

A BCPP MAZDOOR SANGH AND ANR.

v.

N.T.P.C. AND ORS.

OCTOBER 11, 2007

B [TARUN CHATTERJEE AND P. SATHASIVAM, JJ.]

Disinvestment—Transfer of employees from public sector undertaking (PSU) to private sector—NTPC-PSU managing BCPP, wholly owned by BALCO-PSU—NTPC recruiting non-executive employees—Disinvestment of BALCO-PSU by Government, resulting into conversion of BALCO to private sector and existing management deciding to manage BCPP themselves—Transfer of non-executive employees from PSU to private sector on basis of agreement between NTPC and BALCO, enabling NTPC to manage and control BCPP—Justification of—Held: Transfer of employees from NTPC to BALCO bad in law—Agreement between NTPC and BALCO empowering NTPC to make recruitment on behalf of BALCO not in existence when NTPC made recruitments—In absence thereof, clause of appointment letter and undertakings obtained by NTPC from employees for appointment by exercising undue influence illegal, contrary to s. 23 as well as violative of Article 14—Recruitment process was initiated by NTPC and also appointment letters issued by NTPC—Employees were neither party to tripartite agreement nor heard before changing their service condition, thus, action of management violative of Article 14—Also transfer of only non-executive employees to private sector not sustainable—Factual details show that NTPC was their employer for all purposes—Constitution of India, 1950—Article 14—Contract Act, 1872—s. 23—Policy decision—Administrative law—Natural justice.

NTPC and BALCO are public sector undertakings wholly owned by the Government of India. BCPP is wholly owned by BALCO which was set up for production of power for their units. BALCO

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entered into an agreement of construction with NTPC. In 1987, NTPC recruited appellants-non executive employees. It issued appointment order stating the terms and conditions of the appointment. They underwent training and on completion of the same, appellants were issued separate appointment orders in the name of NTPC. BALCO and NTPC had entered into an agreement on 22.5.1990 enabling NTPC to manage, operate, supervise, maintain and control BCPP which was to come into operation from 29.6.1987. Appellants were to be posted against the post sanctioned for BCPP, under management of NTPC. When steps were being taken for transferring them to BALCO-public sector undertaking, subsequently by disinvestment policy of the Government, the entire management vested with a private concern under Agreement dated 20.6.2002. It resulted into conversion of BALCO, public sector to private sector and existing management decided to manage BCPP by themselves. Employees filed writ petition challenging the decision of their transfer from a Public Sector Undertaking to private management; that clauses 8.2 and 16.3 of the agreement dated 22.05.1990 be declared as illegal, arbitrary and unenforceable against them as it unilaterally changed the service conditions of all those employees who were not party to the agreement; and that the respondents-Management be restrained from transferring the non-executive workers working under BALCO Captive Power Plant-BCPP to the management of BALCO from NTPC. High Court dismissed the writ petitions. Hence the present appeals.

Appellant-employees contended that all the non-executive employees/appellants were the employees of NTPC and after disinvestment of BALCO, their services could not be transferred to a private sector organization-BALCO on the strength of agreement between NTPC and BALCO; that their transfer to private organization amounts to retrenchment by NTPC against their wishes; that clause 16.3 is discriminatory since non-executive employees alone were to be transferred to successor organisation; that unilateral changes made to their service conditions when the employees were not party to the agreement cannot be sustained; and that these employees have every right of protection of their

A service conditions.

BALCO and NTPC contended that all the non-executive employees/appellants were not appointed for NTPC, they were selected and appointed only for BCPP which is owned by BALCO, and hence their action to transfer them to BCPP/BALCO was fully justified.

Allowing the appeals, the Court

HELD: 1.1. The bipartite agreement between NTPC and BALCO was entered into on 22.05.1990. The appointments of 236 employees was made prior to 22.05.1990 and at the time of recruitment and appointment by NTPC, no agreement between NTPC and BALCO was in existence empowering NTPC to make recruitment and appointment on behalf of BALCO. Therefore, the provision made in clause 21.0 of the agreement, the effective date and duration of agreement w.e.f 29.06.1987 is contrary to the provisions of s. 23 of the Contract Act and also violative of Article 14 of the Constitution. By virtue of clause 21.0, the service condition has been admitted to be changed to the employees by giving effect of the agreement dated 22.05.1990 w.e.f. 29.06.1987. The appointments made prior to 22.05.1990 cannot be termed in furtherance of the agreement dated 22.05.1990. In such circumstances, the finding of the High Court that the services of the employees appointed by NTPC are transferable to BALCO in the light of the provisions made in clauses 8.2 and 16.3 of the bipartite agreement dated 22.05.1990 between NTPC and BALCO cannot be accepted. It was admitted that the power of attorney was given to NTPC pursuant to the agreement dated 22.05.1990 and 29.05.1991 and it is only those employees who have been appointed by NTPC on behalf of BALCO, pursuant to the said power of attorney, can only be transferred to BALCO. [Para 22] [1100-E, F, G; 1101-A, B]

1.2. The process of recruitment was initiated by NTPC and in the advertisement, it has been mentioned that 'NTPC Ltd. requires persons in the following categories for its Korba Super Thermal Power Project and BALCO Captive Power Project.' The letters for

test or interview to the candidates have also been issued by NTPC. A
 The said advertisement nowhere stipulates that the said process of
 recruitment was on behalf of BALCO. Even those interview letters
 do not reveal that the appointments are being made for/on behalf of
 BALCO. The appointment letters have also been issued by NTPC.

