General Manager, Electrical Rengali ... vs Sri Giridhari Sahu on 12 September, 2019

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Bench: K.M. Joseph, Sanjay Kishan Kaul

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8071 OF 2010

GENERAL MANAGER, ELECTRICAL
RENGALI HYDRO ELECTRIC PROJECT,
ORISSA AND OTHERS ... APPELLANT(S)

VERSUS

SRI GIRIDHARI SAHU AND OTHERS ... RESPONDENT(S)

J U D G M E N T

K.M. JOSEPH, J.

1. This appeal by special leave is directed against judgment of the High Court of Orissa dismissing the Writ Application filed under Articles 226 and 227 of the Constitution of India by the appellant. What was called in question before the High Court was the Award passed by the Labour Court, Bhubaneswar.

2. By the impugned order, the High Court had dismissed the Writ Application and confirmed the Award. The award was passed on an application filed under Section 33A of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act', for short) by 90 workers of the appellant, the respondents herein who shall be referred as the applicants.

3. On 28.10.1992, the High Court, in Writ Petition O.J.C. No. 2420 of 1989, held that the NMR workers in the Rengali Hydro Electric Project (RHEP) who had worked continuously for a period of five years on the date of the judgment, were entitled for regularization. They were found entitled to same pay as regular employees. The appellants challenged the same by a Special Leave Petition which was converted to Civil Appeal Nos.7342-7343 of 1993.

4. In short, the case of the applicants (who were NMR workers in the Rengali Unit) before the Labour Court was that a reference had been made to the Labour Court dated 02.07.1999 for adjudicating disputes between the appellants-Management and its workmen. Issues were essentially whether NMR workers were entitled to payment of Hydro Allowance at revised rates. The further issue was, whether NMR workers of the Rengali Unit of the Orissa Hydro Power Corporation, who were being paid medical allowance, were entitled for such allowance at revised rates.

5. The further case of the applicants, who were NMR workers in the Application under Section 33A of the Act, was that they had signed certain papers on the basis that it was necessary for their being regularized but as it turned out, it was used as if they were Applications for claiming the benefit of a Voluntary Separation Scheme (hereinafter referred to as 'VSS' for short). They were prevented from discharging their duties. They came to know about the deception practiced. This led to the application under Section 33A of the Act.

6. The Labour Court found that the VSS was thrust upon the applicants and there was no publicity and allowed the application and directed reinstatement with 70 per cent back-wages which was directed to be adjusted towards payments made to the applicants.

7. The High Court noticed that an industrial dispute was pending, as noticed by us earlier. It took note of the fact that the Labour Court has proceeded to find that the VSS had not been published widely for the information of the NMR workers, and therefore, it would not be accepted that the NMR workers signed the applications knowing its contents and consequences. It was found inter alia further that the Award was passed on appreciating the oral and documentary evidence produced before the Labour Court. Noticing what was invoked before the High Court was Certiorari jurisdiction and that a writ can be issued only in exercise of the supervisory jurisdiction and finding that there was no jurisdictional error or any error apparent on the face of it, the writ petition was accordingly dismissed.

8. We have heard Mr. Shibashish Misra, learned counsel appearing on behalf of the appellants and Mr. Jayant Bhushan, learned senior counsel appearing for the applicants.

THE CONTENTIONS OF THE PARTIES

9. The appellants would submit that on 16.11.1999), the Government of Orissa, Department of Energy, approved the proposal of the appellant-Corporation to float the VSS after concurrence from the Finance Department in respect of NMRs/Contingent Khalasis. On 15.04.2000, the President of the Employee Union wrote to the Chairman to fix a date to discuss about certain issues. One of the issues was about enhancement of the VRS for NMR employees. On 27.04.2000, the

appellant-Corporation informed the Senior General Manager that the VSS shall be enforced from 01.05.2000 to 31.05.2000 in Rengali Unit. A Notification, along with the Scheme, was to be circulated amongst the workers. It is the appellants case that 260 NMRs/Contingent Khalasis requested for separation out of 357. The Corporation accepted the application of 254 NMRs/Contingent Khalasis. On 25.05.2000, a discussion took place between the Management and the Union. The decisions were taken regarding regularisation of maximum number of 43 workmen and also about the number of workmen to be considered under the VSS. The first applicant applied on 31.05.2000 under the Scheme. The application of the applicant was accepted on 08.06.2000. It is appellants case that applicant's letter dated 01.06.2000 was never received by the appellants. On 13.06.2000, in fact, first applicant sought payment of gratuity under the Scheme. On 17.06.2000, the Corporation notified extension of the VSS for six days from 14.06.2000 to 24.06.2000. During that phase, 23 NMRs/Contingent Khalasis sought VSS benefits and the applications of 21 were accepted.

10. On 18.12.2000, an additional affidavit was filed by the appellant in this Court in Civil Appeal No. 7343 of 1993, bringing out the decision to introduce the VSS and that as on 01.05.2000, inter alia, 260 persons had applied for the Scheme out of which applications of 255 were accepted and they had taken the benefits under the Scheme. On 10.01.2001, there was a round of discussion and it was decided that there would be no more regularisation of NMRs at the Rengali Unit and VSS will be applied once again ending with 28.02.2001. On 28.01.2001, the VSS was made available for one month from 30.01.2001 to 01.03.2001. Under this phase also 3 NMRs/Contingent Khalasis sought the benefit of the VSS. The workmen, who applied for VSS, were paid Rs.1,25,000/- towards ex gratia, Rs.5,500/- towards lumpsum differential on account of hydro and medical allowances and other amounts towards terminal benefits life gratuity, un-availed wages, etc.. A total sum of Rs.4,03,41,675/- was disbursed under the VSS. It was thereafter that on 29.05.2001, the application was filed by the 90 workers under Section 33A of the Act.

11. Learned counsel for the appellants would submit that it is a clear case where the Labour Court has failed to appreciate that the applicants before it, 90 in number, had made applications with full knowledge of the VSS. Employees, who were working in the NMR establishment, who had put in five years of continuous service or more in the Corporation and had three years left before attaining a particular age as on 01.01.1999, were entitled under the Scheme.

12. He has placed reliance on the applications actually filed by the applicants. He has referred to the contents of the applications. He had pointed out that the VSS contemplated payment of ex gratia lumpsum of Rs.1.25 lakhs besides other amounts.

13. The purpose of the Scheme was considering the fact that the employees of the NMR establishment could only be considered for permanent employment in accordance with the Scheme which was introduced during May, 1998, and since these employees had no right to employment without availability of work and considering that some of them had put in number of years of service, the VSS was introduced for seeking separation with commensurate monetary benefits. The further objective was to rationalize manpower of the Corporation in the light of the skilled manpower required and increased productivity. Still further, the Scheme was intended to reduce

redundant manpower and achieve optimum manpower utilization.

14. The Scheme was applicable to employees who had joined before the date of ban imposed on recruitment. This submission, appellants made, on the basis of documents which were brought on record after the arguments had commenced. The date of ban was 12.04.1993. It was further pointed out with reference to Exhibit 'H' which is produced before the Labour Court that applications contemplated witnesses. The witnesses were to be regular or work-charged employees in RHEP. Their names were to be disclosed. Clause (08) of Exhibit 'H' dated 24.04.2000, read as follows and was relied upon:

> "08.The willing employees will be required to open a SB Account in any Nationalised Bank in the locality because the payment toward ex-gratia and lump sum amount will be made by way of A/c Payee Cheque. To facilitate opening of Bank Account, a sum of Rs.500/- may be paid to the concerned employee on request by way of advance which will be adjusted against his final dues."

15. He further submitted that on the basis of the applications filed by all the applicants along with several others, who had also applied, the appellant had applied the yardstick of eligibility. The workers entitled were given the benefit under the VSS. The amount due came to be credited into their bank accounts. Therefore, it is not open to the applicants to resile from their position as established by their applications and set up a case as if they have been defrauded into making such applications. The applicants were aware of the contents and the consequences. The Labour Court has acted illegally in arriving at the conclusions and passing the Award, noticed by us. He also relied on (2003) 5 SCC 163; (2004) 2 SCC 193; (2006) 9 SCC 177; (2004) 9 SCC 36; (2003) 2 SCC 721; (2016) 9 SCC 375; (2006) 3 SCC 708; (2015) 4 SCC 482; (2003) 1 SCC 250; AIR 1964 SC 477.

