

(2001) 06 AP CK 0116
In the Andhra Pradesh High Court
Case No : W.A. No's. 552 to 561 of 2001

Hindustan Coca-Cola Beverages (P) Ltd.	APPELLANT
Vs	
Authority under A.P. Shops and Establishments Act, 1988 and Others	RESPONDENT

Date of Decision : 15-06-2001

Acts Referred:

Andhra Pradesh Shops and Establishments Act, 1988 — Section 48, 49

Citation : (2001) 2 LLJ 872

Hon'ble Judges : S.B. Sinha, C.J.;V.V.S. Rao, J

Bench : Division Bench

Advocate : K. Kasturi and C.R. Sridharan, for the Appellant; Govt. Pleader and P. Sridhar Rao, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.—All these Writ Appeals involving similar questions of fact and law were taken up for hearing together and are being disposed of by this common Judgment.

2. The question which arises for consideration in these appeals is as regards the interpretation of the provisions of Section 49 of the A. P. Shops and Establishments Act (for short "the Act") vis- a-vis the jurisdiction of the 1st respondent herein to entertain an application in terms of Sub-section 1 of Section 48 thereof.

3. The admitted fact of the matter, before adverting to the question involved in these appeals, may be noticed:

The appellant-company, a company registered and incorporated under the Indian Companies Act, with a view to expand its business activity had entered into a purchase agreement with respondents 3 and 4 herein who were essentially engaged in the sale and distribution of non-alcoholic beverages being manufactured and bottled by another company being Spectra Bottling Company

Limited. Although the appellant herein had no liability to take over the services of the employees of respondents 3 and 4, they agreed to take over on its rolls only such of those employees who had no adverse remarks against them or employees against whom no disciplinary proceedings had been initiated or pending as on the date of take over of the firms. The concerned employee who has been arrayed as respondent No. 2 in each of the respective Writ Petitions herein was one of such employees against whom disciplinary proceedings had been initiated or pending at the relevant time. In the enquiry, all the employees were found guilty of the charges of misappropriation. Consequently, they were dismissed from service by orders dated August 25, 1999. Thereafter, each of the concerned employees filed an application purported to be u/s 48(1) of the said Act before the 1st respondent herein, claiming, inter alia the following reliefs:

"The petitioner, therefore, prays that this Hon"ble Court may be pleased to set aside the removal orders passed by the 2nd respondent vide orders dated August 25, 1999 and grant him the relief of reinstatement with full back wages and all other attendant benefits and with continuity of service, in the interest of justice".

4. The 1st respondent-authority by orders dated October 17, 2000 set aside the orders of dismissal holding that the action of the respondent Nos. 3 and/or 4 was illegal and directed reinstatement of the employees in the organisation of the appellant treating them as having not been dismissed from service. Aggrieved by the said order, the appellant has filed the present Writ Petitions. By the common order under appeal, the learned single Judge dismissed the writ applications as not maintainable under Article 226 of the Constitution of India on the ground that the appellant had not availed of the alternative remedy of Second Appeal provided u/s 48(3) of the Act.

5. Though the Writ Petitions were dismissed on ground of availability of alternative remedy, since both the parties had argued the matter on merits also, we have decided the questions involved on merits.

6. It is not in dispute that the relationship of employer and employee existed between the respondents 3 and 4 and the concerned employees. The appellant herein was merely the purchaser of the undertakings of respondents 3 and 4.

7. The concerned employees in the petition filed before the authority u/s 48(1) of the said Act inter alia stated:

"The petitioner submits that when the petitioner and others asked the 1st respondent why they were suspended and that why they were not transferred to the 3rd respondent, then the 1st respondent stated that they will be transferred in due course. The petitioner submits that in the first week, i.e., on January 4, 1999 only he was issued with the charge sheet dated December 22, 1998 alleging certain false allegations. The petitioner submits that had he committed any misconduct, the 1st respondent would have definitely issued the charge sheet on the day of suspension, as the charge sheet was dated December 22, 1998. Therefore, this itself clearly shows that the issuance of charge sheet was

an after thought and issued the same for the purpose of some other ulterior motive. The petitioner submits that the suspension order was issued by the Assistant Manager of the 1st respondent and the charge sheet was issued by the Assistant Manager of 2nd respondent. The petitioner submits that the Assistant Managers of 1st and 2nd respondents are not the competent authority to issue the suspension order and charge sheet respectively; and moreover, the 2nd respondent is in no way concerned with the employment of the petitioner. Therefore, on these grounds alone, the issuance of charge sheet and the suspension order and consequential proceedings were illegal, unjust and contrary to law, and the entire action taken by the 2nd respondent against the petitioner is liable to be set aside on this ground alone".

8. In the counter filed by the appellant before the Appellate Authority, it was pleaded;

"However, it is agreed by the 3rd respondent to purchase the assets of this respondent pertaining to the distribution of soft drinks. During discussion it was also agreed by the 3rd respondent to continue the employees whoever working in the distribution side in the respondent establishment instead of engaging new set of employees. However, the 3rd respondent asked this respondent to transfer the said employees except the employees who were facing disciplinary action or under suspension."