[Para 23] [1101-B, C, D] B

1.3. It is evident that during the process of recruitment it was
 never disclosed to the candidates/selectees that their recruitment
 is exclusively for BALCO, on the other hand, in some of the
 appointment letters issued by NTPC, the terms and conditions of C
 appointment are mentioned which lead to an irresistible conclusion
 that NTPC was their employer in all purposes. Para 8 of the
 appointment letter provides for initial appointment and posting to
 work at Korba and thereafter liable to be posted at the discretion of
 NTPC in other office/project/unit or in any other public sector D
 undertakings in India or abroad. [Para 26] [1103-G; 1104-A, B]

1.4. NTPC being an undertaking of the Government of India
 and an instrumentality of State is under constitutional obligation to
 act fairly with its employees, particularly, the posts which were E
 advertised from 1986 till 1988 were not in existence in BALCO as
 the BCPP was not fully commissioned. In those circumstances,
 NTPC was not justified in inserting clause 14 in the appointment
 letters and obtaining undertakings from the selectees. At the time
 of insertion of clause 14 in the appointment letter and obtaining F
 undertakings from the employees there was no agreement between
 NTPC and BALCO for making recruitment and appointment on
 behalf of BALCO for its BALCO Captive Power Plant. In such
 circumstances, in absence of such agreement between NTPC and
 BALCO, clause 14 of the appointment letter and undertakings G
 obtained by NTPC is illegal and against public policy and is contrary
 to the provisions of s. 23 of the Contract Act as well as violative of
 Article 14 of the Constitution of India for the reason that undue
 influence was exercised by the management of NTPC on the
 unemployed candidates to execute undertakings for appointment.
 By virtue of the clause 14, the status of these public servants have H

A been sought to be changed which is violative of Article 14.

[Paras 24, 25 and 27] [1102-A, B, C; 1103-E, F; 1104-C, D]

Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Anr., [1986] 3 SCC 156; and *Mahavir Auto Store and Ors. v. IOC and Ors.*, [1990] 3 SCC 752, referred to.

C 1.5. No employee could be transferred without his consent from one employer to another. In order to bind the appellants, there must be a tripartite agreement. Since there is no tripartite agreement, the transfer from one employer to another cannot be effected. Therefore, the transfer of employees from NTPC-a public sector undertaking to BALCO which is a private organization was bad in law. [Paras 28 and 30] [1104-G; 1107-D, E]

D *M/s. Pyarchand Kesarimal Ponwal Bidi Factory v. Omkar Laxman Thange and Ors.*, [1969] 2 SCR 272, referred to.

Nokes v. Doncaster Amalgamated Collieries Ltd., (1940) 3 All E.R. 549, referred to.

E 1.6. The Government or its instrumentality cannot alter the conditions of service of its employees and any such alteration causing prejudice cannot be effected without affording opportunity of pre-decisional hearing and the same would amount to arbitrary and violative of Article 14. The employees are neither party to tripartite agreement nor they have been heard before changing their service condition. Therefore, the action of the management was violative of Article 14 of the Constitution of India. [Para 29] [1105-D, E]

G *H.L. Trehan and Ors. v. Union of India and Ors.*, [1989] 1 SCC 764; and *Jawaharlal Nehru University v. Dr. K.S. Jawatkar and Ors.*, [1989] Supp. 1 SCC 679, referred to.

H 1.7. Appointment orders were issued by NTPC and Rules, procedure in respect of probation, training, D.A. and other allowances, absorption in the regular scale, governed by certified standing orders and other Rules and Regulations of the company-

NTPC. Even in the appointment order, it had been specifically stated that in the event of their appointment, they have to execute service agreement in favour of NTPC or any other Department or Undertaking of Government of India for three years. All the employees selected and appointed executed a service agreement in favour of NTPC. All the appointment orders were sent with the specific conditions by the Senior Personal Officer, NTPC Korba Super Thermal Power Project, Bilaspur. Posting orders were also issued by NTPC. Perusal of agreements executed by the selectees clearly show that there is no reference that the said agreement is for and on behalf of the BALCO whereas it only refers NTPC. All the abovementioned factual details clearly support the case of the employees that they were selected and their services could be continued only at NTPC or any other public sector undertakings of Government of India. There is no iota of evidence or indication that they would be transferred to a private concern with less service benefits. [Para 31] [1107-E, F, G; 1108-A, B]

1.8. Clause 16.3 of the agreement dated 22.05.1990 makes it clear that non-executive employees are to be transferred to successor organization and there is no reference to executives. On the other hand, it was demonstrated by facts and figures, that the executives working in BALCO are to be transferred to other establishments of NTPC. Even though the non-executive employees are also having a special knowledge i.e., technicians, in the absence of any plausible reason retaining executives alone with NTPC and transferring non-executive employees to a private organization cannot be sustained and hit by Art. 14 of the Constitution. On the other hand, the appellants-non-executive employees are to be retained by NTPC and posted in their various units. On consideration of various aspects starting from calling for applications and subsequent actions taken by NTPC, the employees have made out a case for continuing their service in NTPC.

[Paras 32] [1108-C, D, E, G]

BALCO employees' Union (Regd.) v. Union of India and Ors., [2002] 2 SCC 333; and *All India ITDC Workers' Union & Ors. v. ITDC*

A *and Ors.*, [2006] 10 SCC 66, referred to.

1.9. NTPC requested this Court that if the claim of the employees are acceptable, they are ready to consider the case of the employees whose appointment letter neither contain clause 14 nor clause 16 and have not given an undertaking and they will be taken back by the NTPC in the phased manner. On consideration of the relevant materials, both the offending clauses in the agreement cannot be sustained and all employees are to be retained in NTPC.

