:
Transfer Petition (civil) 8 of 2000

PETITIONER:
A.K. Bindal & Anr.

RESPONDENT:
Union of India & Ors.

DATE OF JUDGMENT: 25/04/2003

BENCH:
S. Rajendra Babu & G.P. Mathur.

JUDGMENT:

JUDGMENT With T.C.(C) Nos.2, 4, 3, 9, 10, 11, 12, 13, 15 of 2000, T.C. (C) No.35 of 2000, and T.P. (C) No.326 of 2002 G.P. MATHUR,J.

The issue raised in these Transfer Petitions is regarding revision of pay scale of officers of Fertilizer Corporation of India and Hindustan Fertilizer Corporation and, therefore, they are being disposed of by a common order. For the sake of convenience, we will refer to the pleadings in Transfer Case No. 8 of 2000 whereby Writ Petition No. 2108 of 1996 which was filed in Delhi High Court was transferred to this Court. A.K. Bindal, President, Federation of Officers' Association of Fertilizer Corporation of India (for short 'FCI') and Dr. K.P. Sinha, authorised representative of Federation of Officers' Associations of Hindustan Fertilizer Corporation Ltd. (for short 'HFC') filed Writ Petition No. 2018 of 1996 in Delhi High Court praying that Clauses 11,12 and 13 of the Memorandum dated

19.7.1995 issued by Government of India, Ministry of Industry, Department of Public Enterprises and connected clauses of Annexure V of the said Memorandum be quashed and consequently the practice of uniform treatment of the officers in the profit and loss making companies in the FCI/HFC be revived. The other prayer made is that the respondents be directed to pay to the petitioners by way of interim relief at least 60% of the benefit of the revision of pay and perks which their counterparts have been given, pending final decision of the Writ Petition. The respondents arrayed in the Writ Petition are (1) The Union of India through the Secretary, Department of Fertilizers, in the Ministry of Chemicals & Fertilizers; (2) The Secretary, Department of Public Enterprises, Ministry of Industry, Government of India; (3) The Fertilizer Corporation of India Ltd.; and (4) Hindustan Fertilizers Corporation of India Ltd. The pleadings of the parties are fairly long and the documents filed are bulky but we will refer only to basic facts which are necessary for the decision of the controversy.

In January, 1961 two Fertilizer companies, namely Sindri Fertilizers and Chemicals Ltd. and Hindustan Fertilizer and Chemicals Ltd. were merged and a new company named as Fertilizer Corporation of India Ltd. (for short 'FCI') was created. Between 1961 and 1977, FCI, came to have 17 Fertilizer Units, 7 of which were in operation while remaining 10 were at various stages of implementation. In 1978 the Government of India set up a Committee to work out the modalities for reorganisation of its Fertilizer Industry. On the basis of the recommendation of the Committee, the Government of India approved the bifurcation and reorganization of FCI and National Fertilizer Ltd. (for short 'NFL') which was an independent and separate undertaking at that time and allocated the various units to the newly created undertakings which were five in number. Namrup, Haldia, Barauni and Durgapur units were allocated to the newly formed Hindustan Fertilizer Corporation Ltd. (for short 'HFC') and Sindri, Gorakhpur, Ramagundam, Talcher, Korba and Jodhpur Mining Organization were retained with FCI. The other units were allocated to newly created Rashtriya Chemicals and Fertilizers Ltd. and National Fertilizers Ltd. while a fifth company dealing exclusively with planning and development was created which was known as Project and Development (India) Ltd. After reorganization, the industrial pattern of pay and DA was introduced and it was made effective from 1.9.1977. The Department of Chemicals and Fertilizers, Government of India issued a circular on 3.9.1979 which provided that revision of pay scales and fringe benefits of the officers of the entire FCI/NFL would be the same and consequently all the officers in the five companies were treated alike with reference to revision of their pay scales and fringe benefits etc. The revision of pay scales of officers which was due from 1.8.1986 could not be given as the Government did not take steps in that regard. However a decision was taken by the Government to give ad hoc relief to all the officers working in the Public Enterprises, following the Industrial DA pattern and related scales of pay and accordingly ad hoc relief was paid to all the officers of FCI and HFC with effect from 1.1.1986 at uniform rate. Since the Government did not take any decision regarding the revision of pay scales and perks of the officers of the entire public sector in the country, the Bureau of Public Enterprises (for short 'BPE') which is a policy making division of the Government of India, recommended for payment of second relief to the officers of Public Enterprises following the industrial DA pattern on 13.1.1990. Consequently FCI/NFL issued circulars on 24.1.1990 for giving ad hoc relief to the officers. During this period the Government of India and also the Management of FCI and HFC made no distinction on the basis of "loss making" or "profit making" companies in the matter of revision of pay scale and fringe benefits to the officers of the companies and they were

treated alike irrespective of the fact that the companies in which they were working had been making losses. The period of validity of the revised pay scales made applicable from 1.1.1987 was for five years and thereafter the next revision of pay scales became due from 1.1.1992 but the same was not done for the officers employed in FCI and HFC on the ground that the two companies were incurring losses. However, the other companies in erstwhile FCI/NFL group of companies were given revised pay scale and fringe benefits with effect from 1.1.1992. According to the petitioners an unfair and unjust policy of discrimination in the matter of revision of pay scales based upon profits and losses of the company commenced at this stage. Thereafter the Department of Public Enterprises, Ministry of Industry, Government of India issued an Office Memorandum on 12.4.1993 on Wage Policy for the fifth round of wage negotiations in Public Sector Enterprises (for short 'PSEs') whereby the ban imposed by D.O. No.2(3)/91-DPE (WC) dated 17.10.1991 was withdrawn and it was directed that the management of PSEs may commence their wage negotiations with the Trade Unions/Associations. It further provided that under the new Wage Policy the Managements were free to negotiate the wage structure keeping in view and consistent with the generation of resources/profits by the individual enterprises/units but the Government will not provide any budgetary support for the wage increase and the respective managements will have to find the requisite resources from within their own internal generation. Para 5 of this Office Memorandum specifically said that the wage settlement should be negotiated by the PSEs in accordance with the above parameters. This was followed by the impugned Office Memorandum dated 19.7.1995 issued by the Department of Public Enterprises on the subject of revision of scales of pay of the Executives holding post below the Board level and non-unionised supervisors with effect from 1.1.1992. The petitioners are basically aggrieved by para 13 of this Office Memorandum which provides that for sick PSEs registered with the Board for Industrial and Financial Reconstruction (for short 'BIFR'), pay revision and grant of other benefits will be allowed only if it is decided to revive the unit and the revival package should include the enhanced liability on this account.