16. Having received the benefits under the VSS, it was not open to the workers to reprobate. The Labour Court has clearly overlooked the overwhelming evidence in the form of the applications duly made by the applicants claiming benefit of the VSS, the factum of payment to the applicants in terms of the applications into the bank accounts. He would also further point out that the payments can be vouch saved for by the fact that the procedure has been sanctified by there being two witnesses to the said procedure as well.

17. Per contra, Shri Jayant Bhushan, learned senior counsel, would point out that this Court may appreciate that what is involved are findings of fact rendered by the Labour Court. The High Court, under its supervisory jurisdiction, has chosen not to interfere with such findings of fact and they should not be disturbed by this Court in exercise of power under Article 136 of the Constitution of India. Next, he would point out that the applicants, who were only NMR workers, could not be attributed with the knowledge of the contents of the Scheme. All the matters have been appreciated by the Labour Court. He further pointed out that the following application made by one of the applicants (the First Applicant). It reads as follows:

> "To, The Director (HRD), Corporate Office, Bhubaneswar Through the Manager, Maintenance Division RHEP, Rengali.

Sub: Regarding withdrawal of my VSS Application.

Sir

The humble applicant Sri Giridhari Sahoo has been working as NMR Welder in Maintenance Division since 3.6.1988 on 31.5.2000 upon the threat and coercion of the Management, Maintenance, being afraid I was made to sign the VSS against my wish. I never intended to take VSS. I was told that unless I sign the VSS application I will lose (sic) everything and will be forced to dire striates.

Therefore, I humbly request that my application dated 31.5.2000 may be returned to me for which I will remain ever obliged.

Yours faithfully, Sd/-

Giridhari Sahoo
1.6.2000

xxx xxx xxx xxx"

(Emphasis supplied)

18. He further contended that workers have also, immediately after the event, moved the Conciliation

Officer. This is sufficient to show that they were initially not cognizant of the consequences and, at any rate, at the earliest, they have sought to resile. He also relied on the judgment of this Court in Management of Madurantakam Coop.

Sugar Mills Limited v. S. Viswanathan1.

19. Per contra, the learned counsel for the appellants, would point out that there was, at any rate, only one application in the nature of the application which we have just referred to, namely, that is to say, only one worker has brought on record an application stating about threat and coercion of the appellants-Management and that the workmen never intended to take the VSS. No doubt, the case of appellants is that the letter of first applicant dated 01.06.2000, was not received. The evidence has been given by only four workers. The applications have been given by 90 applicants. Therefore, it was not open to the applicants to lay store by the application referred to above. THE SCOPE OF CERTIORARI JURISDICTION

20. Since, applicants contend that the findings of fact by the Labour Court are virtually unassailable in the Certiorari jurisdiction and the argument has been found 1 (2005) 3 SCC 193 appealing and accepted by the High Court, it is necessary to deal with the same.

21. An erroneous decision in respect of a matter which falls within the authority of the Tribunal would not entitle a writ applicant for a writ of certiorari. However, if the decision relates to anything collateral to the merit, an erroneous decision upon which, would affect its jurisdiction, a writ of certiorari would lie. See Parry & Co. Ltd. vs. Commercial Employees Association AIR 1952 SC 179. The scope of writ of certiorari came in for an elaborate consideration by this Court in T.C. Basappa v. T. Nagappa 2 . Therein, this Court, inter alia, held as follows:

> "7. ... The second essential feature of a writ of certiorari is that the control which is exercised through it over judicial or quasi-judicial tribunals or bodies is not in an appellate but supervisory capacity. In granting a writ of certiorari the superior court does not exercise the powers of an appellate tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal 2 AIR 1954 SC 440 purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person [Vide Per Lord Cairns in Walshall's Overseers v. London and North Western Railway Co., (1879) 4 AC 30, 39.].
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> 9. Certiorari may lie and is generally granted when a court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceeding or from the absence of some preliminary proceeding or the court itself may not be legally constituted or suffer from certain disability by reason of extraneous circumstances [Vide Halsbury, 2nd Edn., Vol. IX, p. 880]. When the jurisdiction of the court depends upon the existence of some collateral fact, it is well settled that the court cannot by a wrong decision of the fact give it jurisdiction which it would not otherwise possess [Vide Banbury v. Fuller, 9 Exch. 111; R v. Income Tax Special Purposes Commissioners, 21 QBD 313].
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> 10. A tribunal may be competent to enter upon an enquiry but in making the enquiry it may act in flagrant disregard of the rules of procedure or where no particular procedure is prescribed, it may violate the principles of natural justice. A writ of certiorari may be available in such cases. An error in the decision or determination itself may also be amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceedings, e.g. when it is based on clear ignorance or disregard of the provisions of law. ..." (Emphasis supplied)

22. In Hari Vishnu Kamath v. Ahmed Ishaque & Ors.3, this Court held:

> "21. ... On these authorities, the following propositions may be taken as established: (1) Certiorari will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it. (2) Certiorari will also be issued when the court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice. (3) The court issuing a writ of certiorari acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous. This is on the principle that a court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right, and when the legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a 3 AIR 1955 SC 233 superior court were to rehear the case on the evidence, and substitute its own findings in certiorari. These propositions are well-settled and are not in dispute.
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> 23. It may therefore be taken as settled that a writ of certiorari could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. ... The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case." (Emphasis supplied)

23. The question arose in Dharangadhara Chemical Works Ltd. v. State of Saurashtra and others4. The question was whether the finding by the Tribunal under the Act about the party respondents being workmen was liable to be interfered with. After dealing with various tests relating to 4 AIR 1957 SC 264 determining the issue, this Court also made the following observations:

> "19. ... It is equally well settled that the decision of the Trinbunal on a question of fact which it has jurisdiction to determine is not liable to be questioned in proceedings under Article 226 of the Constitution unless at the least it is shown to be fully unsupported by evidence." (Emphasis supplied)
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> 24. A Constitution Bench of this Court, in Syed Yakoob v.

K.S. Radhakrishnan and another5, has spoken about the scope of Writ of Certiorari in the following terms:

> "7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals:

> these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or

5 AIR 1964 SC 477 where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised (vide Hari Vishnu Kamath v. Ahmad Ishaque [AIR 1955 SC 233] , Nagendra Nath Bora v.

Commr. of Hills Division and Appeals [AIR 1958 SC 398] and Kaushalya Devi v. Bachittar Singh [AIR 1960 SC 1168]).” (Emphasis supplied)

25. We may more importantly also advert to the view expressed by this Court in a matter which again arose under the Act in M/s. Perry and Co. Ltd. v. P.C. Pal, Judge of the Second Industrial Tribunal, Calcutta and others6. It was a case related to the scope of the jurisdiction of the Tribunal in the matter of retrenchment under Section 25F. This is what the Court held inter alia:

> “11. The grounds on which interference by the High Court is available in such writ petitions have by now been well established. In Basappa v. Nagappa [(1955) SCR 250] it was observed that a writ of certiorari is generally granted when a court has acted without or in excess of its jurisdiction. It is available in those cases where a tribunal, though competent to enter upon an enquiry, acts in flagrant disregard of the rules of procedure or violates the principles of natural justice where no particular 6 AIR 1970 SC 1334 procedure is prescribed. But a mere wrong decision cannot be corrected by a writ of certiorari as that would be using it as the cloak of an appeal in disguise but a manifest error apparent on the face of the proceedings based on a clear

> ignorance or disregard of the provisions of law or absence of or excess of jurisdiction, when shown, can be so corrected. In Dharangadhara Chemical Works Ltd. v. State of Saurashtra [(1957) SCR 152] this Court once again observed that where the Tribunal having jurisdiction to decide a question comes to a finding of fact, such a finding is not open to question under Article 226 unless it could be shown to be wholly unwarranted by the evidence. Likewise, in State of Andhra Pradesh v. S. Sree Ram Rao [AIR 1963 S.C. 1723] this Court observed that where the Tribunal has disabled itself from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or where its conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person can ever have arrived at that conclusion interference under Article 226 would be justified. ...” (Emphasis supplied)

26. We may advert to the decision of this Court in Mukand Ltd. v. Mukand Staff & Officers' Association7. We may only advert to the following paragraphs:

> 7 (2004) 10 SCC 460 “47. In support of his contention that this Court while exercising its power under Article 136 of the Constitution of India in an appeal from the judgment of the High Court rendered in exercise of its powers under Articles 226 and 227 of the Constitution of India will exercise the same power which the High Court could exercise and will not interfere with the finding of facts recorded by a Tribunal, learned counsel cited the judgment in the case of Parry & Co. Ltd. v.