[Para 33] [1108-G; 1109-A, B]

1.10. Inasmuch as the claim of the employees relates to interpretation of certain clauses in the agreement, appointment letters and no disputed facts are involved and taking note of the fact that the issue relates to employment of few hundreds of employees and in the light of the assertion that transferring them to private organization from a public sector undertaking without their specific consent is arbitrary and unreasonable and that the alternative remedy is rule of discretion and not the rule of law, the conclusion of High Court that the writ petitions under Article 226 of the Constitution by the employees are maintainable, is accepted.

[Para 18] [1097-C, D, E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 678 of 2006.

From the Judgment and final Order dated 25.03.2004 of the High Court of Chhattisgarh at Bilaspur in Writ Petition No. 2087 of 2001.

WITH

C.A. Nos. 683, 724, 726 & 727 of 2006.

Indira Jaising and Ravindra Shrivastava, Barun Kumar Sinha, Pratibha Sinha, B.K. Satija, Lakshmi Raman Singh, Atul Kumar, Kunal Verma, Md. Mannan, Rajul Shrivastav and Anshul Garg for the Appellants.

Raju Ramachandran and C.A. Sundaram, S.K. Dhingra, Y.K. Rao, Madhu Sikri, Saket Sikri, P.C. Sen and Vishwajit Singh for the

Respondents.

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The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Since all the above appeals were directed against the common order dated 25.03.2004 passed by the High Court of Chhattisgarh at Bilaspur in Writ Petition Nos. 2087 and 2072 of 2001 and 557 of 2004, they are being disposed of by the following common judgment.

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2. The appellants before us are employees recruited by National Thermal Power Corporation (for short 'NTPC') by calling for list of names from the employment exchange and appointed by following the procedure. When steps were being taken for transferring them to Bharat Aluminium Company Limited (for short 'BALCO') which was originally a Public Sector Undertaking under the Government of India, subsequently by policy of disinvestment the entire management had vested with M/s Sterlite under Agreement dated 20.06.2002 w.e.f 01.07.2002. Aggrieved by the decision of their transfer from a Public Sector Undertaking to private management, those employees approached the High Court of Chhattisgarh at Bilaspur by filing writ petitions seeking various reliefs. They mainly prayed for an order declaring clauses 8.2 and 16.3 of the agreement dated 22.05.1990 as illegal, arbitrary and unenforceable against them who are non-executive workers as it unilaterally changes the service conditions of all those employees who were not party to the agreement. In the same writ petitions, they also prayed that the respondents-Management be restrained from enforcing the said clauses and thereby transferring the non-executive workers working under BALCO Captive Power Plant (for short 'BCPP') to the management of BALCO from NTPC.

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3. The case of the appellants/employees is that they were enrolled in the Employment Exchange, Korba and when NTPC Korba Super Thermal Power Project asked to supply the names of Artisan (Trainee), their names were sent to NTPC. On 26.07.1987, NTPC conducted a written/trade test for the post of Artisan Trainee (Fitter/Electrician) and the appellants appeared in the test on the appointed date, time and venue. The appellants received appointment orders duly signed by the Deputy General Manager. (P&A), Korba Super Thermal Power Project of

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A NTPC. In these appointment orders, it is categorically stated that the terms and conditions of appointment of all the appellants are same. They were required to undergo training for a period of one year and also required to submit indemnity bond on the stamp paper of Rs.55/- to remain in the service of NTPC or any other department or undertaking of Government of India, for at least three years. On completion of training, the appellants were issued separate appointment orders in the name of NTPC (a Government of India Enterprise) BCPP. The order further states that after their training, the appellants will be posted against the post sanctioned for BCPP which is under the management of NTPC and in case at a later date, it is decided by BALCO to directly manage the plant/station or transfer its management to some other existing or new organization (called successor organization) then their post and services will stand transferred to BALCO or such successor organization as the case may be.

4. When they were working with NTPC, which was managing BCPP, the Government of India decided to disinvest shares of BALCO, which resulted into conversion of BALCO a public sector enterprise to private sector organization and the existing management decided to manage BCPP by themselves. In view of this, the appellants who were appointed by NTPC should be posted to other projects of NTPC.

5. BALCO entered into an agreement of construction of Captive Thermal Power Station for their aluminium complex at Korba with NTPC on 30.07.1984. Again BALCO entered into another agreement on 22.05.1990 with NTPC. In view of clause 8.2 of the said agreement, recruitment of non-executive staff shall be undertaken by NTPC specifically for BCPP as per NTPC's recruitment norms and policies. It was further made clear that the staff shall be governed by NTPC's policies, rules and regulations and in the event of transfer of management from NTPC to any other agency, their services shall be transferable to the successor organization as per provisions of clause 16.0. Clause 16.3 of the said agreement makes it clear that in the event of transfer of management, BALCO shall ensure transfer to the successor organization of all non-executive staff recruited for BCPP as per provision contained in clause 8.0 and such NTPC executives posted at BCPP who are declared by NTPC as surplus to its requirements as a result of the transfer

of management. It also makes it clear that the terms and conditions of such transfer shall not be inferior to those enjoyed by the employees on the date of transfer. In cases where such transfer is not found possible, BALCO shall be responsible for all consequent liabilities including retrenchment compensation, if any.

6. The said agreement entered into between the two parties cannot be made retrospectively in case it affects the rights and liabilities of the third person. The same was entered into between two parties without knowledge, consent and willingness of the employees. Therefore, these clauses are not binding nor can be enforced against the employees, unless they agree to such conditions. The appellants are employees of NTPC forever. Further during the course of employment process, NTPC has not disclosed to the appellants that they are employing them for and on behalf of BALCO as their agent. Therefore, the O & M Agreement i.e. Agreement to manage BCPP on behalf of BALCO is not applicable to the appellants.