The stand of the respondents in the counter-affidavit filed by them is that FCI and HFC which were under the administrative control of Department of Fertilizers (for short 'DOF') were referred to BIFR and were declared as sick companies on 6.11.1992 and 12.11.1992 respectively. Out of the four units of FCI the unit at Gorakhpur was lying closed since 10.6.1990. The commercial production in the Haldia unit of FCI which is located in West Bengal did not commence at all ever since its mechanical completion in 1981. The equity base of both the companies had been totally eroded as a result of continuous losses. The FCI and HFC had projected net losses of Rs.562.51 crores and Rs.438.99 crores respectively for the year 1996-1997. The BIFR had appointed Industrial Credit and Investment Corporation of India Ltd. (for short 'ICICI') as the Operating Agency in March 1994 to examine various options and work out unit wise rehabilitation plans for these companies. The ICICI submitted its report in January 1995 and thereafter, the matter was taken up by Group of Ministers which set up a Committee of officers to evaluate all the available alternatives for revival of the companies. The Department of Fertilizers, keeping in view the report of the Operating Agency as well as suggestions received from various other bodies including the employees unions/associations formulated revival packages. The package envisaged revamp of the functional units of these companies namely, Sindri, Ramagundam and Talcher of FCI and Durgapur, Barauni and Namrup units of HFC at a total investment of Rs.2201.13 crore (Rs.1736.20 crore for FCI and Rs.464.93 crore for HFC) without providing for wage revision of the employees. However, due to prior commitment

of funds of Public Sector Units/Cooperative Societies in the Fertilizer Sector for their ongoing expansion and reluctance of Financial Institutions to fund the revival packages of sick PSUs, the funding arrangements for these packages could not be tied up. The ICICI also expressed serious reservation on the viability of these packages necessitating a review of the same. The details of the budgetary support given by the government since 1991-1992 till 1995-1996 have been given in para 12 of the counter- affidavit. It is averred in para 14 of the counter-affidavit that in case the pay scales and other benefits of the employees are directed to be revised with effect from 1.1.1992 it would involve additional financial implication of Rs.120 crores (Rs.60 crores each for FCI and HFC) for the five year period. The revival packages for both FCI and HFC have not been approved for implementation by the BIFR because the Operating Agency, the Department of Fertilizers and the Promoters have not been able to mobilize funds required for the revival package. Pay revision of the employees will further add to the financial requirements for the revival package, which is held up for want of funding.

It is also pleaded in the counter affidavit that the Government guidelines do not prohibit BIFR referred companies from revising their pay scales and other benefits with effect from 1.1.1992 but has linked it with the basic issue of revival packages of such companies. This revival package is to be approved by the BIFR after it is agreed to by the Operating Agency and funding institutions. It has thus been submitted that no decision could be taken on revision of pay scales of the employees of FCI and HFC as it is linked to the revival packages being formulated for these companies for approval of BIFR. The Office Memorandum dated 19.7.1995 has been issued with the approval of the Cabinet Committee on Economic Affairs. The basic thrust of the policy as contained in office memorandum dated 12.4.1993 is that PSUs should generate their own resources for meeting the enhanced liability on account of pay revision and no budgetary support shall be extended to them by the Government.

After transfer of writ petitions, this Court issued several directions to BIFR to submit reports regarding viability of the units of the companies. The BIFR by its order dated 2.11.2001 recommended winding up of FCI. A similar order for winding up of HFC has also been passed. The FCI preferred an appeal before AAIFR which has been dismissed. The Delhi High Court is now proceeding with winding up of both the companies namely, FCI and HFC.

Shri R. Venkataramani, learned senior counsel for the petitioners, has submitted that just as pension is not bounty or a matter of grace depending upon the sweet will of the employer, so also, a fair and reasonable return for employment is neither a bounty nor a matter of grace. This is a right arising out of the relationship of employment and in the determination of the same particularly if the employer is the State, fair and reasonable criteria will have to be adopted and to the extent a fair and reasonable return is denied on the sole ground of the need to take a decision regarding continued existence of the establishments in question, the fundamental right of the petitioners guaranteed under Articles 14 and 21 read with Article 39(a) and 43 of the Constitution is violated. Learned counsel has submitted that the impugned Office Memorandum is discriminatory in as much as PSUs which follow the Central Dearness Allowance pattern are getting the benefit of periodical pay revision regardless of the position of the undertaking, namely whether running in losses or making profits. The PSUs, such as the establishments in question, which are governed by

the Industrial Dearness Allowance pattern are singled out and are denied periodical pay revision since 1992. It has been urged that having regard to socio-economic objectives sought to be realized by the establishment of the fertilizer industry in the public sector and the fact that the said industry has served the aforesaid purpose of production and distribution of fertilizers at affordable prices and augmenting agricultural and rural productivity, it was inappropriate on the part of the Government of India to postpone the revision of pay from 1992 and to link it up in the year 1995 with the decision to refer the companies to BIFR. Learned counsel has further submitted that when it is not demonstrated that the incident of loss is attributable to the conduct of employees or workers and when it is acknowledged that several factors which could have been conveniently dealt with to eliminate loss making condition (viz. old plants and obsolete technology) and to do so was within the competence of the Government of India, it will be gross injustice to the employees to deny their pay revision by relating it with profitability. Sickness of PSU without consideration of the causes of sickness, it is urged, can be no ground for denial of fair pay revision particularly when the Government of India has failed to take relevant and efficient steps to promote the health of the industry.

