

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

O.A. No. 511/87
T.A. No.

198

DATE OF DECISION 25.9.1992

(8)

Shri Om Prakash Gupta

Applicant (s)

In person

Advocate for the Applicant (s)

Union of India and Ors.

Respondent (s)

Shri M.L. Verma, Counsel

for Respondent No. 1. Advocate for the Respondent (s)

Shri Anand Prakash, Sr. Counsel with Shri J.C. Seth, Counsel for Respondents 2 and 3.

CORAM :

The Hon'ble Mr. Justice V.S. Malimath, Chairman.

The Hon'ble Mr. I.K. Rasgotra, Member (A).

1. Whether Reporters of local papers may be allowed to see the Judgement ?
2. To be referred to the Reporter or not ? Yes
3. Whether their Lordships wish to see the fair copy of the Judgement ?
4. To be circulated to all Benches of the Tribunal ?

Malimath

(V.S. MALIMATH)
CHAIRMAN

In the Central Administrative Tribunal

Principal Bench: New Delhi

OA No.511/87

Date of decision: 25.09.1992.

Shri Om Prakash Gupta

...Petitioner

Versus

Union of India, through its ... Respondents
Secretary, Department of Power, Ministry of
Energy, Sharam Shakti Bhawan, Rafi Marg, New Delhi

& Others.

Coram:-

The Hon'ble Justice Mr. V.S. Malimath, Chairman
The Hon'ble Mr. I.K. Rasgotra, Administrative Member

For the petitioner In person

For the respondents Shri M.L. Verma, counsel for Respondent No.1.

Shri Anand Prakash, Senior Counsel with Shri J.C. Seth, counsel for Respondents NO. 2&3.

Judgement(oral)
(Hon'ble Mr. Justice V.S. Malimath, Chairman)

The petitioner, Shri Om Prakash Gupta in this Original Application has prayed for setting aside the impugned orders dated 3.3.1987 and 6.3.1987 and for further direction to respondents No. 2&3 to treat him as a civil servant and for other consequential benefits.

2. Respondent No.1 is Union of India represented by the Secretary, Department of Power, Ministry of Energy, Respondent No.2 is the Badarpur Thermal Power Station owned by the Ministry of Energy, Department of Power and Respondent No.3 is National Thermal Power Corporation which

is a Government company registered under the Companies Act.

3. Government of India established an industrial undertaking viz. the Badarpur Thermal Power Station (hereinafter referred to as 'the Undertaking'). For the purpose of manning the said undertaking, Government of India took steps to make appointments to the several posts. The petitioner was offered an appointment as per Annexure-C dated 19.12.1974 as Operator Grade-II in the Undertaking. Clause-7 of the terms of offer says:-

"Your appointment as Operator Grade-II in Badarpur Thermal Power Station will be against the temporary post of Operator Grade-II sanctioned for the O & M work of the Badarpur Thermal Power Station and the post would stand transferred to successor agency as and when it is formed. As such you alongwith your post will be transferred to that Organisation. You will have no option to remain on the cadre of Central Water and Power Commission (PW)."

The petitioner accepted the offer and the terms whereupon he was duly appointed. He joined on 6.1.1975. It cannot be disputed that when the petitioner joined service in the Undertaking he did so as a government servant inasmuch as the Undertaking was then owned and managed by the Government of India itself. It is clear from the offer and the terms of appointment that the transfer of the Undertaking was in contemplation and that is the reason why in clause-7

it was provided that once the Undertaking is transferred to another organisation, the petitioner will have no option to remain in the service of the Central Water and Power Commission. In other words, it was made clear that the prospects of the petitioner, so far as his service is concerned, would get tied to the Undertaking and not to the Government.

4. The National Thermal Power Corporation (hereinafter referred to as NTPC), respondent No.3, as already stated, is a registered company under the Companies Act, which is engaged in the business of generation and distribution of power. The Government thought that it is better to transfer the management of the Undertaking to the said organisation. After negotiation between the Government on the one hand and respondent No.3 on the other. The terms of transfer of management were settled as per Annexure-F at page 25 of April, 1978. The terms of the agreement make it clear that what was transferred to the NTPC is not the industrial Undertaking itself but the management. In the preamble of the agreement, it is stated:-

"WHEREAS the Government of India have decided to entrust the management of the aforesaid three units viz. Station Stage I, Project Stage II and Project Stage III to NTPC with effect from 1.4.1978 and the NTPC has agreed to manage the operations and maintenance of the aforesaid Stage I, the construction of "Project Stage II" and "Project