7. Before the High Court, the managements, namely, NTPC and BALCO filed separate counter affidavit. According to them, the writ petition filed by the employees as well as their union under Article 226 of the Constitution of India is not maintainable as the appellants have not been able to show their legal right. In any case, contractual rights between the parties are not enforceable under Article 226 or 227 of the Constitution of India. Highly disputed questions cannot be decided in a writ petition under Article 226. Further, the provisions of the Madhya Pradesh Industrial Relations Act are applicable to BALCO and NTPC and the appellants have efficacious alternative remedy of approaching the Labour Court.

8. According to NTPC, it is merely an agent of BALCO on a specific Power of Attorney given to them. The ownership of BCPP belongs to BALCO. Recruitment was made pursuant to an agreement exclusively for BCPP with specific undertaking from the non-executive employees. Those employees joined employment knowing fully well the meaning of undertaking. They have no right to question the agreement between BALCO and NTPC. The construction of BCPP was entrusted

A by BALCO to NTPC. Apart from the construction work, the operation and maintenance of BCPP was also entrusted to NTPC. In order to carry out the operation and maintenance of BCPP, NTPC recruited required number of workmen and supervisors starting from 1980's. The recruitment of these employees was for the limited purpose of carrying out the O & M of BCPP as long as the management of BCPP remained with NTPC. The offer of appointment as well as the undertaking given by the employees specifically bring out the above fact. Besides, the O & M agreement signed between NTPC and BALCO also makes it clear that the recruitment made by NTPC is specifically for BCPP and in the event of transfer of O & M of BCPP to any other agency, the services of such employees will be transferable to the successor agency. BCPP was and is being managed by NTPC on behalf of its owner i.e. BALCO which is being operated under the specific Power of Attorney. In view of the same, the manpower of this plant is shown separately from the manpower of NTPC in its annual report. The balance sheet, profit and loss account statement of NTPC also do not include BCPP, hence it is not another unit or division of NTPC.

9. The employees have misunderstood the action taken by the respondents. The BCPP is owned by BALCO. The BALCO, because of their lack of expertise, wanted NTPC to maintain the plant on behalf of BALCO. Based on the agreement, various administrative actions were taken and all those actions that were taken for and on behalf of BALCO and not for NTPC. Due to oversight, certain lapses have crept into a few appointment letters and the appellants cannot take advantage of lapses in a few cases. These employees have also executed an undertaking and in all the appointment letters it is specifically written on the right hand corner of page 1 that the appointment is for BCPP.

10. As per clauses 8.0 and 16.3 of the agreement dated 22.05.1990 entered into between NTPC and BALCO, since these employees were recruited and appointed for BCPP they can be transferred to BCPP which was made clear to them by mentioning in para 14 of majority of appointment letters. It was also made clear that at a later date if it is decided by BALCO to directly manage the plant/station or transfer its management to some other existing or new organization, then their post

and services will stand transferred to BALCO or such successor organization as the case may be. They will not have any option to remain on the rolls of NTPC. Once BCPP owned by BALCO is taken over by BALCO, the entire non-executive staff of BCPP will continue to remain in BCPP under the management of BALCO in terms of clauses 8.0 and 16.3 of the Agreement. Once the plant is taken over, if the non-executive employees are not going to BALCO and if they are to be taken by NTPC, they will become surplus and NTPC will have no option except to order retrenchment. To avoid such contingency, it is just and proper that the non-executive employees should go along with the plant.

11. Similar details have been furnished in the counter affidavit filed on behalf of BALCO.

12. Additional counter affidavit has also been filed on behalf of NTPC clarifying certain facts. It is reiterated that neither the union nor the workers can compel NTPC to continue the management. It is also reiterated that all the employees were aware of the fact that BCPP is owned by BALCO and NTPC is merely an agent to run the establishment for some time and not permanently.

13. The High Court, after considering the claim of both parties with reference to terms and conditions of the agreement after finding that the writ petition by the employees are maintainable and noting the terms and conditions, particularly, clauses 8.0 and 16.3, the undertaking of the employees accepted the stand taken by the management and dismissed all the writ petitions filed by the employees. In the same order, the High Court has also recorded the statement of the learned Additional Solicitor General, who appeared for NTPC that if any representation is made to the NTPC and if any vacancy in any of their projects is available, the same will be considered. Aggrieved by the dismissal of all the writ petitions, the union as well as the employees filed the above appeals.

14. We heard Ms. Indira Jaising, Mr. Ravindra Shrivastava, learned senior counsel and Mr. Lakshmi Raman Singh and Mr. Atul Kumar, learned counsel on behalf of the appellants-employees and Mr. Raju Ramachandran, Mr. C.A. Sundaram, learned senior counsel and Mr. S.K. Dhingra, learned counsel for the respondents-Managements.

A 15. Ms. Indira Jaising and Mr. Ravindra Shrivastava, learned senior counsel for the employees, submitted as follows:

B (i) That all the non-executive employees were recruited by NTPC; training was imparted by NTPC and in the appointment orders, it was made clear that their service terms and conditions will be as applicable to NTPC employees and in future their services may be transferred to any project of NTPC, therefore, all the non-executive employees/ appellants herein are the employees of NTPC and after disinvestment of BALCO, their services cannot be transferred to a private sector organization - BALCO on the strength of O & M agreement dated C 22.05.1990 and the subsequent agreement dated 20.06.2002 entered into between NTPC and BALCO.

(ii) that their transfer to private organization amounts to retrenchment by NTPC against their wishes which is not permissible under law.

D (iii) that clause 16.3 is discriminatory since it applies only to non-executive employees and they alone are to be transferred to successor organization whereas the executives working in BALCO are to be transferred to other establishments of NTPC.