In support of his submissions that financial capacity or otherwise can be no ground for denying revision of wages of employees of the State or PSUs, Shri Venkataramani has placed strong reliance on South Malabar Gramin Bank v. Coordination Committee of South Malabar Gramin Bank Employees' Union and South Malabar Gramin Bank Officers' Federation and Ors. (2001) 4 SCC 101 and All India Regional Rural Bank Officers Federation & Ors. v. Government of India & Ors. (2002) 3 SCC 554. Regarding the submission based upon violation of fundamental rights of the petitioners, learned counsel has laid great emphasis on the following observations made by Sawant J. in Delhi Transport Corporation v. D.T.C. Mazdoor Congress (1990) Supp 1 SCR 142 at pages 276 and 277 which read as under:-

> "The employment under the public undertakings is a public employment and a public property. It is not only the undertakings but also the society which has a stake in their proper and efficient working. Both discipline and devotion are necessary for efficacy. To ensure both, the service conditions of those who work for them must be encouraging, certain and secured, and not vague and whimsical. With capricious service condition, both discipline and devotion are endangered and efficiency is impaired.
>
> The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them."

To strengthen his submission that the denial of fair wages on account of non-revision of pay scale would violate the fundamental right of the petitioners, learned counsel has also tried to take support

from certain observations made in All India Imams Organisation & Ors. v. Union of India 1993 (3) SCC 584 wherein it was held that Imams who perform religious duties are also entitled to emoluments, as right to life, enshrined in Article 21 means right to live with human dignity and that financial difficulties of the institutions cannot be above fundamental rights of a citizen. Another serious contention raised by Shri Venkataramani is that the Union of India had also agreed both in the meeting held on 20.9.1996 and also in the affidavit filed before the Delhi High Court for a settlement regarding the revision of pay scales being implemented from 1.1.1992 but without payment of arrears upto 1.1.1996. According to the learned counsel the High Court had passed an order on 10.11.1997 recording the compromise and the matter was adjourned only to work out the modalities of payment, but on account of filing of Transfer Petition by the Union of India in this Court, the compromise could not be implemented. However, taking note of the said compromise this Court passed orders on 19.4.2000 and 18.8.2000 for payment of fixed amounts to various categories of employees. The submission is that in view of the compromise entered into by the respondents and the orders passed by Delhi High Court and thereafter by this Court, it is not open to the respondents to resile from the same and deny the benefit of revision of pay scale to the petitioners.

In order to appreciate the first submission, it is necessary to refer to the two Office Memorandums which have been assailed in the writ petitions. Para 2 of Office Memorandum No.1 (3)/86-DPE (WC) dated 12.4.1993 issued by Department of Public Enterprise, Ministry of Industry, Government of India which is relevant for our purposes is being reproduced below:

> "Under the new wage policy, the Managements are free to negotiate the wage structure keeping in view and consistent with the generation of resources/profits by the individual enterprises/units. The Government will not provide any budgetary support for the wage increase and the respective managements will have to find the requisite resources from within their own internal generation. For certain PSEs which are monopolies or near monopolies or having an administered price structure, it must be ensured that increase in wages after negotiations do not result in an automatic increase in administered prices of their goods and services."

The subject and paras 11 and 13 of Office Memorandum issued by the same department on 19.7.1995 read as under:

> "Subject: Revision of Scales of Pay of the Executives holding posts below the Board level and non- unionised supervisors w.e.f. 1.1.1992.
>
> Para 11. The pay revision of the executives holding posts below the Board level and non-unionised supervisors would be permitted subject to the conditions stipulated in the DPE's OM No.1(3)86-DPE(WC) dated 12.4.1993 and 17.1.1994. These conditions prescribe that there shall be no increase in labour cost per physical unit of output. The Government shall not provide any budgetary support to the PSEs for meeting the enhanced liability. The PSEs which are monopolies or near monopolies or having an administered price structure, it must be ensured that increase in salaries/wages do

> not result in an automatic increase in administered prices of their goods and services. Requisite resources for the pay increases must be found from within own internal generation.
>
> Para 13. For sick PSEs registered with the BIFR, pay revision and grant of other benefits will be allowed only if it is decided to revive the unit. The revival package should include the enhanced liability on this account. The benefit of pay revision, etc. shall be extended to IISCO and financial liability thereof shall be met by SAIL."

The change in policy effected by these Memorandums was that the Government would not provide any budgetary support for the wage increase and the undertakings themselves will have to generate the resources to meet the additional expenditure, which will be incurred on account of increase in wages. So far as sick enterprises which were registered with BIFR it was directed that the revision in pay scale and other benefits would be allowed only if it was actually decided to revive the industrial unit. The question which arises for consideration is whether the employees of Public Sector Enterprises have any legal right to claim that though the industrial undertakings or the companies in which they are working did not have the financial capacity to grant revision in pay scale, yet the Government should give financial support to meet the additional expenditure incurred in that regard.

The Fertilizer Corporation of India and Hindustan Fertilizer Corporation are both companies registered under the Companies Act with the only difference that they are Government Companies within the meaning of Section 617 of the Companies Act. What will be the legal position of a Government Company and whether its employees will be treated to be government servants was examined in Heavy Engineering Mazdoor Union v. State of Bihar & Ors. AIR 1970 SC 82 and it was held as under in para 4 of the reports:

> ".....It is an undisputed fact that the company was incorporated under the Companies Act and it is the company so incorporated which carries on the undertaking. The undertaking, therefore, is not one carried on directly by the Central Government or by any one of its departments as in the case of posts and telegraphs or the railways....."