P.C. Pal [AIR 1970 SC 1334 : (1969) 2 SCR 976] . In the said case, this Court held as under:

> (AIR p. 1341, para 13) “13. Since this is an appeal arising from a writ petition for certiorari we also would not interfere with the conclusions arrived at by the Tribunal except on grounds on which the High Court could have done.”
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> 48. In the case of Fuel Injection Ltd.

v. Kamger Sabha [(1978) 1 SCC 156 : 1978 SCC (L&S) 33] this Court observed as under: (SCC p. 157, para 3) “But the present appeals are from a judgment of the High Court under Article 226 and so the jurisdiction of this Court in entertaining an appeal by special leave under Article 136 must ordinarily be confined to what the High Court could or would have done under Article 226.”

49. In our view, the material that was placed before the Tribunal was not considered or discussed and that there was, as such, no adjudication by the Tribunal. The whole award of the Tribunal, in our view, is liable to be set aside on the ground of non-application of mind by the Tribunal to the material on record. In the first place, the Tribunal has no jurisdiction to entertain and decide a dispute which covered within its fold “persons who are not workmen”. That the material on record before the Tribunal as regards the comparable concerns was admittedly “sketchy” and incomplete as observed by the learned Single Judge of the High Court and that the award based on such material could not have been sustained.” (Emphasis supplied)

27. In Durga Das Basu "Commentary on the Constitution of India" 9th Edition, in regard to the concept of no evidence, we find the following discussion:

> "No evidence' does not mean only a total dearth of evidence. It extends to any case where the evience taken as a whole is not reasonably capable of supporting the finding, or where, in other words, no tribunal could reasonably reach that conclusion on that evidence. This "no evidence" principle clearly has something in common with the principle that perverse or unreasonable action is aunauthorised and ultra vires. An order made without "any evidence" to support it is in truth, made without order made without "any evidence is worthless, it is equal to having "no evidence" jurisdiction." (Emphasis supplied)

28. In fact, in the decision relied upon by the applicants, viz., S. Viswanathan (supra), it is, inter alia, held as follows:

> "12. Normally, the Labour Court or the Industrial Tribunal, as the case may be, is the final court of facts in these types of disputes, but if a finding of fact is perverse or if the same is not based on legal evidence the High Court exercising a power either under Article 226 or under Article 227 of the Constitution can go into the question of fact decided by the Labour Court or the Tribunal. But before going into such an exercise it is necessary that the writ court must record reasons why it intends reconsidering a finding of fact. In the absence of any such defect in the order of the Labour Court the writ court will not enter into the realm of factual disputes and finding given thereon...." (Emphasis supplied)

29. On the conspectus of the decisions and material, we would hold as follows:

> The jurisdiction to issue writ of certiorari is supervisory and not appellate. The Court considering a writ application of Certiorari will not don the cap of an Appellate Court. It will not reappreciate evidence. The Writ of Certiorari is intended to correct jurisdictional excesses. A writ of prohibition would issue when a Tribunal or authority has not yet concluded its proceedings. Once a decision is rendered by a body amenable to Certiorari jurisdiction, certiorari could be issued when a jurisdictional error is clearly established. The jurisdictional error may be from failure to observe the limits of its jurisdiction. It may arise from the procedure adopted by the body after validly assuming jurisdiction. It may act in violation of principles of natural justice. The body whose decision which comes under attack may decide a collateral fact which is also a jurisdictional fact and assume jurisdiction. Such a finding of fact is not immune from being interfered with by a Writ of Certiorari. As far as the finding of fact which is one within the jurisdiction of the court, it is ordinarily a matter 'off bounds' for the writ court.
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> This is for the reason that a body which has jurisdiction to decide the matter has the jurisdiction to decide it correctly or wrongly. It would become a mere error and that

too an error of fact. However, gross it may amount to, it does not amount to an error of law. An error of law which becomes vulnerable to judicial scrutiny by way of Certiorari must also one which is apparent on the face of the record. As held by this Court in Hari Vishnu Kamath (supra), as to what constitutes an error apparent on the face of the record, is a matter to be decided by the court on the facts of each case.

A finding of fact which is not supported by any evidence would be perverse and in fact would constitute an error of law enabling the writ court to interfere. It is also to be noticed that if the overwhelming weight of the evidence does not support the finding, it would render the decision amendable to certiorari jurisdiction. This would be the same as a finding which is wholly unwarranted by the evidence which is what this Court has laid down [See M/s. Perry and Co. Ltd (supra)].

THE APPLICATION UNDER SECTION 33A OF THE ACT

30. The applicants were NMR workers. They moved the application before the Labour Court alleging violation of Section 33(1) of the Act. Section 33 (1) of the Act, reads as follows:

> "33(1) During the pendency of any conciliation proceeding before a

conciliation officer or a Board or of any proceeding before 2 an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall--

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending."

31. Section 33A of the Act, reads as follows:

> "33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceeding.- Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, Labour Court, Tribunal or National Tribunal any employee aggrieved by such contravention, may make a complaint in writing, in the prescribed manner,-
>
> (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute; and

> (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly."

32. We have noticed that there was a proceeding before the Labour Court on the reference regarding the availability of certain benefits to the NMR workers. It is during the pendency of the same that the applicants alleged denial of employment. They alleged that in essence, they were duped into submitting applications as if they were intended to secure the benefit of the VSS whereas they put their signatures on the blank papers not comprehending such use.

33. In this case, the case of the appellants is that Section 33 of the Act is not attracted as this is a case where the applicants voluntarily applied for getting benefit of the VSS. They were given the benefits. Section 33 of the Act has no application.

34. Learned senior counsel for the applicants, very fairly, submitted that if it is found that the applications were made by the applicants voluntarily and they had claimed the benefits of the VSS, then, Section 33, as such, may not apply. Therefore, the core issue to be decided is, whether applications were indeed filed by the applicants cognizant of its contents and aware of its consequences. THE PLEADING IN THE APPLICATION AND THE LAW

35. It is, inter alia, pleaded as follows:

> "6. That the Hon'ble High Court of Orissa in OJC No.1527/91 have passed an order to regularize all NMR workers those who have completed 5 years of service or otherwise payment equal pay for equal work as their counter part in regular establishments are getting in the Rengali Hydro Power Project."

36. There is reference to the matters, which were pending, which we have, inter alia, referred to. We must notice the further pleading in the application filed by the applicants under Section 33A of the Act:

> 9. To defraud the workmen for regularization of their services, appropriate authorities have obtained their signatures enmass on certain papers under the pretext of regularization of workmen and by showing undue influence of regularization of the service of the workmen that since the projects were temporary and they were to be regularized in the Corporation in regular cadre, the old job will come to an end and new job in Corporation would stand afresh for which the workmen without understanding the implication of application on plain faith with authority have signed such applications. A fraud was practiced on the workmen and such change amended to change service without leave of Tribunal, as such illegal. Change having been not voluntary, being actuated with fraud, action of the

> Management is in violation of Section 33 of the Act and is in nullity. Opposite parties refused employment which amounts to retrenchment. This action is in clear violation of Section 33 of the Act.