E (iv) that unilateral changes made to their service conditions particularly when these employees were not party to the agreement cannot be sustained. Inasmuch as these employees enjoy service facilities in NTPC which is a Government of India undertaking, they have every right of protection of their service conditions. The appellants being workers not F being in equal bargaining powers have no option but to sign on the dotted lines. They want to secure employment, in those circumstances it is unjust and unreasonable to impose terms and conditions of the agreement in which they were not parties to the same.

G (v) that under a special scheme, namely, land owner category some persons were appointed by NTPC and they cannot be transferred to other organization, particularly, to a private organization.

H 16. On the other hand, learned senior counsel Mr. C.A. Sundaram appearing for BALCO and Mr. Raju Ramachandran appearing for NTPC

by taking us through the appointment letters, undertakings, terms and conditions of the agreement dated 22.05.1990, particularly, clauses 8.0 and 16.3 submitted that all the non-executive employees/appellants were not appointed for NTPC, on the other hand, they were selected and appointed only for BCPP which is owned by BALCO hence their action to transfer them to BCPP/BALCO is fully justified and the High Court was right in dismissing the writ petitions filed by those employees.

17. We have carefully perused all the relevant materials and considered the rival submissions.

18. Though no serious objection was made as to the maintainability of the writ petition, however, learned senior counsel appearing for the Management pointed out that even if there is any breach by BALCO of its obligations in the matter of terms and conditions of employment, the appellants have appropriate remedy under Industrial Law. Inasmuch as the claim of the employees relates to interpretation of certain clauses in the agreement, appointment letters and no disputed facts are involved and taking note of the fact that the issue relates to employment of few hundreds of employees and in the light of the assertion that transferring them to private organization from a public sector undertaking without their specific consent is arbitrary and unreasonable and also of the settled position that alternative remedy is rule of discretion and not the rule of law, we accept the conclusion of the High Court and hold that the writ petitions under Article 226 of the Constitution filed by the employees are maintainable.

19. In order to answer the contentions raised and in the light of the reliefs prayed for by the employees, it is useful to refer to the relevant clauses in the agreement. First agreement between the BALCO and NTPC was executed in July, 1984. Since we are very much concerned about the subsequent agreement dated 22.05.1990, we will consider the relevant clauses of 1990 agreement. Among various clauses, clauses 8.2, 8.5, 16.3 and 21.0 are relevant, which read as under:

“8.0 PERSONNEL MANAGEMENT

8.2. Non-Executives

- A Recruitment of non-executive staff (supervisory and workmen) shall be undertaken by NTPC specifically for BCPP as per NTPC recruitment norms and policies, this staff shall be governed by the NTPC's policies, rules and regulations. In the event of transfer of management from NTPC to any other
- B agency, their services shall be transferable to the successor organization as per provisions of clause 16.0."

"8.5 Terms and Conditions of Service

- C BCPP employees would for the matters of discipline, be governed by Standing Orders, Conduct, Disciplines and Appeal Rules; etc. framed by NTPC and BALCO shall have no jurisdiction in such matters during the period NTPC manages BCPP on behalf of BALCO. If BALCO enters into any agreement with its own
- D employees for grant of any benefits or change in any terms and conditions, it shall have no effect whatsoever or NTPC for any dispensation influenced by the said agreement for employees engaged in BCPP, Revision of terms and conditions of BCPP employees will be in accordance with the policy laid down by NTPC for these employees, which may be similar to that of other
- E employees of NTPC or might be different on merit of each case as consciously decided by NTPC."

"16.0 Transfer of management:

16.3 Transfer of staff:

- F In the event of transfer of management, BALCO shall ensure transfer to the successor organization of all non-executive staff recruited for BCPP as per provision contained in clause 8.0, and such NTPC executives posted at BCPP who are declared by
- G NTPC as surplus to its requirements as a result of the transfer of management. Terms and conditions of such transfer shall not be inferior to those enjoyed by the employees on the date of transfer. In cases where such transfer is not found possible, BALCO shall be responsible for all consequent liabilities including retrenchment compensation, if any.
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At the end of plant life, BALCO shall be responsible for all liabilities including retrenchment compensation etc., when the non-executives and such NTPC executives posted at BCPP who are declared surplus are retrenched or any other dispensation as deemed fit is resorted to.”

“21.0 Effective date and duration of agreement:

The agreement shall come into force from 29.6.1987.....”

20. Clause 8.5 makes it clear that in respect of matter of discipline, the relevant Rules, Standing Orders framed by NTPC alone are applicable for employees of BCPP and BALCO has no jurisdiction in those matters during the period NTPC manages BCPP on behalf of BALCO. Likewise, though clause 16.3 enables BALCO to transfer all non-executive staff to the successor organization, namely, new management, it makes it clear that terms and conditions of such transfer shall not be inferior to those enjoyed by the employees on the date of transfer. As per clause 21.0, the agreement of the year 1990 deemed to come into operation from 29.6.1987. In other words, all the terms and conditions have retrospective effect from 29.06.1987. With this background, we will consider whether those terms are sustainable and the action of the management in transferring the employees-appellants to BCPP which is a private management is justifiable or not?