After referring to the well known decision in Saloman v. A. Saloman & Co. Ltd. 1897 AC 22, Halsbury's Laws of England and some other English decisions the Court ruled as under:

> ".....Therefore, the mere fact that the entire share capital of the respondent-company was contributed by the Central Government and the fact that all its shares are held by the President and certain officers of the Central Government does not make any difference. The company and the share holders being, as aforesaid, distinct entities the fact that the President of India and certain officers hold all its shares does not make the company an agent either of the President or the Central Government....."

Again in para 5 it was held that the fact that a minister appoints the members or directors of a corporation and he is entitled to call for information, to give directions which are binding on the directors and to supervise over the conduct of the business of the corporation does not render the corporation an agent of the State.

The legal position is that identity of the Government Company remains distinct from the government. The Government Company is not identified with the Union but has been placed under a special system of control and conferred certain privileges by virtue of the provisions contained in Sections 619 and 620 of the Companies Act. Merely because the entire share holding is owned by the Central Government will not make the incorporated company as Central Government. It is also equally well settled that the employees of the Government Company are not civil servants and so are not entitled to the protection afforded by Article 311 of the Constitution (Pyare Lal Sharma v. Managing Director AIR 1989 SC 1854). Since employees of Government Companies are not government servants they have absolutely no legal right to claim that government should pay their salary or that the additional expenditure incurred on account of revision of their pay scale should be met by the government. Being employees of the companies it is the responsibility of the companies to pay them salary and if the company is sustaining losses continuously over a period and does not have the financial capacity to revise or enhance the pay scale, the petitioners cannot claim any legal right to ask for a direction to the Central Government to meet the additional expenditure which may be incurred on account of revision of pay scales. It appears that prior to issuance of the Office Memorandum dated 12.4.1993 the Government had been providing the necessary funds for the management of Public Sector Enterprises which had been incurring losses. After the change in economic policy introduced in early nineties, Government took a decision that the Public Sector Undertakings will have to generate their own resources to meet the additional expenditure incurred on account of increase in wages and that the government will not provide any funds for the same. Such of the Public Sector Enterprises (Government Companies) which had become sick and had been referred to BIFR, were obviously running on huge losses and did not have their own resources to meet the financial liability which would have been incurred by revision of pay scales. By the Office Memorandum dated 19.7.1995 the Government merely reiterated its earlier stand and issued a caution that till a decision was taken to revive the undertakings no revision in pay scale should be allowed. We, therefore do not find any infirmity legal or constitutional in the two Office Memorandums which have been challenged in the writ petitions.

We are unable to accept the contention of Shri Venkataramani that on account of non-revision of pay scales of the petitioners in the year 1992, there has been any violation of their fundamental rights guaranteed under Article 21 of the Constitution. Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The scope and content of this Article has been expanded by judicial decisions. Right to life enshrined in this Article means something more than survival or animal existence. It would include the right to live with human dignity. Payment of very small subsistence allowance to an employee under suspension which would be wholly insufficient to sustain his living, was held to be violative of Article 21 of the Constitution in State of Maharashtra v. Chandrabhan AIR 1983 SC 803. Similarly, unfair conditions of labour in People's Union for Civil Liberties v. Union of India AIR 1982 SC 1473. It has been held to embrace within its field the right to livelihood by means which are not illegal, immoral or opposed

to public policy in Olga Tellis v. Bombay Municipal Corporation AIR 1987 SC 108. But to hold that mere non-revision of pay scale would also amount to a violation of the fundamental right guaranteed under Article 21 would be stretching it too far and cannot be countenanced. Even under the Industrial law, the view is that the workmen should get a minimum wage or a fair wage but not that his wages must be revised and enhanced periodically. It is true that on account of inflation there has been a general price rise but by that fact alone it is not possible to draw an inference that the salary currently being paid to them is wholly inadequate to lead a life with human dignity. What should be the salary structure to lead a "life with human dignity" is a difficult exercise and cannot be measured in absolute terms. It will depend upon nature of duty and responsibility of the post, the requisite qualification and experience, working condition and a host of other factors. The salary structure of similarly placed persons working in other Public Sector Undertakings may also be relevant. The petitioners have not placed any material on record to show that the salary which is currently being paid to them is so low that they are not able to maintain their living having regard to the post which they are holding. The observations made in paragraphs 276 and 277 in Delhi Transport Corporation v. D.T.C. Mazdoor Congress (supra), strongly relied upon by learned counsel for the petitioners, should not be read out of its context. In the said case the Court was called upon to consider the constitutional validity of Regulation 9 of Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952, which gave power to terminate the services of an employee after giving one month's notice or pay in lieu thereof. The termination of services of some of the employees on the ground that they were inefficient in their work by giving one month's notice was set aside by the High Court as in its opinion Regulation 9(b) gave absolute unbridled and arbitrary powers to the management to terminate the service of any permanent or temporary employee and, therefore, the same was violative of Article 14 of the Constitution. It was in this context that the aforesaid observations were made by one Hon'ble Judge in his separate opinion. The issue involved was not of revision of pay scale but that of termination of service which has an altogether different impact on an employee.

The contention that economic viability of the industrial unit or the financial capacity of the employer cannot be taken into consideration in the matter of revision of pay scales of the employees, does not appeal to us. The question of revision of wages of workmen was examined by a Constitution Bench in Express Newspapers Ltd. & Ors. v. Union of India & Ors. AIR 1958 SC 578 having regard to the provisions of Industrial Disputes Act and Minimum Wages Act and the following principles for fixation of rates of wages were laid down :

> (1) that in the fixation of rates of wages which include within its compass the fixation of scales of wages also, the capacity of the industry to pay is one of the essential circumstance to be taken into consideration except in cases of bare subsistence or minimum wage where the employer is bound to pay the same irrespective of such capacity ; (2) that the capacity of the industry to pay is to be considered on an industry-cum-region basis after taking a fair cross section of the industry; and (3) that the proper measure for gauging the capacity of the industry to pay should take into account the elasticity of demand for the product, the possibility of tightening up the organisation so that the industry could pay higher wages without difficulty and the possibility of increase in the efficiency of the lowest paid workers resulting in

> increase in production considered in conjunction with the elasticity of demand for the product - no doubt against the ultimate back-ground that the burden of the increased rate should not be such as to drive the employer out of business.