9. The said Act was enacted to consolidate and amend the law relating to the regulation of conditions of work and employment in shops, commercial establishments, restaurants, theatres and other establishments and for matters connected therewith.

10. Before embarking upon the questions involved in these Writ Appeals, it is necessary to consider the definitions of "commercial establishment", "employer", "employee" "establishment" which are in the following terms:

"2(5). "commercial establishment" means an establishment which carries on any trade, business, profession or any work in connection with or incidental or ancillary to any such trade, business or profession or which is a clerical department of a factory or an industrial undertaking or which is a commercial or trading, or banking or insurance establishment and includes an establishment under the management and control of a co-operative society, an establishment of a factory or an industrial undertaking which falls outside the scope of the Factories Act, 1948 (Central Act 63 of 1948) and such other establishment as the Government may, by notification, declare to be a commercial establishment for the purposes of this Act but does not include a shop.

2(8) "employee" means a person wholly or principally employed in, and in connection with any establishment and includes an apprentice and any clerical or other staff of a factory or an industrial establishment who fall outside the scope of the Factories Act, 1948 (Central Act 63 of 1948), but does not include the husband, wife, son, daughter, father, mother, brother or sister of an employer or

his partner, who is living with and depending upon such employer or partner and is not in receipt of any wages.

2(9) "employer" means a person having charge of or owning or having ultimate control over the affairs of an establishment and includes the Manager, Agent or other person acting in the management or control of an establishment.

2(10) "establishment" means a shop, restaurant, eating-house, residential hotel, lodging house, theatre or any place of public amusement or entertainment and includes a commercial establishment and such other establishment as the Government may, by notification, declare to be an establishment for the purposes of this Act."

11. All establishments under the said Act are required to be registered. Section 47 provides for the conditions for terminating the services of an employee in the following terms:

"Conditions for terminating the services of an employee, payment of service compensation for termination, retirement, resignation, disablement, etc. and payment of subsistence allowance for the period of suspension:- (I) No employer shall, without a reasonable cause, terminate the service of an employee who has been in his employment continuously for a period of not less than six months without giving such employee at least one month's notice in writing or wages in lieu thereof and in respect of an employee who has been in his employment continuously for the period of not less than one year, a service compensation amounting to fifteen days average wages for each year of continuous employment.

Provided that every termination shall be made by the employer in writing and a copy of such termination order shall be furnished to the Inspector having jurisdiction over the area within three days of such termination,"

12. Section 48 provides for a forum for preferring an appeal against an order of termination of service of an employee in terms of Section 47. Section 49 provides for notice and payment of service compensation to employees in the case of transfer of establishment. The learned single Judge, although entertained the writ petition but dismissed the same inter alia on the ground that the appellants have a right of further appeal in terms of Sub-section (3) of Section 48 of the Act under which a second appeal will lie only when the appellant deposits the entire amount of back wages.

13. Before the learned single Judge as also before us, it was submitted that having regard to the fact that there had been no relationship of employer and employee, an application u/s 48 of the Act would not be maintainable as against the appellant.

14. The learned single Judge in the judgment under appeal inter alia held that although the appellants are required to deposit the entire amount the same would not stand as a bar in asking the appellants to avail the alternative remedy.

15. The power of the High Court to entertain a writ petition despite existence of an alternative remedy has succinctly been stated by the Apex Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, wherein it has been held:

"Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in atleast three contingencies namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

16. The law in this regard is no longer *res integra*. It may be true that the High Court may exercise self-restraint in the matter of entertaining a writ petition. It may not also entertain a writ petition only because the appeal remedy is onerous. It is one thing to say that the High Court will refuse to entertain writ petition when the appeal remedy is onerous but it is another thing to say that even when a jurisdictional error has been committed by the statutory authority or when it lacks inherent jurisdiction the writ petition would not be entertained. The relief prayed for by the concerned employees was not against the appellant herein as would appear from para 20 of the petition filed u/s 48(1) of the Act extracted above.

17. The basic fact the matter is not in dispute. The concerned employees were employees of the 3rd respondent. By reason of an agreement of transfer the relationship of employer and employee between the 3rd respondent and the concerned employees had not come to an end. It is not in dispute that order of removal has been passed by the 3rd respondent/4th respondent. The concerned employees as noticed hereinbefore, had prayed for setting aside the order of removal passed by the 2nd respondent and granting the relief of reinstatement with full back wages with continuity in service. The provisions of the said Act do not contemplate automatic take over of the services of the employees of the transferor establishment by the transferee establishment. A transfer of an establishment by reason of agreement must be distinguished from a transfer by reason of a statutory provision. A statute may provide for continuity of employment despite termination of service of the concerned employees by the erstwhile employer. The, provisions of the said Act as also the Industrial Disputes Act clearly contemplate that only by reason of a transfer neither the relationship by and between the transferor company and the concerned employees comes to an end nor a new relationship of employer and employee by and between the said employees and the transferee company comes into being. The authority u/s 48 is a statutory authority. It can exercise its jurisdiction only within the four

corners of the statute. An appeal in terms of Section 48 will be maintainable only against an employer which in turn would mean that that relief can be granted only against the employer and not against any other person.