(Emphasis supplied)

37. Counter affidavit was filed. There is denial by the appellants of the above contentions.

38. Order VI Rule 4 of The Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC', for short), reads as follows:

> "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

39. Therefore, in a civil suit, if the plaintiff alleges fraud, misrepresentation or undue influence, he is obliged to given particulars. An allegation of fraud is a matter of a grave nature. So is the allegation of undue influence and misrepresentation. The intention underlying Order VI Rule 4 of the CPC is that the opposite party is to be put on sufficient notice as to the case which he is called upon to meet. The law loathes, parties to the lis being taken by surprise resulting in the violation of the basic principle of justice that a party should be able to effectively meet the case set up against him. What is fraud? Is it the same as misrepresentation?

40. In The Indian Contract Act, 1872 (hereinafter referred to as 'the Contract Act', for short), definition of "fraud", is as follows:

> "17. 'Fraud' defined.—'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:— (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
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> (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it;
>
> (4) any other act fitted to deceive; (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak2, or unless his silence, is, in itself, equivalent to speech.

Explanation.-Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

41. "Misrepresentation" is separately defined in Section 18 of the Contract Act, as follows:

> "18."Misrepresentation" defined.— "Misrepresentation" means and includes— (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (2) any breach of duty which, without an intent to deceive, gains an advantage of the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; (3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement."
>
> 42. Section 19 of the Contract Act declares that when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is voidable at the option of the person whose consent was so caused. The exception in Section 19, reads as follows:
>
> "Exception —If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence."
>
> 43. "Undue influence" is separately defined under Section 16 of the Contract Act, which reads as follows:
>
> "16. 'Undue influence' defined.—(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—
>
> (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
>
> (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
>
> (3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence

> adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

Nothing in the sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872)."

44. A perusal of the definition of the word "fraud", as defined in Section 17 of the Contract Act, would reveal that the concept of fraud is very wide. It includes any suggestion, as a fact, of that which is not true, by a person who does or does not believe it to be true. It may be contrasted with Section 18(1) of the Contract Act which, inter alia, defines "misrepresentation". It provides that it is misrepresentation if a positive assertion is made by a person of that which is not true in a manner which is not warranted by the information which he has. This is despite the fact that he may believe it to be true. In other words, in fraud, the person who makes an untruthful suggestion, does not himself believe it to be true. He knows it to be not true, yet he makes a suggestion of the fact as if it were true. In misrepresentation, on the other hand, the person making misrepresentation believes it to be true. But the law declares it to be misrepresentation on the basis of information which he had and what he believed to be true was not true. Therefore, the representation made by him becomes a misrepresentation as it is a statement which is found to be untrue. Fraud is committed if a person actively conceals a fact, who either knows about the fact or believes in the existence of the fact. The concealment must be active. It is here that mere silence has been explained in the Exception which would affect the decision of a person who enters into a contract to be not fraud unless the circumstances are such that it becomes his duty to speak. His silence itself may amount to speech. A person may make a promise without having any intention to perform it. It is fraud. The law further declares that any other act fitted to deceive, is fraud. So also, any act or omission, which the law declares to be fraudulent, amounts to fraud. Running as a golden trend however and as a requirement of law through the various limbs of Section 17 of the Contract Act, is the element of deceit. A person who stands accused of fraud be it in a civil or criminal action, must entertain an intention to commit deception. Deception can embrace various forms and it is a matter to be judged on the facts of each case. It is, apparently, on account of these serious circumstances that fraud has on a legal relationship or a purported legal relationship that the particulars and details of fraud is required if pleaded in a civil suit or a proceeding to which the CPC applies.

45. We are here not concerned with a civil suit. The application in question has been filed under Section 33A of the Act. Section 11 (1) to (3) of the Act, read as follows:

> "11. Procedure and powers of conciliation officers, Boards, Courts and Tribunals.-(1) Subject to any rules that may be made in this behalf, an arbitrator, a Board, Court, Labour Court, Tribunal or National Tribunal shall follow such procedure as the arbitrator or other authority concerned may think fit. (2) A conciliation officer or a member of a Board, 4 or Court or the presiding officer of a Labour Court, Tribunal or National Tribunal may for the purpose of inquiry into any existing or apprehended industrial dispute, after giving reasonable notice, enter the premises occupied by any establishment to which the dispute relates.

> (3) Every Board, Court, Labour Court, Tribunal and National Tribunal] shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit, in respect of the following matters, namely:-
>
> (a) enforcing the attendance of any person and examining him on oath;
>
> (b) compelling the production of documents and material objects;
>
> (c) issuing commissions for the examination of witnesses;
>
> (d) in respect of such other matters as may be prescribed; and every inquiry or investigation by a Board, Court, 2 Labour Court, Tribunal or National Tribunal], shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860)." (Emphasis supplied)

46. An application under Section 33A of the Act is not a civil suit. The provisions of Order VI Rule 4 of the CPC, as such, is not applicable to proceedings under the Act. Does it mean that the law as to pleadings is not to apply at all to proceedings under the Act or will it be more correct to say that the law as to pleadings will apply but without its full vigor. We would think the latter would be the correct position in law. While the provisions of the CPC may not apply the salutary principles embodied would apply. This is for the reason that the purpose of pleading, be it in a civil suit or other proceeding, is to allow the opposite party to meet the case of his opponent to ready the evidence to be adduced and marshal the law in support of its case.

47. In Management of Hindustan Steel Limited v. Workmen and others 8 , the case arose under Section 25-FFF of the Act 8 AIR 1973 SC 878 thereof and the notice issued under the provision was impugned as being conditional. This is what this Court found in regard to the contention about the vagueness of the plea:

> "13. In our view, Shri Setalvad was fully justified in submitting that the management had been taken by surprise and that the Tribunal was in error in holding the general ground in the written statement to cover the specific plea of infirmity of the notice because of its being conditional. The plea of the statutory defect in the notice should, in our opinion, have been reasonably specific and precise so as to enable the appellant to meet it. The general plea could not serve the object of putting the appellant on guard about the precise case to be met at the trial and tell the management the precise nature of the plea with respect to the defect in the notice, to enable them to meet it. ..."
>
> 48. In Bharat Iron Works v. Bhagubhai Balubhai Patel 9 , again a case arose under Section 33 of the Act and is, therefore, close to the facts of the case before us.

Respondent/ employee complained of victimization and invoked Section 33 of the Act. This Court, apart from holding that the Tribunal granting or withholding 9 AIR 1976 SC 98 permission under

Section 33 of the Act does not sit as a Court of Appeal, administered the following words of caution in regard to pleading:

> "9. A word of caution is necessary. Victimisation is a serious charge by an employee against an employer, and, therefore, it must be properly and adequately pleaded giving all particulars upon which the charge is based to enable the employer to fully meet them. The charge must not be vague or indefinite being as it is an amalgam of facts as well as inferences and attitudes. The fact that there is a union espousing the cause of the employees in legitimate trade union activity and an employee is a member or active office-bearer thereof, is, per se, no crucial instance. Collective bargaining being the order of the day in a democratic social welfare State, legitimate trade union activity which must shun all kinds of physical threats, coercion or violence, must march with a spirit of tolerance, understanding and grace in dealings on the part of the employer. Such activity can flow in healthy channel only on mutual cooperation between employer and employee and cannot be considered as irksome by the management in the best interest of the concern. Dialogues with representatives of a union help striking a delicate balance in adjustment and settlement of various contentious claims and issues.

10. The onus of establishing a plea of victimisation will be upon the person pleading it. Since a charge of victimisation is a serious matter reflecting, to a degree, upon the subjective attitude of the employer evidenced by acts and conduct, these have to be established by safe and sure evidence. Mere allegations, vague suggestions and insinuations are not enough. All particulars of the charge brought out, if believed, must be weighed by the Tribunal and a conclusion should be reached on a totality of the evidence produced."

49. In regard to a case based on acquiescence, the High Court of Madras has also spoken of the need for specific plea [See (1991), Labour and Industrial Cases, Page 40].

50. Applying the principles of law to the facts of our case, we would think that there is no sufficient pleading in regard to fraud. The allegation as to undue influence is totally without any basis in the pleading.