(Emphasis supplied) The same question was again examined in Hindustan Times Ltd. v. Their Workmen AIR 1963 SC 1332 and the Court recorded its conclusion in following words in para 7 of the Report :

> "While industrial adjudication will be happy to fix a wage structure which would give the workmen generally a living wage, economic considerations make that only dream for the future. That is why the Industrial Tribunals in this country generally confine their horizon to the target of fixing a fair wage. But there again, the economic factors have to be carefully considered. For these reasons, this Court has repeatedly emphasised the need of considering the problem on an industry-cum-region basis, and of giving careful consideration to the ability of the industry to pay."

(Emphasis supplied) It may be noticed that in these cases the Court was considering the question of wage structure for workmen who belong to economically poor section of society and providing them even living wage was held to be a distant dream on account of economic considerations and also the capacity of the industry to pay.

In South Malabar Gramin Bank v. Coordination Committee of South Malabar Gramin Bank Employees' Union and South Malabar Gramin Bank Officers' Federation and Ors. (2001) 4 SCC 101, relied upon by the learned counsel for the petitioners, the Central Government had referred the dispute regarding the pay structure of the employees of the Bank to the Chairman of the National Industrial Tribunal headed by a former Chief Justice of a High Court. The Tribunal after consideration of the material placed before it held that the officers and employees of the Regional Rural Banks will be entitled to claim parity with the officers and other employees of the sponsor banks in the matter of pay scale, allowances and other benefits. The employees of nationalised commercial banks were getting their pay scales on the basis of 5th bipartite settlement and by implementation of the award of the National Industrial Tribunal, the employees of the Regional Rural Banks were also given the benefits of the same settlement. Subsequently, the pay structures of the employees of nationalised commercial banks were further revised by 6th and 7th bipartite settlements but the same was not done for the employees of the Regional Rural Banks who then filed writ petitions. It was contended on behalf of the Union of India and also the Banks that financial condition of the Regional Rural Banks was not such that they may give their employees the pay structure of the employees of the nationalised commercial banks. It was in these circumstances that this Court observed that the decision of the National Industrial Tribunal in the form of an award having been implemented by the Central Government, it would not be permissible for the employer bank or the Union of India to take such a plea in the proceedings before the Court. The other case namely All India Regional Rural Bank Officers Federation & Ors. v. Government of India & Ors. (2002) 3 SCC 554 arose out of interlocutory applications and contempt petitions which were filed for implementation of the direction issued in the earlier case namely South Malabar Gramin Bank (supra). Any observation in these two cases to the effect that the financial capacity of the employer

cannot be held to be a germane consideration for determination of the wage structure of the employees must, therefore, be confined to the facts of the aforesaid case and cannot be held to be of general application in all situations. In Associate Banks Officers' Association v. State Bank of India & Ors. 1998 (1) SCC 428 it was observed that many ingredients go into the shaping of the wage structure of any organisation which may have been shaped by negotiated settlements with employees' unions or through industrial adjudication or with the help of expert committees. The economic capability of the employer also plays a crucial part in it; as also its capacity to expand business or earn more profits. It was also held that a simplistic approach, granting higher remuneration to workers in one organisation because another organisation had granted them, may lead to undesirable results and the application of the doctrine would be fraught with danger and may seriously affect the efficiency and at times, even the functioning of the organisation. Therefore, it appears to be the consistent view of this Court that the economic viability or the financial capacity of the employer is an important factor which cannot be ignored while fixing the wage structure, otherwise the unit itself may not be able to function and may have to close down which will inevitably have disastrous consequences for the employees themselves. The material on record clearly shows that both FCI and HFC had been suffering heavy losses for the last many years and the Government had been giving considerable amount for meeting the expenses of the organisation. In such a situation, the employees cannot legitimately claim that their pay scales should necessarily be revised and enhanced even though the organisations in which they are working are making continuous losses and are deeply in red.

The second argument based upon the so-called settlement/compromise may now be examined. The petitioners A.K. Bindal and others moved Civil Misc. Application No.7885 of 1996 before the High Court for grant of interim relief. It was prayed that a direction regarding implementation of the revision benefit with effect from the date of the application by notionally calculating the pay etc., as would have been available to the petitioners, had the pay revision been implemented from 1.1.1992 be issued and further at least 50 per cent of the arrears which would be due to the petitioners for the period 1.1.1992 to the date of the filing of the application be paid to them. The respondents opposed the prayer for grant of interim relief by filing a reply stating that the application is devoid of any merits and the same is liable to be dismissed. The relevant part of para G, H and I which has a bearing on the controversy in hand, is being reproduced below:-

> "As already submitted in reply to A & B above, budgetary support to the extent possible has been provided by the Government to enable these companies to sustain operations in their functional units with a view to avoiding irretrievable damage to equipment and supplementing the indigenous urea production. This has been done even at the cost of large cash losses incurred by these companies pending a final decision on their revival by the BIFR. These companies are unable to generate any internal resources to absorb the enhanced liability of increased salary to their employees. Under the extant guidelines for salary revision of PSUs employees, such liability is not to be met through budgetary support. Pay revision will be allowed only if it is decided by the BIFR to revive these companies and the revival packages include the enhanced liability on this account. As a compromise solution, the managements of the Respondents No.3 and 4 had explored the possibility of

> providing salary revision w.e.f. 1.1.96 subject to the condition that no arrears would be paid for the period 1.1.92 to 31.12.95 which the company would consider at a later date after its turn around, however, subject to availability of funds. Since no mutual agreement could be arrived at between the managements & the associations, this proposal could not get finalised....."

The application was heard by a learned Single Judge of the High Court who passed an order on 10.11.1997 which according to the petitioners contains the terms of the settlement. After the transfer of the Writ Petitions this Court passed a detail order on 19.4.2000 and it is necessary to reproduce the same in extenso.