21. It is not in dispute that NTPC is a public sector undertaking wholly owned by the Government of India. Likewise, initially BALCO was also a public sector undertaking and BCPP is wholly owned by BALCO which was set up for production of power for their units. Subsequently in the year 2001, by virtue of disinvestment policy of the Government of India, BALCO including BCPP were transferred to M/s Sterlite which is a private concern. Though the agreement between BALCO and NTPC was entered into on 22.5.1990 enabling the NTPC to manage, operate, supervise, maintain and control BCPP in all aspects, as per clause 21.0, the terms and conditions deemed to come into operation from 29.6.1987. Learned senior counsel appearing for the appellants, by placing the relevant materials, submitted that most of the employees were appointed prior to the agreement dated 22.5.1990,

A however, admittedly they were not parties to the agreement. In other words, according to the employees, the said agreement was only bipartite i.e., between BALCO and NTPC and that they were on the rolls of NTPC on the date of the said agreement without their being party various terms and conditions which affect their services are not enforceable against them. The appointment letters of employees are annexed in Vol. II of the appeal paper book which clearly show that they were appointed in the year 1987. It is not in dispute that the agreement was executed on 22.5.1990. In order to bind these employees, the management could have executed a tripartite agreement by taking their consent. At this juncture, it is relevant to mention that even as per the agreement, particularly, clause 16.3 insists that in the event of transfer to the successor organization or new management, the terms and conditions of such transfer shall not be inferior to those enjoyed by the employees on the date of transfer. Learned senior counsel appearing for the employees pointed out that inasmuch as these persons provided more benefits as per the Standing Orders/Rules of NTPC and if the transfer is implemented, all the non-executive employees have to work with a private concern with less benefits and privileges compared to NTPC which is a public sector undertaking.

22. The bipartite agreement between NTPC and BALCO was entered into on 22.05.1990. It is brought to our notice that the appointments of 236 employees are made prior to 22.05.1990 and at the time of recruitment and appointment by NTPC, no agreement between NTPC and BALCO was in existence empowering NTPC to make recruitment and appointment on behalf of BALCO. Therefore, as rightly pointed out by learned senior counsel for the employees, the provision made in clause 21.0 of the agreement, the effective date and duration of agreement w.e.f 29.06.1987 is contrary to the provisions of Section 23 of the Indian Contract Act and also violative of Article 14 of the Constitution of India. By virtue of the aforesaid clause, the service condition has been admitted to be changed to the employees by giving effect of the agreement dated 22.05.1990 w.e.f. 29.06.1987. Even during the course of arguments made on behalf of BALCO, it was not seriously disputed that the appointments made prior to 22.05.1990 cannot be termed in furtherance of the agreement dated 22.05.1990. In such circumstances, the finding of the High Court that the services of the

employees appointed by NTPC are transferable to BALCO in the light of the provisions made in clauses 8.2 and 16.3 of the bipartite agreement dated 22.05.1990 between NTPC and BALCO is not acceptable. Even for the sake of argument, it was admitted that the power of attorney was given to NTPC pursuant to the agreement dated 22.05.1990 and 29.05.1991, it is only those employees who have been appointed by NTPC on behalf of BALCO, pursuant to the said power of attorney, can only be transferred to BALCO.

23. Now we will consider the appointment letters and the undertakings. It is not in dispute that the process of recruitment was initiated by NTPC and in the advertisement, it has been mentioned that "NTPC Ltd. requires persons in the following categories for its Korba Super Thermal Power Project and BALCO Captive Power Project." The said advertisement nowhere stipulates that the said process of recruitment was on behalf of BALCO. The letters for test or interview to the candidates have also been issued by NTPC, which are in the appeal paper-book. Even those interview letters do not reveal that the appointments are being made for/on behalf of BALCO. As stated earlier, it is not in dispute that those appointment letters have also been issued by NTPC. Learned senior counsel appearing for the management, by drawing our attention to clause 14 of the appointment letters, submitted that those employees are precluded from raising such contention. We are unable to accept the same. It is true that in some of the appointment letters, clause 14 reads as under:

"14. Your appointment as Jr. Tech (elect) will be against the post sanctioned for BALCO Captive Power Plant/Station, which is presently under the management of National Thermal Power Corporation Limited. In case at a later date it is decided by BALCO to directly manage the Plant/Station or transfer its management to some other existing or new organization (called successor organization) then your post and your services will stand transferred to BALCO or such successor organization as the case may be. You will be not have any option to remain on the rolls of National Thermal Power Corporation Ltd., or claim any benefit/compensation for the past services from NTPC but shall be governed by the terms and conditions as applicable to BALCO

A or such successor organization, as the case may be. Accordingly
please submit an undertaking in the enclosed format, while accepting
this offer of appointment.”

B 24. It is to be noted that at the time of insertion of above-mentioned
clause 14 in the appointment letter and obtaining undertakings from the
employees there was no agreement between NTPC and BALCO for
making recruitment and appointment on behalf of BALCO for its BALCO
Captive Power Plant. In such circumstances, as observed earlier and rightly
pointed out by learned senior counsel for the employees in the absence
of such agreement between NTPC and BALCO, clause 14 of the
C appointment letter and undertakings obtained by NTPC is illegal and is
contrary to the provisions of Section 23 of the Indian Contract Act. In
this connection, reliance was placed on a judgment of this Court rendered
in the case of *Central Inland Water Transport Corporation Limited
and Anr., v. Brojo Nath Ganguly and Anr.*, [1986] 3 SCC 156. In para
D 91, this Court made the following observation :