51. The VSS, if availed of by an employee voluntarily, amounts to a contract. This Court, in Bank of India and others v. O.P. Swarnakar and others10, was dealing with the case of voluntary retirement scheme floated by the bank. A question arose as to whether the scheme was an offer or an invitation to treat. After elaborate consideration of the scheme, the Court took the view that having regard to the facts, in particular, the fact that the bank reserved its right to accept or reject the application, the scheme was an invitation to treat. The application made by the employee amounted to an offer and a contract emerged only if the application was accepted by the bank. It was only when the offer of the employee was accepted, it became an enforceable contract, it was held. This aspect assumes significance in the light of the fact that the concept of fraud, undue influence and misrepresentation as defined in the Contract Act, would be apposite in the context of the Scheme giving rise to an enforceable contract. THE EVIDENCE BEFORE THE LABOUR COURT

52. Now, the time is ripe to look at the material which has been produced before the Labour Court by the parties. On the side of the applicants, 90 in number, 4 witnesses were 10 (2003) 2 SCC 721 examined. The first witness is Giridhari Sahu-the First Applicant. He states, inter alia, as follows:

> He is one of the applicants. There are 89 other applications with him praying for the same relief. He was working in the Maintenance Division. Others were working in other Divisions. He was working since 03.06.1988. He was refused employment since 13.06.2000. Reference is made to the order passed in O.J.C. No. 2420 of 1989 which we have referred to. Appellants did not comply with the directions of the High Court. It was stated that the Civil Appeal is pending in this Court. A regulation was made regulating the regularization of the NMRs who had completed five years of service. After formation of the Corporation, the appellants introduced the Scheme. AW1 and other applicants were given to understand that their services will be regularized and signatures taken in the VSS form. There was no decision in the meeting regarding the VSS in the Union. Signatures of the witness and other applicants were taken by the appellants forcibly giving an impression that their services will be regularized. They protested. The reference, which we have adverted to, is pending. The conditions of service had been changed. In the cross-examination, AW1 would state that he has not been issued with any appointment letter by the time he joined in service. 327 persons, including AW1, were working during his tenure. He denied that he, along with other applicants, signed in the Scheme. He stated it that it is not a fact that he had given the application in the Scheme out of his own without any compulsion or force. So also the other applicants.

AW2 is one Chirtamani Patra. He joined from 04.05.1987 and till 13.06.2000, he worked continuously. The appellants gave them the impression that their services will be regularized and, at first instance, their signature was taken on a blank paper and subsequently in a form. Subsequently, he could know that the form was meant for VSS. Prior to taking signatures in the VSS form, no intimation or no notice was given regarding the VSS. He had drawn attention to the authorities regarding taking of his signatures in the VSS application form. The signatures were obtained at the Divisional level. In the cross-examination, he, inter alia, stated that more than 300 persons were engaged as NMR at that time. He had no knowledge about the VSS prior to his refusal of employment. He denied that the VSS was sufficiently published and he submitted his application for VSS. He also stated that it was not a fact that signatures of the applicants were not taken forcibly or fraudulently. He admits to have received Rs.5,500/- towards hydro allowance and medical allowance as ex gratia.

AW3 is one Kurtartha Sahu. He joined on 02.04.1984. He would state that with the instigation by the higher authorities, their signatures on the VSS form were taken forcibly. In the similar way, signatures of all the applicants were taken. VSS was not published in the notice board or circulated among the workers prior to taking their signatures. The VSS was not published in any local newspaper. In the cross-examination, he, inter alia, states that it is not a fact that he, along with other applicants, signed in the VSS form knowing the consequences. He further stands by his case in the chief.

AW4 joined on 06.03.1984. He was refused employment on 14.06.2000 along with others. Their signature was taken in an application and three to four blank papers. They were given to understand that their services will be regularized. Subsequently, they came to know about the application that the application they signed was a VSS form. He says in cross-examination that to his knowledge, the VSS was not published on the notice board. He further says he does not know if any settlement was made with any Union or not by the management. The Executive Engineer and HRD and others compelled him and others to sign. He has not intimated the concerned Chief Engineer. The application, in which his signature was taken, was dated 31.05.2000. About 15 days thereafter, he got the amount in bank draft. About 3-4 days after 31.05.2000, he raised objection and protested against the VSS. After protest, they received the money from the management.

(Emphasis supplied) EVIDENCE FOR THE APPELLANTS ORAL EVIDENCE

53. OPW1, the Management Witness No.1, would state as follows:

> Out of the 336 NMRs, 256 NMRs accepted the VSS. The Management has neither terminated nor retrenched the workers. The applicants voluntarily separated themselves by accepting the VSS. Exhibit 'A' is produced as the Notification dated 27.04.2000 constituting the Recommending Committee. Exhibit 'B Series' were marked as the applications. Exhibit 'C Series' are the acceptances of the applications. Exhibit 'D' is the Order authorizing AGM, HRD Shri A.K. Mitra to accept the application. Exhibit 'E Series' are the payment sheets showing the payment of their legal dues and ex gratia in account payee cheque. Exhibit 'C Series' are marked with objection. It is stated in Indrawati, the Management implemented the VSS and 690 persons were given VSS in December, 1999. Exhibit 'A/I' is the Notification extending the VSS till 24.06.2000. Exhibit 'A/II' is the Notification extending the VSS till 01.03.2001. Discussion was made with Rengali Power Projects Workers Union before implementing the VSS on 10.04.2000 AND 14/15.04.2000. The President had given the agenda for discussion vide Exhibit 'F' including VRS for NMR employees. Finally, discussion was held on 20.05.2000 as per Exhibit 'G' (marked with objection). The Union was aware of the implementation of the VSS prior to the implementation. The witnesses have signed in Exhibit 'E Series'.

Exhibit 'H' is the guideline issued by the Corporate Office. The suggestion that signatures of the applicants have been taken forcibly, has been denied. An amount of Rs.5,500/- paid to the applicants as ex gratia towards the enhanced medical allowance and hydro allowance.

In the cross-examination, the witness would state, inter alia, as follows:

> The Executive Engineer is the appointing authority so far as NMR workers were concerned. The VSS was introduced in all the units of the Corporation in the State. The Scheme was not notified in the Gazette by the Government or by the Corporation. There was no request from the side of the applicants to implement the VSS or VRS nor there was any proposal from the Rengali Head to reduce the number

of NMRs by implementing the VSS. To reduce extra manpower, the VSS was introduced. The Scheme was not published in any newspaper for the general public. Witness states that he does not know the applicants personally. He did not say which applicant was paid how much wages. He cannot say without referring to the application and acceptance letter, from which date the applications were accepted. In Exhibit 'G', neither Shri R.C. Kuntia nor Shri D.N. Padhi has signed although their names are there. He does not know the witnesses who had signed in the applications in B Series. All the applicants signed in the presence of the Executive Engineer, in Exhibit B series. Then, he again says, he cannot say in whose presence the applicants signed in Exhibit B Series. He cannot say who has given the application form to the applicants in Exhibit B Series. He denies that signatures of the applicants were obtained forcibly.

OPW2-Management Witness No.2, is the Manager of a Division. He joined as Manager on 16.04.2002. Prior to this, he was working as the Deputy Manager with the Corporation. While he was working as SDO, 63 NMRs were working under him. To his knowledge, now, 21 NMRs were working under the appellants. Other 42 persons have separated themselves by obtaining VSS. By the time the VSS was introduced. The objective of the Scheme was widely circulated. The applicant took the application form for VSS after signing on a sheet of paper.

He states it to be incorrect that signatures were taken forcibly.

In cross-examination, he states as follows:

He came to Rengali in the year 1999. He has no personal acquaintance with the 42 applicants. He cannot say if any high-level discussion was made or not. The information was notified on the office board. The VSS Notification was made in English. All the NMRs were not conversant with English. The Notification was not published in Oriya. The condition of VSS was incorporated in the application form and the applicants and other NMRs were not given the Scheme for their information separately. At present, he cannot say as to from which date applicants started receiving application forms. He has not assisted the applicants in filing the application form. He can identify witnesses who have signed the application form of the applicants. Then, he says, he cannot say who is Sahdev Raut, in what capacity he had signed. Below the signature of the witnesses, their designation and date have not been given. He has no knowledge about the pendency of the case in the Supreme Court. He has no knowledge about the withdrawal of the application by AW1. He says, it is not a fact that the signatures of the applicants were taken forcibly giving impression that their services will be regularized.