> "Having heard leaned senior counsel for the petitioners, learned senior counsel Mr. Goswami for the Union of India, the learned counsel for the Hindustan Fertiliser Corporation Ltd. (HFC) and Fertilizer Corporation of India (FCI), we find that appropriate interim orders, without prejudice to the rights and contentions of all concerned, are required to be passed at this stage for employees of all the units of the aforesaid two corporations.

In the writ petition which was moved before the High Court of Delhi by the concerned employees of the aforesaid two concerns claiming for revision of pay scales and payment of appropriate amounts accordingly, a learned Single Judge of the High Court has on 10th November 1997 made the following observations :

> "In reply to the petitioner's application the respondent had taken the stand that as a compromise the respondents 3 and 4 agreed to provide revised salary to the petitioners w.e.f. 1st January 1996, subject to the contention that no arrear w.e.f. 1st January 1992 till 31st December 1995 will be paid. The petitioner is prepared to accept the offer of the respondent. Counsel for the respondent wants to take instruction with regard to payment as per record. Let him do so.
>
> Matter be listed on 21st November, 1997."

It is, of course, true that the order recites that respondent nos.3 and 4 agreed to provide revised salary to the petitioner w.e.f. 01st January 1996 subject to the contention that no arrears w.e.f. 01st January 1992 till 31st December 1995 will be paid and the petitioner was prepared to accept the said offer of the respondent. Though respondent nos.3 and 4 agreed to provide revised salary to the petitioner but the real responsibility to make payment would rest on the shoulders of the respondent- Union of India. The order further recites that counsel for the respondent wanted to take instructions with regard to the payment as per the record and the Court said 'let him do so', and, therefore, the matter was to be listed on 21st November, 1997.

It is to be noted that, therefore, the matter stood adjourned for passing appropriate orders in the light of what transpired on 10th November 1997 only in connection with fixing the mode of payment of the appropriate salary in the revised time scale with effect from 01st January, 1996. For that

purpose, the matter stood adjourned from time to time till ultimately it got transferred to this Court pursuant to our order in T.P. (c) No.845 of 1998.

Learned senior counsel Shri Goswami has filed a reply, which is taken on record, to the prayer of the petitioners in the transferred case. In fact he raised grievance that the financial conditions of these units is not good and many of them have been closed. Be that as it may, as the proceedings are pending before the Board for Financial and Industrial Reconstruction (BIFR), since 1992 it will be for the BIFR to look into the grievance of the respondent-Union of India to do the needful in this connection. We are sure that the Union of India will also fully cooperate in seeing to it that the BIFR is enabled to take appropriate decisions in this connection at the earliest.

However, in the light of what is stated in the order of the learned Single Judge of the High Court dated 10th November 1997 which uptill now has not been sought to be got revised, reviewed or appealed against, we deem it fit, in the interest of justice, to give at least a limited relief to all the employees of the aforesaid two concerns, including, Class III and IV employees, purely as an ad-hoc measure, and without prejudice to the rights and contentions of all concerned to the following effect :

> Revised salary shall be computed with effect from 01st January 1992 notionally for the concerned staff members of all the units of the aforesaid two Government Corporatations, namely, HFC and FCI only.
>
> No arrears shall be paid to the concerned staff members till 31st March, 2000. Only actual revised salary will be available in the time scale so computed, from 01st April 2000 on the basis of the revised pay scale available from 01st January 1992.
>
> However, no further upward revision of pay scales will be available to the concerned staff members pursuant to the present order. That question is kept open.
>
> The revised salaries payable from 01st April 2000 shall be paid to the concerned employees within six weeks from today and then in future salaries in revised pay scales as per 1.1.92 revision will be made available to the concerned staff members from month to month till further orders.
>
> These proceedings will now stand over for six months. In the meantime we hope and trust that the Union of India will take appropriate steps before BIFR due to the emergent situation which is projected vociferously by learned senior counsel for the Union of India to the effect that may of these units have been closed.
>
> It is for the Union of India to respond appropriately to the BIFR enquiry which is pending since 1992. Learned counsel for BIFR also assured this Court that the moment the BIFR hears from the concerned authroties, BIFR will promptly take decisions in the matter.

It is axiomatic to observe that if these two corporations, which are the limbs of the Government, want appropriate funds to be released for compliance of this order, it will be for the Union of India to stand up to the occasion and to comply with such request."

(Emphasis supplied) The Union of India moved an application for clarification/modification of the above order which was heard on 18.8.2000 and the following order was passed:-

"Having heard learned Solicitor General for the applicant

- Union of India and learned senior counsel Mr. Sanyal, for the contesting respondents, purely as an adhoc measure and without prejudice to the rights and contentions of the parties in the main matter, we deem it fit in the interest of justice to modify our order dated 19.04.2000 to the following effect :-

(i) The authorities shall pay as an adhoc measure and on account Rs.1,500/- to Class-I employees; Rs.1,000/- to Class II employees;

Rs.750/- to Class-III employees and Rs.500/- to Class-IV employees consisting of various categories in each of the Classes; per month with effect from 1.4.2000. This payment will be without prejudice to the rights and contentions of the parties in the pending matters.

(ii) We make it clear that this order will not affect whatever payment by way of HRA is being released or was released by the authorities to the employees concerned.

(iii) The direction that payments as earlier issued by us on 19.4.2000 will stand modified by the present order.

(iv) According to this order, all arrears with effect from 1.4.2000 to 31.7.2000 will be cleared within ten weeks from today and the current payment be made with effect from 1.8.2000 along with the salary payable for the month of August, 2000.

(v) Future payments shall accordingly be made from month to month regularly along with usual salaries payable to them.

This order is passed purely as an ad hoc measure and will not come in the way of the ultimate decision of this Court. This order will also not be treated as a precedent in any matter in view of the special facts of the present case. We express no opinion about the nature of the order passed by learned Single Judge of the High Court. That question will abide by the decision in the main matter. In view of the present order, I.A.s are disposed of."