Stage III' in accordance with the Sanctions given by Government of India and the Project reports approved by the Government of India, to commission the projects and after commissioning to operate and maintain efficiently the "Station, Stage II" and Station Stage III" on behalf of the Government of India, and accordingly the Government of India has on the first day of April, 1978 put NTPC in possession of all the properties described in the first and second schedules and all records and documents necessary for proper accounting of payments and receipts on mercantile basis on the following terms and conditions;"

In paragraph-1 of the agreement this is what is provided:-

"In consideration of the remuneration hereby reserved and all the covenants and conditions on the part of the NTPC hereinafter contained, the Government of India appoint NTPC their Manager and Agent for the purposes of maintenance, management and operations of 'Station Stage I' and construction, commissioning and, thereafter maintenance, management and operation of 'Station Stage II and 'Station Stage III' as hereinafter recited....."

So far as the personnel working in the Undertaking is concerned, this is what is provided in paragraph-5 h) of the agreement:-

"h) i) To deploy Government personnel working in the said Project and Station as on 31.3.1978 either in Badarpur or in any other Projects of NTPC, on such terms and conditions as may be agreed upon between the Government and the NTPC.

ii) Personnel transferred to NTPC on deputation by the Government of India would be governed by the terms of deputation.

iii) Personnel transferred finally to NTPC would be given terms and conditions of service by NTPC not inferior to or less favourable than those enjoyed by them as on 31.3.1978."

Thus, while transferring the management of the industrial Undertaking to the NTPC care was taken to ensure that equitable treatment is meted out to those who were serving in different posts in the Undertaking. The employees working in the Undertaking were given an option to continue to serve in the Undertaking under the NTPC. The employees having exercised their option were continued as the employees by the NTPC. The NTPC ultimately thought of permanently absorbing them in their service. They made the offer and asked them to exercise their option. They were told that their previous service would be counted and that they would be absorbed in conditions which are not less favourable to those enjoyed by them when the Undertaking was under the management of the Government. It is necessary to state at this stage that nearly 2500 employees exercised

the option that was offered to them by the NTPC and they have been absorbed in the regular service of the NTPC. We are told that the petitioner and two others are the only exception. Among the three persons, the petitioner is the only one among them who has chosen to challenge the action of the respondents in this behalf.

5. So far as the petitioner is concerned, the NTPC made the offer as per Annexure R-4 dated 10/15.3.1984. The petitioner gave a reply as per Annexure R-9 dated 22.5.1984. The petitioner has taken the stand that the offer of absorption is on conditions which are less favourable and is, therefore, not proper and acceptable. As the posts held by the employees were to stand transferred to the successor agency as and when it is formed, he would also stand transferred to the successor organisation. The petitioner took the stand that in his opinion the Badarpur Thermal Power Station has not been transferred to the NTPC, / the question of his being transferred to the NTPC does not arise. The petitioner says that he responded to the offer as per Annexure A-5 dated 13.4.1984. The Senior Personnel Officer of the NTPC did not accept the stand of the petitioner and asked the petitioner to submit his unconditional acceptance of the offer of absorption dated 10/15.3.1984 at an early date for taking further action in the matter. The petitioner did not offer any Undertaking as called upon by the NTPC. He appears to have questioned the

right of the NTPC to hold disciplinary enquiry against him. The NTPC after examination of the entire matter communicated its views in this behalf letter dated 18.1.1986 produced as Annexure-R-3. They have taken the stand that the petitioner is an employee of the NTPC and that they are entitled to exercise disciplinary control over him, which obviously became necessary, having regard to the events took place in the meanwhile.

6. The petitioner had earlier given an undertaking on 1.8.1975 is produced as Annexure-R-8, which reads:-

"I Om Prakash son of Shri Kishori Lal Gupta fully understand that my appointment is purely temporary and the appointment has been made for service in Badarpur Thermal Power Station. In case it is later on decided to set upon a separate organisation for the Operation and Maintenance of the Badarpur Thermal Power Station outside the Central Water & Power Commission (Power Wing), my service will stand transferred to the successor organisation and I will have 'no' option to remain on the cadre of Central Water & Power Commission (Power Wing).

Signature sd/-

Place: Badarpur

Name Om PRAKASH GUPTA

New Delhi-44.