(Emphasis supplied) THE DOCUMENTARY EVIDENCE

54. The documentary evidence, which is produced by the applicants, is as follows:

> a. The OER (Transfer of Undertaking, Assets, Liabilities, Proceedings and Personnel) Scheme Rules, 1996;
>
> b. The Order passed by the High Court in O.J.C. No. 2420 of 1989, which we have already adverted to;
>
> c. The letter written by the first applicant dated 01.06.2000, which we have already extracted;

d. The Gazette Notification dated 01.04.1996 regarding change over from the Government.

55. As far as documentary evidence of the appellants is concerned, they are as follows:

> Exhibit 'A' is the Notification dated 27.04.2000 constituting the Recommending Committee. It also contains the Scheme itself.

Exhibit 'A/I' is the Notification dated 17.06.2000 indicating that the VSS will be enforced for a period of six days from 19.06.2000 to 24.06.2000. Exhibit 'A/II' is the Notification dated 28.01.2001 indicating that the VSS will be enforced for a period of one month from 30.01.2001 to 01.03.2001. Exhibit 'B Series' are the applications made by the applicants. Exhibit 'C' is acceptance of the VSS application which is seen marked with objection. Exhibit 'D' is the order authorizing the AGM to accept the applications. Exhibit 'E Series' are the payment sheets showing payment of the legal dues and ex gratia in account payee cheques. Exhibit 'F' is letter dated 15.04.2000 by the President of the Union seeking discussion, inter alia, about enhanced amount of VRS by NMR employees. Exhibit 'G' purports to be the Minutes of the Discussion held between the Management and the Union on 20.05.2000 (marked with objection). Exhibit 'H' is again letter dated 27.04.2000 containing points for facilitating the smooth implementation of the Scheme. Exhibit 'J' purports to be the acknowledgment of VSS of NMR employees, Sub-Division II. Exhibit 'K' purports to be the Office Order dated 13.06.2000 relieving the applicants.

FINDINGS OF THE LABOUR COURT

56. The Labour Court found that the application under Section 33A of the Act is maintainable. This is on the basis that, had the VSS been in the true sense, there would not have been any illegality. It is found that the applicants have challenged the Scheme as illegal and the applications were obtained by misrepresentation. On that basis, it was found that the application was maintainable. Thereafter, the Labour Court goes through the evidence and has recorded the following findings:

> "9. I have gone through the evidence of witnesses examined on either side so also the documents exhibited. There was no demand from the side of the complainants nor

there was any proposal from the side of the officials for introduction of Voluntary Separation Scheme or Voluntary Retirement Scheme. Similarly the SDO and the Executive Engineer of OHPC have never recommended for reducing the staff strength. Admittedly Voluntary Separation Scheme was not published widely for the information of NMRs and therefore it cannot be exported that the NMRs signed the Voluntary Separation Scheme applications knowing its content and consequences. On a reference to Ext.3 it is clear that A.W.1 though submitted application for Voluntary Separation Scheme either under pressure or under a wrong notion he has withdrawn the same on 1.6.2000 but the application of Sri Sahoo was not returned back and he was given the Voluntary Separation Scheme. Therefore I am of the considered view that the Voluntary Separation Scheme was not the choice of the complainants but it was thrust upon the complainants and therefore amounts to refused of employment to the guise of Voluntary Separation Scheme.

10. In view of the discussions made above, the action of the management opposite parties in implementing the Voluntary Separation Scheme forcibly or by misrepresentation is illegal and unjustified. The complainants are entitled to be reinstated in service and are deemed to be continuing in service from the date of the Voluntary Separation Scheme was implemented.

The management opposite parties have paid certain amount to the complainants being the benefits under Voluntary Separation Scheme. The complainants will be eligible to get 70% (seventy percent) back wages and the amount already paid by the management to the complainants towards the Voluntary Separation Scheme benefit shall be adjusted. The Award shall be implemented by the opposite parties within one month from the date of its Notification for publication."

57. The substance of the findings is contained in paragraph-9 (extracted above). It is found that there was no demand from the applicants. There was no proposal from the officials for introduction of the Scheme. The SDO and the Executive Engineer of the Corporation never recommended for reducing staff strength. Admittedly, the Scheme was not published widely for the information of NMRs. Reference is made to the application made by AW1, which we have extracted. On this finding, the Labour Court finds that the Scheme was not the choice of the applicants but it was thrust upon the applicants. This amounted to refusal of employment in the guise of the Scheme. On this basis, the relief was granted. The relief consisted of directing reinstatement in service and the applicants were deemed to be working continuously in service from the date of the Scheme being implemented. Noticing that certain amounts had been paid to the applicants and directing that the applicants would get 70 per cent of the back-wages, the amounts were directed to be adjusted.

58. It may be necessary to notice one development which took place in the High Court. In the High Court, when application was made under Section 17B of the Act, the applicants were directed to deposit the amount which they received. 28 applicants deposited the amount which they received under the Scheme. It is not disputed that the said amounts are with the appellants.

THE JUDGMENT IN O.J.C. NO. 2420

59. In the first place, we must notice the judgment of the High Court of Orissa rendered in O.J.C. No. 2420 of 1989. In the same, the Court, inter alia, held as follows:

> "The petitioner represents a large number of N.M.Rs. who were employed in Rengali Hydro Electric Project and the like projects. Presently, they are under the Energy Department of the Government of Orissa. The prayer of the petitioner union is to direct the opposite parties to regularize the services of the N.M.R. employees and to pay them emoluments equal to those of regular employees discharging the same nature of work.
>
> We need not traverse the legal ground as the same has been duly taken note of in a recent decision of this court in Balaram Sahu-v-State of Orissa, 74(1992) CLT 367 and following what was stated in that judgment the facts of the two cases being similar. We direct regularization of those members of the union who have served continuously for a period of five years by today. The opposite parties shall find out with reference to Annexure-7 or any other document available to them as to which of the members of the petitioner-union have completed five years of continuous service by today. It may be pointed out here that in Annexure-7, details have been given about 281 (though the last serial number is 280 in Annexure-7, Shri Das states that sl. No. 114 was mentioned twice by mistake) persons. Learned counsel states that details of 85 workmen represented by the petitioner-union who have been transferred to different divisions could not be made available to the court. ..." (Emphasis supplied)

60. The court went on, no doubt, to consider the pay to be given to the NMR workers. The court proceeded to hold "there was no reason for discriminating the NMR employees from other regular employed persons".

THE JUDGMENT IN CIVIL APPEAL NOS.7342-7343 OF 1993

61. The Civil Appeal, which was carried against the same, was finally decided by this Court in State of Orissa and others v. Balaram Sahu and others 11 . The judgment was rendered on 29.10.2002. From the perusal of the said judgment, we find that this Court did not deem it fit to 11 (2003) 1 SCC 250 interfere with the judgment of the High Court as such. This is what this Court said:

> "14. For all the reasons stated above, the appeals are allowed and the orders of the High Court are set aside insofar as the pay equal to that of the regular employed staff has been ordered to be given to the NMR/daily-wager/casual workers, as indicated above, to which they will not be eligible or entitled, till they are regularized and taken as the permanent members of the establishment. For the period prior to such permanent status/regularization, they would be entitled to be paid only at the rate of the minimum wages prescribed or notified, if it is more than what they were being paid as ordered by this Court in Jasmer Singh case [(1996) 11 SCC 77 : 1997 SCC (L&S) 210]. There will be no order as to costs." (Emphasis supplied)

62. Thus, the judgment, insofar as it related to the direction to regularize the members of the writ petitioners' union, became final on 29.10.2002.

63. The judgement of the High Court was dated 28.10.1992.

Thus, we proceed on the basis, therefore, that the applicants, were members of the writ petitioners' union in O.J.C. No. 2420 of 1989, who became entitled under the judgment of the High Court which was affirmed by this Court as regards the direction for regularization provided they had served continuously for a period of five years as on 28.10.1992, i.e., the date of the judgment of the High Court.

64. According to the learned counsel for the appellants, in fact, a Scheme was floated to effectuate regularization as ordered by the court. It appears to be their case that the appellants also floated the VSS.