(Emphasis supplied) It may be noticed that the reference to the word "compromise" has been made in the order of the High Court dated 10.11.1997 and this order was passed in Civil Misc. Application

No.7885 of 1996 which was filed by the petitioners for grant of interim relief. In the counter-affidavit which was filed on behalf of the respondents it was asserted that the application is meritless and the prayer for interim relief was devoid of any merits and the application was liable to be dismissed. In para G, H and I of the counter- affidavit, reproduced above, it was stated that pay revision will be allowed only if it is decided by the BIFR to revive the companies and the revival packages will include the enhanced liability on this account. A reading of the above paragraphs will further show that the management of respondent nos. 3 and 4 alone had explored the possibility of a compromise solution but even this proposal could not be finalised. The learned Single Judge of the High Court, in our opinion, misunderstood the content and import of the stand taken in para G, H and I of the counter-affidavit and wrongly proceeded on the basis as if the respondent nos. 3 and 4 had, subject to certain conditions, agreed to provide revised salary from 1.1.1996. In fact no offer of payment of revised salary had been made yet it was mentioned in the order that "the petitioner is prepared to accept the offer of the respondent". No final order had been passed recording any compromise as the counsel for respondents wanted to take instructions and the matter was adjourned. It is also noteworthy that the so called agreement/compromise mentioned in the order was only on behalf of respondent nos. 3 and 4 which are FCI and HFC respectively. There was no compromise or agreement to pay revised salary on behalf of the Union of India which is respondent no. 1 to the writ petition. The order passed by this Court on 19.4.2000 clearly recorded that a limited relief to all the employees of the two companies was being granted purely as ad hoc measure and without prejudice to the rights and contentions of all concerned. This was reiterated in the subsequent order dated 18.8.2000 when it was said that the order was being passed purely as ad hoc measure and will not come in the way of the ultimate decision of the Court The principal relief claimed by the petitioners is against Union of India and Secretary, Department of Public Enterprises (respondent nos. 3 and 4) as it is they who have issued the impugned memorandum dated 19.7.1995 which places embargo upon the revision of pay scale of employees of sick PSUs registered with BIFR. Factually there being no compromise or settlement on behalf of respondent nos.3 and 4 for payment of revised salary as they had never agreed to do so and the orders passed by this Court on 19.4.2000 and 18.8.2000 having clearly indicated that they were being passed by way of ad hoc measure and were not to come in any way in the ultimate decision of the case, it is not possible to hold that there was any compromise or settlement at any earlier stage which entitled the petitioners to get revised salary. The contention of the petitioner based upon the alleged settlement or compromise is, therefore, devoid of merits and has to be rejected.

Apart from what we have discussed earlier, it is necessary to take note of a subsequent development which has a serious impact on the relief claimed by the petitioners. The respondents have filed an affidavit on 15.2.2003 sworn by Shri Pawan Wadhwa, Deputy Secretary, Department of Fertilizers, Ministry of Chemicals and Fertilizers. It is averred in the said affidavit that the accumulated losses as on 31.1.2003 of HFC have been Rs.7421.52 crores and that of FCI have been Rs.8874.00 crores. To meet the expenditure towards salary, wages as well as other administrative expenses in these units including preservation cost of the plants, total plan and non-plan budgetary assistance to the tune of Rs.2,227.00 crores has been extended by the Government of India till 31.1.2003. The commercial production in some of the units of both the companies never commenced and the remaining units suspended operations one by one as viability/economics of production of urea in these plants had become extremely unfavourable. The revival packages of these companies could not

be taken up for want of funding tie up with the Financial Institutions on account of their reservation about the techno-economic viability of the proposals. The revival package based on unit-wise techno-economic viability were considered by the competent authority in the Government from time to time culminating in Government's decision on 18.7.2002 and 5.9.2002 for closure of majority of the units of both FCI and HFC along with supporting establishments. The Government had incurred an expenditure for Rs.72.96 lakhs per month in respect of HFC and Rs.69 lakhs per month in respect of FCI in implementing the orders of this Court dated 19.4.2000 and 18.8.2000. The accumulated expenditure which had been borne by the Government of India through non-plan budgetary support till date as on this account adds up to Rs.16.56 crores in respect of FCI and Rs. 21.56 crores in respect of HFC. It is further averred that in October 1998 the Government announced a scheme for Voluntary Retirement for the employees of the Central Public Sector Undertakings. This scheme was liberalised and another scheme was announced on 5.5.2000 in order to give benefit to the employees of the Enterprises in which pay revision with effect from 1.1.1992 and 1.1.1997 had not been affected. The Government announced further liberalised scheme on 6.11.2001 under which the Voluntary Retirement compensation on the basis of their existing pay (basic + DA) was increased by 100 per cent and 50 per cent respectively. According to the respondents almost 99 per cent of employees of FCI and HFC had opted for the Voluntary Retirement Scheme (for short VRS). The exact figures regarding implementation of the Scheme as on 24.3.2003 is given below:

PSU-WISE DETAILS OF IMPLEMENTATION OF VRS S.No Item HFC FCI

1.