Dated: 1/8/75

Designation Opt. Gr.II

7. Obviously relying upon this undertaking and paragraph-7 of the offer of appointment the NTPC passed

order as per Annexure-A dated 3.3.1987 to the effect that the petitioner stands absorbed into the service of the NTPC w.e.f. 1.4.1978 as Senior Operator/ Supervisor in the pay scale of Rs.425-700 with the basic pay of Rs.440/- and Rs.44/- as interim benefit which would not count as pay for any purpose and would automatically stand adjusted on revision of pay scale of NTPC. This was followed by another office order (AnnexureB) dated 6.3.1987 passed by the NTPC fixing his pay at Rs.564/- in the revised pay scale of Rs.550-800 as on 1.1.1979 with next increment date due on 1.11.1979, treating the petitioner as having stood absorbed in the service of the NTPC as per earlier order dated 3.3.1987.

8. It is in this background that the petitioner has approached the Tribunal for reliefs as aforesaid.

9. If we analyse the reliefs, it becomes clear that primarily the petitioner seeking a declaration that notwithstanding the transfer of the management of the Undertaking to the NTPC he continues to remain as a Government servant. Hence, his functioning in the NTPC would be regarded as either on foreign service basis or on deputation basis and not as the regular employee of the NTPC as such. The impugned orders, Annexures A and B make it clear that the NTPC has asserted that the petitioner has become its employee w.e.f. 1.4.1978. Hence, there is a dispute as to whether the petitioner is an employee of the

NTPC w.e.f. 1.4.1978 or continued to be a Government employee from 1.4.1978 onwards.

10. The learned counsel for the respondents took a preliminary objection on the maintainability of the Application on the ground that this Tribunal has no jurisdiction under the Administrative Tribunals Act, 1985 to adjudicate upon service matters pertaining to the NTPC. As the NTPC is not a department of the Government of India but a company registered under the Companies Act and is also not one of the organisations notified under Section 14 of the Act, we have no jurisdiction in regard to service matters of the personnel of the NTPC. It, therefore, follows that we have no jurisdiction to decide as to whether the impugned orders (Annexures A&B) are illegal and invalid, as those are the orders by the NTPC asserting that the petitioner is the employee of the NTPC w.e.f. 1.4.1978. We, therefore, hold that we have no jurisdiction to examine the validity of Annexures A & B. There is, however, a prayer of the petitioner for a declaration against all the three respondents that he continues to remain as a Government servant even after the transfer of the management of the Undertaking to the NTPC. So far as declaration of the petitioner's status is concerned, we have jurisdiction to decide as to whether he continued as an employee of the Government even after 1.4.1978 vis-a-vis respondents No.1 and 2 though not against Respondent No.3, N.T.P.C. We,

therefore, propose to examine this limited question, which in our opinion fairly falls within our jurisdiction viz.

whether the petitioner continues to be a Government employee even after the management of the Undertaking was transferred by it w.e.f. 1.4.1978 vis-a-vis Respondent No.2.

11. It is admitted that the Undertaking in question is an industrial Undertaking and that the petitioner is a workman governed by the provisions of the Industrial Disputes Act, 1947. The Government has taken the stand under an agreement between the Government on the one hand and the NTPC on the other; the management of the Undertaking has been transferred to the N.T.P.C. w.e.f. 1.4.1978. As the management stood transferred under an agreement between the parties the stand taken by the respondents is that the provisions of the Section 25FF of the Industrial Disputes Act, 1947, are attracted to the facts of this case. For the sake of convenience, we extract the said provisions:-

"25FF. Compensation to workmen in case of transfer of undertakings.--Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled

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to notice and compensation in accordance with the provisions of Section 25-F, as if the workman had been retrenched:

Provided that nothing in this section shall apply to a workman in any case where there has been a change of employers by reason of the transfer, if--

(a) the service of the workman has not been interrupted by such transfer;

(b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and

(c) the new employer is under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer."

It is clear from this provision that the consequences specified therein would follow in every case where ownership or management of the undertaking is transferred whether by agreement or by operation of law from the employer in relation to that undertaking to a new employer in respect of every workman who has been in continuous service for not less than one year in that undertaking immediately before transfer. The consequence that would

follow is that every workman who was in continuous service for not less than one year in the undertaking before such transfer is deemed to have been retrenched from service and becomes entitled to notice and compensation in accordance with Section 25F. There is a statutory fiction of deemed retrenchment when the transfer of ownership or management of the undertaking is effected. As there is a deemed retrenchment it further provides that the workmen would be entitled to receive a notice and compensation in accordance with Section 25FF. It has been held by the Supreme Court in **1969 (1) LLJ 762 Payment of Wages Inspector v. Surajmal Mehta** that notice and compensation contemplated by Section 25FF are not conditions precedent for the statutory effect of retrenchment to flow by the operation of the Section 25FF of the I.D. Act. We shall now examine as to whether the transfer of ownership or the management has taken place in this case in respect of the undertaking in question either by an agreement or by operation of law to attract Section 25FF. Respondents No.1 and 2 have filed a common reply wherein they have taken a positive stand that Section 25FF is attracted, the necessary condition of transfer of management of the undertaking having taken place under an agreement between the parties in this case. The relevant averment in the reply in this behalf is contained in paragraph 6.6. which reads as follows:-