“91. Is a contract of the type mentioned above to be adjudged
voidable or void? If it was induced by undue influence, then under
Section 19A of the Indian Contract Act, it would be voidable. It
E is, however, rarely that contracts of the types to which the principle
formulated by us above applies are induced by undue influence as
defined by Section 16(1) of the Indian Contract Act, even though
at times they are between parties one of whom holds a real or
apparent authority over the other. In the vast majority of cases,
F however, such contracts are entered into by the weaker party under
pressure of circumstances, generally economic, which results in
inequality of bargaining power. Such contracts will not fall within
the four corners of the definition of "undue influence" given in
Section 16(1). Further, the majority of such contracts are in a
standard or prescribed form or consist of a set of rules. They are
G not contracts between individuals containing terms meant for those
individuals alone. Contracts in prescribed or standard forms or
which embody a set of rules as part of the contract are entered
into by the party with superior bargaining power with a large
number of persons who have far less bargaining power or no
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bargaining power at all. Such contracts which affect a large number of persons or a group or groups of persons, if they are unconscionable, unfair and unreasonable, are injurious to the public interest. To say that such a contract is only voidable would be to compel each person with whom the party with superior bargaining power had contracted to go to court to have the contract adjudged voidable. This would only result in multiplicity of litigation which no court should encourage and would also not be in the public interest. Such a contract or such a clause in a contract ought, therefore, to be adjudged void. While the law of contracts in England is mostly judge-made, the law of contracts in India is enacted in a statute, namely, the Indian Contract Act, 1872. In order that such a contract should be void, it must fall under one of the relevant sections of the Indian Contract Act. The only relevant provision in the Indian Contract Act which can apply is Section 23 when it states that "The consideration or object of an agreement is lawful, unless . . . the court regards it as . . . opposed to public policy."

In view of the same and of the fact that words and phraseology used in the undertakings are same which are in a stereotype form, it is justified in arriving at a conclusion that undue influence was exercised by the management of NTPC on the unemployed candidates to execute undertakings for appointment.

25. NTPC being an undertaking of the Government of India and an instrumentality of State is under constitutional obligation to act fairly with its employees, particularly, the posts which were advertised from 1986 till 1988 were not in existence in BALCO as the BCPP was not fully commissioned. In those circumstances, NTPC was not justified in inserting clause 14 in the appointment letters and obtaining undertakings from the selectees.

26. As rightly pointed out by learned senior counsel for the employees and from the materials brought on record either before the High Court or this Court, it is evident that during the process of recruitment it was never disclosed to the candidates/selectees that their recruitment is

- A exclusively for BALCO, on the other hand, in some of the appointment letters issued by NTPC, the terms and conditions of appointment are mentioned. It provides pay-scale of NTPC, allowances and HRA payable as per rules of NTPC and other facilities as admissible under the rules of NTPC. It also provides other benefits of the company - contributory
- B provident fund and gratuity are payable as per rules of NTPC. Para 8 of the appointment letter provides for initial appointment and posting to work at Korba and thereafter liable to be posted at the discretion of NTPC in other office/project/unit or in any other public sector undertakings in India or abroad. The aforesaid terms and conditions lead to an irresistible
- C conclusion that NTPC was their employer in all purposes.

27. The materials placed clearly show that clause 14 referred to above is against public policy and contrary to Section 23 of the Indian Contract Act as well as violative of Article 14 of the Constitution of India for the reason that undue influence was exercised by NTPC management

D and the selected candidates to accept the terms and conditions stipulated therein. By virtue of the aforesaid clause 14, as pointed out earlier, the status of these public servants have been sought to be changed which is again violative of Article 14. In *Mahavir Auto Store and Ors. v. IOC and Ors.*, [1990] 3 SCC 752, this Court has observed in para 18 that

E even in the field of public law, the persons affected should be taken into confidence.

28. The next submission of learned senior counsel for the employees was that transfer of employer is not permissible without tripartite

F agreement. As per the law laid down in *Nokes v. Doncaster Amalgamated Collieries Ltd.*, (1940) 3 All E.R. 549 and decision of this Court in *Manager, M/s. Pyarchand Kesarimal Ponwal Bidi Factory v. Omkar Laxman Thange & Ors.*, [1969] 2 SCR 272, the consent must be express and consciously accorded in the course of negotiation

G contemporaneous with the process of transfer so as to amount to an informed consent. Consequently, in order to bind the appellants, there must be a tripartite agreement. Since there is no tripartite agreement, as observed above, the transfer from one employer to another cannot be effected.

In *Nokes v. Doncaster Amalgamated Collieries Ltd.*, (supra), it

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was observed as under:

“It will be readily conceded that the result contended for by the respondents in this case would be at complete variance with a fundamental principle of our common law - namely, that a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent.....”

This Court in *Pyarchand v. Omkar Laxman* (supra) held thus:

“A contract of service being thus incapable of transfer unilaterally, such a transfer of service from one employer to another can only be affected by a tripartite agreement between the employer, the employee and the third party, the effect of which would be to terminate the original contract of service by mutual consent and to make a new contract between the employee and the third party.”

29. The Government or its instrumentality cannot alter the conditions of service of its employees and any such alteration causing prejudice cannot be effected without affording opportunity of pre-decisional hearing and the same would amount to arbitrary and violative of Article 14. As pointed out earlier, in the case on hand, the employees are neither party to tripartite agreement nor they have been heard before changing their service condition. Therefore, the action of the management is violative of Article 14 of the Constitution of India. Similar view has been taken by this Court in *H.L. Trehan and Ors. v. Union of India and Ors.*, [1989] 1 SCC 764. In para 11 of the judgment, this Court observed as under:

“..... It is now a well established principle of law that there can be no deprivation or curtailment of any existing right, advantage or benefit enjoyed by a Government servant without complying with the rules of natural justice by giving the Government servant concerned an opportunity of being heard. Any arbitrary or whimsical exercise of power prejudicially affecting the existing conditions of service of a Government servant will offend against the provision of Article 14 of the Constitution. Admittedly, the

A employees of CORIL were not given an opportunity of hearing or representing their case before the impugned circular was issued by the Board of Directors. The impugned circular cannot, therefore, be sustained as it offends against the rules of natural justice.”