Total employees as on 20.9.2002

2. Employees opted for VRS

3. Employees released

4. Funds released by DOF (Rs. Crores) 174.50 253.50

5. Funds actually utilized by the company 154.10 237.30

6. Balance funds with the Company 20.50 16.20 Shri Mukul Rohtagi, learned Additional Solicitor General has submitted that while framing the Voluntary Retirement Scheme the grievance of the petitioners regarding non-revision of their pay scale has been taken into consideration and it was for this reason that in the second Voluntary Retirement Scheme announced on 6.11.2001 ex-gratia payment in respect of employees on pay scales at 1.1.1987 level has been increased by 100 per cent and for employees on pay scales at 1.1.1992 level, it has been increased by 50 per cent So far as HFC is concerned 4781 out of 4881 employees had opted for VRS and only 100 remained. Similarly for FCI out of 5712 employees 5675 had opted for VRS and only 37 remained. The majority of left over number of employees in both the companies is proposed to be retained for assisting in completion of the formalities entailing the closure process. The Government of India had released an amount of

Rs.154 crores to HFC and Rs.237.50 crores to FCI for disbursal of VRS benefits to these employees. Learned counsel has submitted that the employees of both the Companies having taken advantage of VRS and having taken the amount without any demur, the relationship of employer and employee had ceased to exist. They cannot therefore raise any grievance regarding the non revision of pay scale at this stage and consequently the Writ Petitions have become infructuous. Even Shri A.K. Bindal who filed the writ petition in his capacity as President of Federation of Officers Association had also taken voluntary retirement and after acceptance of the amount had left the company and had gone out. Shri Venkataramani has submitted that the employees had no option in the matter and had accepted the VRS under compulsion as it was provided therein that those who did not opt for the same within three months from the date of offer would be eligible only for retrenchment compensation. He has also submitted that under the Scheme the total compensation amount has to be calculated on the basis of existing pay scale and as there was no revision of pay scales since 1992, the petitioners have got a very small amount. Learned counsel has further submitted that there can be no waiver of fundamental rights and even if an employee has opted for VRS and has taken the amount and left the company it would not mean that he has foregone his right to claim the salary which he was entitled to get during the period when he was an employee of the company. The material on record shows that both FCI and HFC had suffered continuous losses. The Financial status of the companies as on 31.3.1996 was as under:

> FCI HFC Paid up equity and reserves as on 31.3.96 662.84 705.13 Accumulated Loss upto 31.3.96 2510.95 3096.16 Net worth as on 31.3.96 (-) 2248.11 (-) 2385.03 Net Profit/Loss (95-96) (-) 426.62 (-) 466.52 (Provisional) (All figures in crores) In the year 1996-97 FCI and HFC projected net losses of Rs. 562.51 crores and Rs. 438.99 crores respectively. The total loss suffered by these companies as on 31.1.2003 was Rs.8874.00 crores and 7421.52 crores respectively. The Government extended non-plan budgetary assistance of Rs.2369.00 crores to FCI and Rs.2227.00 crores to HFC upto 31.1.2003. The units of the companies have already suspended their operations quite some time back and as on date no unit is functioning nor any production is being made. There is also no denial of the fact that the companies have suffered huge losses and salaries of the employees who were practically doing no work has been paid by the Government for a considerable long period. The employees accepted VRS with their eyes open without making any kind of protest regarding their past rights based upon revision of pay scale from 1.1.1992.
>
> The Voluntary Retirement Scheme (VRS) which is some times called Voluntary Separation Scheme (VSS) is introduced by companies and industrial establishments in order to reduce the surplus staff and to bring in financial efficiency. The Office Memorandum dated 5.5.2000 issued by Government of India provided that for sick and unviable units, the VRS package of Department of Heavy Industry will be adopted. Under this Scheme an employee is entitled to an ex-gratia payment equivalent to 45 days emoluments (pay + D.A.) for each completed year of service or the monthly emoluments at the time of retirement multiplied by the balance months of service left before the normal date of retirement, whichever is less. This is in addition to terminal benefits. The Government was conscious about the fact that the

> pay scales of some of the PSUs had not been revised with effect from 1.1.1992 and therefore it has provided adequate compensation in that regard in the second VRS which was announced for all Central Public Sector Undertakings on 6.11.2001. Clause
>
> (a) of the scheme reads as under:
>
> a) Ex-gratia payment in respect of employees on pay scales at 1.1.87 and 1.1.92 levels, computed on their existing pay scales in accordance with the extant scheme, shall be increased by 100% and 50% respectively.

This shows that a considerable amount is to be paid to an employee ex-gratia besides the terminal benefits in case he opts for voluntary retirement under the Scheme and his option is accepted. The amount is paid not for doing any work or rendering any service. It is paid in lieu of the employee himself leaving the services of the company or the industrial establishment and forgoing all his claims or rights in the same. It is a package deal of give and take. That is why in business world it is known as 'Golden Handshake'. The main purpose of paying this amount is to bring about a complete cessation of the jural relationship between the employer and the employee. After the amount is paid and the employee ceases to be under the employment of the company or the undertaking, he leaves with all his rights and there is no question of his again agitating for any kind of his past rights, with his erstwhile employer including making any claim with regard to enhancement of pay scale for an earlier period. If the employee is still permitted to raise a grievance regarding enhancement of pay scale from a retrospective date, even after he has opted for Voluntary Retirement Scheme and has accepted the amount paid to him, the whole purpose of introducing the Scheme would be totally frustrated. The contention that the employees opted for VRS under any kind of compulsion is not worthy of acceptance. The petitioners are officers of the two companies and are mature enough to weigh the pros and cons of the options which were available to them. They could have waited and pursued their claim for revision of pay scale without opting for VRS. However they, in their wisdom thought that in the fact situation VRS was a better option available and chose the same. After having applied for VRS and taken the money it is not open to them to contend that they exercised the option under any kind of compulsion. In view of the fact that nearly ninety nine per cent of employees have availed of the VRS Scheme and have left the companies (FCI & HFC), the writ petition no longer survives and has become infructuous.

Shri Nageshwar Rao, learned senior counsel appearing in Transferred Case No.35 of 2000 (Writ Petition filed by employees of HFC in Calcutta High Court) apart from challenging the validity of the Office Memorandum on the same grounds also urged that the price of urea was fixed by the Government under Fertilizer Control Order which was wholly unremunerative and, therefore, the employees cannot in any way be held responsible for the losses suffered by the Units and consequently they should not be made to suffer on that account. We are unable to entertain this submission as the factual foundation for such a plea has not been laid in the pleadings. That apart, learned counsel for the respondents has made a statement that the Government had reimbursed the Units in that regard. For the reasons discussed above, we find no merit in the Transferred Petitions which are accordingly dismissed. No costs.