"6.6. That the contents of para 6.6 as stated are incorrect and denied. It is submitted that the NTPC is Successor Agency/Organisation as contemplated by para 7 of his appointment letter of the applicant and his own Undertaking. The transfer of service of the applicant also satisfies the principles contained in Section 25 FF of the Industrial Disputes Act, 1947 which requires that on transfer of management of undertaking the terms & conditions of service of employees would not be less favourable than those enjoyed by the employees earlier to the transfer. On transfer of management of an undertaking the transferee organisation becomes the Successor of the transferor as contemplated by Section 25FF of I.D. Act 1947. Para 7 of the appointment letter and Section 25FF of Industrial Disputes Act do not necessarily require transfer of ownership of the industrial undertaking and it is sufficient that only management of the industrial undertaking is transferred, as in the present case. Vide Agreement dated 12.4.1978 between Govt. of India and Respondent No. 3 complete and full management of BTPS has been entrusted to NTPC, who have appointed and absorbed over 2500 employees of BTPS in their service managing, operating and maintaining the Station. There has been no change of service conditions of the applicant. If at all, there is a

change it is for his benefit..." 22

There is a very clear assertion made by the respondents that under the agreement between the Government and the NTPC the management of the undertaking has been transferred to the NTPC and that the provisions of Section 25FF are attracted. It is no doubt true that they have further contended that by that process the petitioner has also become an employee of the NTPC. But we shall not examine that part of the case, as we have already said that the Tribunal has no jurisdiction to grant any relief against the NTPC. We find that the basic factual averment in regard to the applicability of Section 25FF made in the reply have not been controverted by the petitioner in the rejoinder which he has chosen to file in this case. The relevant reply in this behalf is contained in paragraph-6.6. which reads as follows:-

"6.6. This para is wrong and denied.

The corresponding para of the application is correct and reaffirmed. It is further denied that under Clause-7 of the Appointment Letter, the NTPC is a successor agency/organisation.

Before the temporary transfer Section 25-FF of the I.D. Act has not been complied with. The letter dated 20.8.1985 categorically states that C.E.A. is not the appointing authority of the applicant and therefore, C.E.A. has got no jurisdiction to give ✓ the objection or No objection in respect of the

applicant. It is stated that the Badarpur Thermal Power Station is a Departmental Organisation under the Ministry of Energy, Department of Power and is directly controlled as subordinate office by the said ministry. and for certain other purposes by the C.E.A.. which is an attached office of the Ministry and the same has been admitted by the respondent No.3 itself in their counter-affidavit filed in transfer application No.T-331/85 which is disposed of by this Hon'ble Tribunal. The relevant portion of the counter affidavit filed by the respondent No.1,2 and 3 is set out here as under:-

"It is submitted that the Badarpur Thermal Power Station is a Departmental organisation, under the Ministry of Energy and is directly controlled as a subordinate office by the said Ministry for certain purposes and by the Central Electricity Authority which is an attached office of the Ministry for certain other purposes. I crave leave to submit that this Power Station, being the first departmental organisation, had to draw upon experienced personnel from Central Electricity Authority and State Electricity Boards for filling up its posts of officers. However, the subordinate posts were filled by this Power Station by making its own recruitment..."

It is further denied that the transfer has not been made with less favourable condition. For example it is submitted that there has been tremendous change in the dearness allowance as the original pattern of Central D.A. has been changed to industrial D.A. and there is complete ban of Pension and Central Govt. Employees Insurance Scheme etc."