B 30. It is useful to refer to the judgment of this Court in *Jawaharlal Nehru University v. Dr. K.S. Jawatkar and Ors.*, (1989) Supp. 1 SCC 679. In this case, Jawaharlal Nehru University was the appellant before this Court. The main contention of the appellant-University was that the respondent was appointed at the Centre of Post Graduate Studies, Imphal and when the Centre was transferred to Manipur University his services
C were automatically transferred to that University and consequently he could not claim to be an employee of the appellant-University. The argument proceeds on the assumption that the Centre of PG studies at Imphal was an independent entity which existed by itself and was not a department of the appellant-University. Rejecting the said contention, this Court held
D thus:

“7. The Centre of Post-Graduate Studies was set up at Imphal as an activity of the appellant University. To give expression to that activity, the appellant University set up and
E organised the Centre at Imphal and appointed a teaching and administrative staff to man it. Since the Centre represented an activity of the appellant University the teaching and administrative staff must be understood as employees of the appellant University. In the case of the respondent, there can be no doubt whatever
F that he was and continues to be, an employee of the appellant University. There is also no doubt that his employment could not be transferred by the appellant University to the Manipur University without his consent notwithstanding any statutory provision to that effect whether in the Manipur University Act or elsewhere. The
G contract of service entered into by the respondent was a contract with the appellant University and no law can convert that contract into a contract between the respondent and the Manipur University without simultaneously making it, either expressly or by necessary implication, subject to the respondent's consent. When the Manipur
H University Act provides for the transfer of the services of the staff

working at the Centre of Postgraduate Studies, Imphal, to employment in the Manipur University, it must be construed as a provision enabling such transfer of employment but only on the assumption that the employee concerned is a consenting party to such transfer. It makes no difference that the respondent was not shown in the list of Assistant Professors of the appelland University or that the provision was not indicated in its budget; that must be regarded as proceeding from an erroneous conception of the status of the respondent. The position in law is clear, that no employee can be transferred, without his consent, from one employer to another. The consent may be express or implied. We do not find it necessary to refer to any case law in support of this conclusion.

8. Inasmuch as the transfer of the Centre of Post-graduate Studies from the appelland University to the Manipur University could not result in a transfer of the employment of the respondent from the one to the other, it must be concluded that the respondent continues in the employment of the appelland University.....”

It is clear that no employee could be transferred without his consent from one employer to another. Therefore, in view of the aforesaid rulings the transfer of employees from NTPC - a public sector undertaking to BALCO which is a private organization is bad in law.

31. The above discussion would clearly show that all appointment orders were issued by NTPC and Rules, procedure in respect of probation, training, D.A. and other allowances, absorption in the regular scale, governed by certified standing orders and other Rules and Regulations of the company i.e., NTPC. Even in the appointment order, it had been specifically stated that in the event of their appointment, they have to execute service agreement in favour of NTPC or any other Department or Undertaking of Government of India for three years. It is not disputed that all the employees selected and appointed executed a service agreement as suggested in favour of NTPC. All the appointment orders were sent with the above referred specific conditions by the Senior Personal Officer, NTPC Korba Super Thermal Power Project, Bilaspur. Posting orders were also issued by NTPC. Perusal of agreements

A executed by the selectees clearly show that there is no reference that the
said agreement is for and on behalf of the BALCO whereas it only refers
NTPC. All the abovementioned factual details clearly support the case
of the employees that they were selected and their services could be
continued only at NTPC or any other public sector undertakings of
B Government of India. There is no iota of evidence or indication that they
will be transferred to a private concern with less service benefits.

32. Learned senior counsel appearing for the employees finally
submitted that the impugned clauses in the agreement are liable to be
interfered with on the ground of discrimination. Clause 16.3 of the
C agreement dated 22.05.1990 makes it clear that non-executive employees
are to be transferred to successor organization and there is no reference
to executives. On the other hand, it was demonstrated before us, by facts
and figures, that the executives working in BALCO are to be transferred
D to other establishments of NTPC. Even though the non-executive
employees are also having a special knowledge i.e., technicians, in the
absence of any plausible reason retaining executives alone with NTPC
and transferring non-executive employees to a private organization cannot
be sustained and hit by Art. 14 of the Constitution of India. On the other
hand, the appellants-non-executive employees are to be retained by NTPC
E and posted in their various units. We are also conscious of the earlier
decisions of this Court in *BALCO Employees' Union (Regd.) v. Union
of India & Ors.*, [2002] 2 SCC 333 (BALCO's case) and *All India
ITDC Workers' Union & Ors. v. ITDC & Ors.*, [2006] 10 SCC 66
(ITDC's case) upholding the policy of disinvestment. Learned senior
F counsel appearing for the Management strongly relying on BALCO's case
and ITDC's case submitted that no employee of public sector undertaking
has a vested right in continuing to be employed by an instrumentality of
the State. There is no quarrel as to the proposition laid down in BALCO's
and ITDC's case. However, considering our discussion relating to various
G aspects starting from calling for applications and subsequent actions taken
by NTPC, we are satisfied that the employees have made out a case for
continuing their service in NTPC.

33. At the end of the arguments, Mr. Raju Ramachandran, learned
H senior counsel appearing for the NTPC requested this Court that if the

claim of the employees are acceptable, they are ready to consider the A
case of the employees whose appointment letter neither contain clause
14 nor clause 16 and have not given an undertaking and they will be taken
back by the NTPC in the phased manner. While appreciating the gesture
of the learned senior counsel and considering the relevant materials, we
are of the view that both the offending clauses in the agreement cannot B
be sustained and all employees are to be retained in NTPC.

34. In the light of the above discussion, common order dated
25.3.2004 passed by the High Court of Chhatisgarh in W.P. Nos. 2087
of 2001, 2072 of 2001 and 557 of 2004 are set aside and the appeals C
filed by the employees are allowed. No order as to costs.

N.J.

Appeals allowed.