65. Going by the judgment of the High Court in O.J.C. No.2420 of 1989, those members of the writ petitioners' union who served continuously for a period of five years till 28.10.1992 (date of judgment) were entitled to regularization as the High Court had directed regularization. They had indeed acquired a legal right. This was undoubtedly subject to the lis pending in this Court. A period of five years continuous service prior to 28.10.1992 would mean those employees who were members of the writ petitioners' union before the High Court in O.J.C. No. 2420 of 1989, would be employees who were appointed on or before 27.10.1987. In fact, going by the deposition of applicants, it would appear that AW1 claimed to be working since 1988. This means AW1 apparently was not one who was covered by the direction for regularization by the High Court as he was working from 03.06.1988. He would complete five years only by 02.06.1993. Though, in the application, there is reference to O.J.C. No.1527 of 1991, in his deposition, he refers only to O.J.C. No.2420 of 1989. No doubt, as far as AW2 to AW4, going by the dates given, which we have already indicated, if they had worked continuously from the dates, they would be covered by the order of the High Court for regularization. We are considering the VSS which was introduced during the pendency of the litigation before this Court. This means that while they had acquired a right under the direction of the High Court, the sword of Damocles over-hanged them in the form of the uncertainty confronting them as the direction in their favour could be either confirmed or overturned by this Court.

66. In other words, the direction in their favour had not become final. We have stated this only to highlight that if the VSS was floated and it was found sufficiently attractive, it would not be unnatural for them or unfair to them to take advantage of the same. In this regard, the appellants have projected before us that out of the 281 NMRs and Contingent Khalasis who opted for the Scheme, the Corporation accepted the applications for 271 workers. It is only the 90 applicants, it is pointed out, who have made a somersault and sought to resile from the applications which were made by them.

67. The application under section 33A of the Act was filed after several months from the date of receiving the ex gratia payment. There is also the case of the appellants that there was a letter from

the President of the Workers' Union of 15.04.2000, which was before the circulation of the Scheme, requesting for enhancing the amount for VRS for the NMR workers. There are Minutes of the discussion held on 20.05.2000 between the Management and the representatives of the Union. The Minutes indicate that the issue relating to the VSS, which was taken up for discussion, was – "(1) Enhanced amount of VSS for the NMR employees".

68. It may be true that the Notification dated 27.04.2000 was published in English. So were the further Notifications dated 17.06.2000 and 28.01.2000.

69. There is no dispute that the applicants have been favoured with an amount of Rs.1,25,000/- which is the amount which is contemplated under the Scheme besides other amounts. These amounts have been paid by cheques into the accounts of the applicants. The applications which have been produced before us appear to be witnessed by two witnesses. This is as per the terms of the Notification which contemplates that the application must be signed by two witnesses. So also, in regard to the payments which are effected, the authorization appears to be supported by the signatures of two witnesses.

70. No doubt, as far as this aspect is concerned, the applicants do not dispute that they have received the payments. In fact, they will not be in a position to establish that they have not received the payments. They would brush aside the payments on the basis that they were paid some amounts which they thought they were entitled to on the basis that they were being regularized. A sum of Rs.1,25,000/- plus other benefits was paid to all the applicants. This amount happens to be also the amount which was contemplated under the VSS.

71. None of the applicants have a case that the signatures in the applications have not been appended by them. They do not appear to have a case about the witnesses as such except as we have noticed in the evidence. It may be true that one applicant out of the 90 has written a letter purporting to withdraw. It is noteworthy that other 89 applicants had not made any application seeking to withdraw. In the application filed by one worker (First Applicant), which we have extracted, he would state that he was threatened and coerced and, being afraid, he was made to sign the application for VSS against his wish. He never intended to take the VSS and he was told that he would be forced to dire striats. No doubt, his application is dated 01.06.2000, which is the very next date of the making of his application. It may be remembered that AW1 was not a person who was entitled even to the benefit of the order passed by the High Court as he had not completed five years as on the date of the judgment. There can be no similarity between a case of threat or coercion on the one hand and fraud.

72. The manner in which fraud was perpetuated, the exact nature of the fraud and person or persons by whom the fraud was perpetuated, are found missing in the pleadings, as noticed by us. As far as the first applicant is concerned, the prevarication in his case is palpable and discernible from the somersault that he carried out in the pleading in the application in comparison with his case in the letter, which he wrote seeking to withdraw from the Scheme, on 01.06.2000, wherein the case was built around alleged threat and coercion. It may be noticed that coercion is another element which is antithetical to free consent and is separately dealt with under Section 15 of the Contract Act. He

minces no words after employing the expression “threat, coercion”, when he declared that being afraid, he was made to sign the VSS against his wish. He was threatened with being forced into dire straits unless he signs the application. Conspicuous by its absence, in his letter dated 01.06.2000, is even the faintest whisper about fraud of any kind. This is the application dated 01.06.2000. It must be noted it is on the very next day after he made the application claiming the VSS on 31.05.2000. The application under Section 33A of the Act, on the other hand, came to be filed much later, i.e., on 19.04.2001, after several months. In the pleading, in paragraph-9 of the application, as to who defrauded amongst the authorities, is not pleaded. It must be noted that the persons arrayed in the application are the General Manager (Electrical); Manager (Electrical); Maintenance Division; Manager (Electrical), Protection and Control Division; Director (HRD) of the Corporation. It is not even mentioned as to who amongst them committed the alleged act of fraud. No doubt, the fraud could be committed by either the opposite parties or anyone action at their behest. If so, it should have been pleaded. There is no such plea forthcoming. The substance of the plea is that for regularization, which we gather, on a liberal reading of the application, being one under the Act and bearing in mind also the need to be not far too strict, enmass signatures of workers were taken on certain papers and by showing undue influence. The pleas of fraud and undue influence are distinct and separate. It will be noticed that the case of coercion and threat does not make its appearance in the pleading.

73. Coming to the oral evidence, AW1, as noticed by us, states that he and other applicants were given to understand that their services will be regularised and signatures were taken on the VSS form. He further says that his signatures and that of the other applicants were taken by appellants forcibly giving an impression that their services will be regularised. As has been noticed by us, there is no case of force which is used in paragraph-9 of the application, which constitutes the sole pleading.

74. Passing in to AW2, he would say that the appellants gave them an impression that their services would be regularised and, at the first instance, their signature was taken on a blank paper and subsequently on a form. Subsequently, he came to know that it is meant for the Scheme and he drew attention of the authorities (There is no mention about before whom he ventilated his objection. No written document is forthcoming). He would state that the signatures were obtained at the Divisional Level giving the same impression. In cross, he says he has no knowledge about VSS prior to his refusal of employment. It is further stated that it is not a fact that the signatures of the applicants were not taken forcibly and fraudulently by the appellants. This is about all that AW2 has to say. The inconsistency between “fraudulently” and “forcibly” is self-evident and “forcibly” is not vaguely pleaded.

75. AW 3 would state that with the instigation of the higher authorities, their signatures in the VSS were taken forcibly. In the similar way, the signatures of all the applicants were taken. No doubt, he speaks about the notice not being published nor it being circulated amongst the workers. It was not published in any local newspaper. In cross-examination, he would state that it is not a fact that he and other applicants were not refused employment forcibly nor the condition of service changed. On conspectus of his evidence, his deposit9ion is only to the effect that the application of AW3 and other applicants were secured forcibly. This is completely incompatible with the case of fraud which

is pleaded and there is no pleading for force being used as we have noticed.

76. Coming to the last witness AW4, he would state that their signature was taken on an application and three to four blank papers. They were given to understand that their services would be regularised. But in cross-examination, he would state that the Executive Engineer and HR have compelled him and others to sign. The complete prevarication is palpable and does not require any elucidation. This would qualify as a case where the pleading does not match up to the requirements of the case. The state of the evidence, which is adduced, makes matters even worse.

77. A perusal of the documentary evidence, produced by the applicants, would show that they have nothing to do about establishing the case set up by the applicants. On the other hand, the protest letter dated 01.06.2000 sent by the firstly applicant completely demolishes the case as pleaded in the application. It is noteworthy that apart from the first applicant, none of the 89 other applicants have registered their protest about the VSS. Though there is mention about a letter sent to the Conciliation Officer, it is not brought on record.