Apart from the general denial none of the factual averments on the main question has been contradicted by the respondents. The averments in the rejoinder therefore, indicate that the petitioner did not controvert the assertion of the respondents that by agreement between the parties the management of the undertaking has been transferred. The only matter on which he has joined issue is that the terms on which the employees are required to be absorbed are less favourable. The terms of the agreement which we have already extracted above make it clear that the Government transferred the management of the undertaking in favour of the NTPC w.e.f. 1.4.1978. The petitioner contends that Section 25 FF would not come into play unless the ownership of the undertaking itself is transferred. It is not possible to accede to this contention, having regard to the clear language employed in the said section which says "Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law". It is, therefore, clear that the consequences specified in ✓ Section 25FF would flow not only when the ownership is

transferred but also when the management of an undertaking is transferred. The agreement shows that the management of the undertaking has been transferred by the Government to the NTPC. The respondents 1-3 have asserted in their reply that management of the undertaking has been transferred. The petitioner has not controverted in the rejoinder which he has filed and has not taken the stand that the management of the undertaking has not been transferred. Hence, we have no hesitation in holding that the management of the undertaking has been transferred w.e.f. 1.4.1978 by the Government of India in favour of the NTPC. We shall now examine as to what are the consequences of such transfer of management in favour of the NTPC.

12. So far as the workmen who have been in continuous service for not less than one year in the undertaking immediately before the transfer is concerned, to which category the petitioner belongs, the Section says that such person shall be entitled to notice and compensation in accordance with provisions of Section 25F of I.D. Act, as if he had been retrenched. We have earlier adverted to the decision of the Supreme Court which has laid down that giving of notice and compensation contemplated in Section 25F is not a condition precedent for retrenchment to take effect. Retrenchment takes effect the moment there is transfer of ownership or management of the undertaking either by agreement or by operation of law. The workman in such a case of deemed ✓ retrenchment only becomes entitled to receive a notice and

compensation from the transferror of the undertaking. He stands retrenched from service and the limited right which he acquires is in the matter of receiving notice and compensation in accordance with Section 25F of the I.D. Act. So far as the termination of relationship of master and servant between the transferor and the employee is concerned it takes effect the moment there is transfer of management. But the petitioner contends that the proviso to Section 25FF comes to his aid to maintain that notwithstanding the transfer of management in favour of the NTPC he continues to be the government servant. Let us examine what is stated in the proviso. The proviso says that nothing in the main part of the Section shall apply to a workman in a case where there has been a change of employer by reason of transfer, if the three conditions specified therein are satisfied namely :-

- a) the services of the workman are not interrupted by such transfer;
- b) The terms and conditions of such transfer are not less favourable.
- c) The new employer is under the terms and conditions of transfer or otherwise legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer.

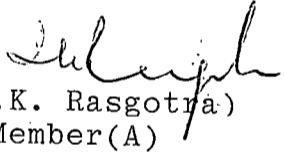
Whereas the petitioner maintains that the second and third conditions are not satisfied in this case, the respondents maintain that those conditions are also satisfied. They say that these conditions have been satisfied and therefore the petitioner has become the employee of the NTPC. We have

already stated that we have no jurisdiction to examine whether the petitioner has become the employee of the NTPC. We shall assume for the sake of argument that the petitioner is right in maintaining that the last two conditions mentioned in the proviso are not satisfied. If those conditions are not satisfied the proviso says nothing in the main Section shall apply to a workman. Therefore, it follows that if the conditions in the proviso are not satisfied what is provided in the main Section will apply. The only right under the main part of Section 25 FF is to notice and compensation as provided in Section 25F from the employer on the deemed retrenchment taking place consequent upon transfer of the undertaking or the management. Hence the failure to satisfy any of these conditions would not help the petitioner to maintain that he continued as a Government servant even after transfer. Section 25FF has been enacted as an equitable measure to advance the interest of the workmen who are affected by transfer of the undertaking or its management. When an undertaking is transferred the employer would not be obliged to continue the employees in service and they would stand retrenched. Provision has been made to ensure that he gets appropriate compensation, if satisfactory arrangement cannot be made for his securing continuance of service under the transferee. If such an arrangement as stated in the proviso to Section 25FF is made the transferor is relieved of the liability to give notice and compensation. Non-fulfilment

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of the conditions mentioned in the proviso cannot prevent the legal effect of retrenchment taking place consequent upon the transfer of the management in favour of the NTPC. We therefore, hold that consequent upon transfer of management of the undertaking by the Government in favour of the NTPC w.e.f. 1.4.1978 the petitioner stood retrenched from service which he held under the Government by the operation of Section 25FF of the I.D. Act. We hold that the petitioner ceased to be a Government servant from 1.4.1978 the date of transfer of the management. However, we do not express any opinion on the question as to whether he became an employee of the NTPC, as we have no jurisdiction to adjudicate upon this aspect of the matter.

13. For the reasons stated above this Application is dismissed. No costs.


(I.K. Rasgotra)

Member(A)


(V.S. Malimath)

Chairman

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