78. As against this, the appellants have produced a wealth of documentary evidence before the Labour Court. Exhibits 'A' to 'K' were produced. They included the applications which were signed by the applicants and two witnesses; the VSS Scheme itself; the document evidencing the authorisation of payments of the amounts under the VSS Scheme; the Charter of Demand before the Management for discussion-Exhibit 'F'. The Minutes of the Discussion of the meeting which was held on 20.05.2000. The Minutes would indicate that regularisation of 43 NMR workers out of total of 343 was to be considered in terms of the Scheme for regularisation of the NMR workers after the VSS/VRS Scheme, is implemented in respect of 300 workers. This is item no.1. The next item no.2 dealt with enhanced amount of VSS for NMR employees. After a detailed discussion, it was mutually decided that this was not possible.

79. Item nos. 3 and 4 would show that it was decided that 43 NMR employees will be regularised on the basis of skill and qualification, seniority in terms of regularisation of NMR workers.

80. Though there was a direction by the High Court to direct all the employees of the writ petitioners' union, the matters stood challenged before this Court in Civil Appeal and as on date when VSS Scheme was floated and the regularisation scheme also was enforced, this Court had not yet rendered its judgment. Upholding the direction to regularise, the decision of this Court was rendered only in the year 2002.

81. Having regard to the materials, we would think, therefore, that the applicants have failed to plead and prove, and on the yardstick of it being a case of no evidence, the Award became infirm and was liable to be interfered with. At any rate, the findings, which have been rendered by the Labour Court, which is to the effect that it was not the choice of the applicants and was thrust upon the complainants amounting to refusal of employment, is completely insupportable both in law and on facts. The finding that there was no demand from the side of the complainants for the introduction of the VSS is completely irrelevant, as, as an employer, it was certainly open to devise such policy which was in the best interest of the Corporation. Validity of the Scheme did not depend upon the

Scheme having its origin in a demand by the workmen. The finding that there was no proposal for the Scheme or recommendation for reducing the staff strength was wholly irrelevant. It is the factum of the Scheme being propounded, in fact and implemented elsewhere as well, which should have been considered by the Labour Court.

82. We noticed that in paragraph-9 of the application after stating about getting the signatures enmass on certain papers under the pretext of regularisation and by showing undue influence of regularisation that since the projects were temporary and they are to be regularised in the Corporation in regular cadre, the old job will come to an end and a new job in the Corporation would start afresh for which workmen without understanding the implication of the application, have signed on such application. From the evidence which consists of the testimony of AW1 to AW4, as far as this aspect is concerned, there is no evidence at all. It is true, in the response of the appellants, it has been pleaded in paragraph-8 that a Scheme has been displayed on the notice board and the same has been widely circulated for information of all concerned. However, the witness for the appellants, in evidence, has deposed that the VSS was not published in any newspaper. It is stated that it is not published in any newspaper for the information of the general public. He also does say that it is not notified in the Gazette either by the Government or by the Corporation. The second witness for the appellants also states that implementation was notified on the Office Notice Board. It was made in English and the NMRs were not conversant with English. Nothing was published in Oriya. We have also undoubtedly taken note of the deposition of AW1 to AW4 which appears to project the case of non-publication of the Scheme. In this regard, we must notice the following features:

> 1. The applicants themselves lay store by the judgment of the High Court in the earlier Writ Petition O.J.C. No.2420 of 1989. Therein, the petitioner was the Rengali Power Projects Workers' Union.
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> 2. Apparently, the applicants claimed to be members of the said Union. AW1, in fact, in his deposition, also refers to the order passed in O.J.C. No. 2420 of 1989 and that the appellants did not comply with the direction of the High Court and appeal is pending in this Court. Therefore, applicants must be understood as being members of the Union. They must also be treated as aware of the pendency of the civil appeal in this Court.

83. It is pertinent to note, in this regard that there is evidence (OPW1), to show that before implementation of the VSS, discussion took place on 10.04.2000 and 15.04.2000. Most importantly, Exhibit 'F' is a letter sent by one Mr. R.C. Kuntia dated 15.04.2000, written to the Chairman-cum-Managing Director of the appellant-Corporation that he stood elected as the President of the Union. They had some important problems to be discussed with the Management. He requested for a date and time to discuss the problems. Under the heading "Agenda of the Discussion", Item No.2 was "Enhance the amount of VRS for the NMR employees". This document was, in fact, marked without any objection through OPW1. The discussions took place on 20.05.2000. Item no.2 was about enhancing amount of VSS for NMR workers. It was decided, after a detailed discussion that it was not possible. Therefore, the only finding possible is that the Union

to which the applicants belonged, wanted the VSS amount to be enhanced. This aspect has not been considered at all by the Labour Court. It is true that the document was marked as Exhibit 'G' with objection. In the cross-examination of the witness, through whom Exhibit 'G' was marked, there is no suggestion that such a discussion did not take place or the discussion did not relate to the enhanced payment under the VSS. But it is true that OPW1 admits that in Exhibit 'G', the two Office Bearers have not signed though their names are appearing. However, there is no cross-examination about discussion taking place prior to implementation. Therefore, this would, at any rate, show that the applicants, who were members of the Union, were fully aware of the VSS. There is no case for them that they were misled or defrauded by their own Union Leaders. A perusal of the Award would show that apart from stating that Exhibits 'A' to 'K' were marked on behalf of the appellants and Exhibits '1' to '4' were marked on behalf of the applicants, there is no discussion about these documents at all. Thus, this is a case where documentary evidence adduced is by appellants is ignored by the Labour Court.

84. The finding that it cannot be accepted that the NMRs signed knowing its contents and consequences, amounts to nothing short of a perverse finding. The pleading and the evidence, does not support in the least, such a finding. On the other hand, the weight of evidence should have been borne in mind by the Labour Court as completely eliminating the possibility. It is surprising that the Labour Court should find solace in the letter written by the first applicant dated 01.06.2000 to find that he submitted the application either under pressure or under wrong notion. In fact, the very concept of wrong notion is missing in the letter dated 01.06.2000(See paragraph 17 for the letter). The Labour Court appears to be oblivious also to the fact that there is only one such letter. Even taking it at its face value, there is no letter written by any of the other 89 applicants. The Labour Court also lost sight of the fact that the applicants were favoured with amounts under the Scheme. By way of cheque the amounts stood credited in their accounts. The application is moved only after several months of receiving the benefits.

85. We are, therefore, of the clear view that no case was made out before the Labour Court for invoking Section 33A read with Section 33 of the Act. In the case of Writ of Certiorari, no doubt, the Court also bears in mind that it is not axiomatic, or that upon a finding of illegality, a court is bound to interfere. The court may still exercise its discretion and decline jurisdiction unless there is manifest injustice. Bearing in mind this principle also, we are inclined to think that the appellants have made out a case of manifest injustice if the Award is allowed to stand. Large sums were spent by a Public Sector Corporation in seeking to trim its work force. The workers voluntarily on our finding, accepting the terms of the Scheme, receiving the benefits, and thereunder and got separated. Implementing the Scheme would mean reinstatement of the workers and that too with 70 per cent back-wages, when there was absolutely no warrant for the same.

86. There is only one aspect which remains. During the pendency of the Writ Petition filed by the appellants in the High Court, 28 applicants deposited the amount which they have received from the appellants so that application under Section 17B of the Act could be pursued. This amount must be directed to be returned to the concerned workmen who had made the deposit and we also feel that the amount should be returned with interest.

87. Accordingly, the appeal is allowed and the judgment of the High Court is set aside. The Award passed by the Labour Court is set aside and the application filed by the applicants is dismissed. However, the appellants will return the entire amount deposited with them by the 28 applicants with interest at the rate of 8 per cent per annum from the date of deposit till the date of payment. The amount shall be returned back with interest as above to the applicants concerned within a period of two months form the date of receipt of copy of this judgment.

88. There shall be no order as to costs.

.....J. (SANJAY KISHAN KAUL) .....J. (K.M. JOSEPH) New Delhi, September 12, 2019.