18. The appellate authority by reason of the order dated October 17, 2000 impugned in the writ petition, despite the prayer of the employees to the aforementioned effect, held:

"Keeping in view of the entire facts and circumstances I do not hesitate to say that it is a case of victimization and also there is ample evidence of discrimination as discussed in detail in the above paras. It is also clear that the respondent No. 2 had ceased to be the employer of the petitioner and he is not in existence w.e.f. December 23, 1998. I, therefore, hold beyond any doubt that the dismissal order dated August 25, 1999 issued by the respondent No. 2 is not sustainable in the eye of law as the charges are not proved.

I further hold that the whole action taken by respondent No. 2 on or after December 23, 1998 is illegal. Consequently the dismissal order dated August 25, 1999 issued by respondent No. 2 is set aside. Thus the 5th issue is answered.

I, therefore, hold that the petitioner is entitled for reinstatement with full back wages, continuity of service and all other attendant benefits.

The respondent No. 2 is not in existence w.e.f. December 23, 1998 and ceased to be the employer of the petitioner. As the respondent No. 3 has taken over all the business activities of the respondent No. 2 along with all the employees, except the petitioner and 9 others, w.e.f. December 23, 1998, it would be appropriate if the following direction is given to the respondent No. 3 to meet the ends of justice."

19. Having so held, it was directed:

"Accordingly, the respondent No. 3 herein is directed to reinstate the petitioner into service w.e.f. December 23, 1998 treating the petitioner, as if he was not dismissed from service by respondent No. 2, and transferred to respondent No. 3, with continuity of service with full back wages and all other attendant benefits. These orders shall be complied forthwith."

20. The only question which, therefore, arises for consideration is as to whether the 1st respondent acted within its jurisdiction in granting the aforementioned relief. The answer to the said question must be rendered in negative.

21. The 1st respondent is a statutory authority. It derives jurisdiction from the provisions of the Act and is thus required to confine its jurisdiction within the four corners of the statute. Section 48 of the Act, as noticed hereinbefore, empowers the authority specified in this regard by the Chief Inspector, to direct reinstatement or even direct payment of compensation without reinstatement. The appeal provided for u/s 48 must be in relation to termination of service of an employee. Termination of service of an employee can be effected by an employer

which clearly implies that there must exist relationship of employer and employee, the parties to the lis. But, where such relationship does not exist, nor where a relief has been sought for against a third party, the authority in terms of the provisions of the said Act, would not have any jurisdiction whatsoever in the matter. Section 47 of the said Act lays down the conditions under which the service of an employee can be terminated by the employer. Section 48 provides for an appeal against an order passed by an employer terminating the services of its employees. In the appeal, the employer cannot, unless, there exists provisions in the statute contra, must prefer an appeal only against the person whose action is in question. The appellant before us being not the employer of the concerned employees, could not have and in fact did not terminate the services of the employees. The appeal against it *ex facie*, therefore, was not maintainable. It is beyond any cavil of doubt that both on principles as also on precedent a transferee of an undertaking does not *ipso facto* become the employer in relation to the employees working in the transferor establishment. The only exception where such a relationship may come into being would be when the transferee-company accepts the employees as its own employees, as a result whereof continuity of service is maintained.

22. Section 49 of the said Act provides for payment of compensation by the employer to the employee. The right of the employee in a case of transfer of the company would be to receive compensation in terms of the said provision. The proviso appended thereto merely carves out certain exception which would not make the employee eligible to receive the amount of compensation. It is not the case of any of the parties herein that there has been change of employer by reason of transfer. Even if in a case of change of employer by reason of transfer, compensation may be held to be payable if the conditions precedent laid down therein are not fulfilled. The condition No. (c) appended to the proviso to Section 49 of the Act reads thus:

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

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

23. Clause (c) aforementioned, therefore, postulates a liability on the part of a new employer to make himself legally liable to pay the employee service compensation on the basis that his employment has been continued and has not been interrupted by reason of transfer. An exception to the same can be brought about only either by reason of operation of a statute or agreement. It is not and could not be the case of the employees that the transfer had been taken place by reason of any statute. It is also not the case of the concerned employees that the transferor and the transferee had entered into an agreement to the effect that the services of the employees would be taken out. In fact, the specific case of

the parties is that the employment of the concerned employees had not been taken over having regard to the fact that they were facing departmental proceedings and/or under an order of suspension. Section 49 of the said Act is in pari materia with Section 25FF of the Industrial Disputes Act. For a better comparative appreciation the said provisions may be quoted thus:

Section 25FF of the Industrial Disputes Act, 1947 Section 49 of the AP Shops and Establishments Act, 1988

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

49. Notice and payment of service compensation to employees in the case of transfer of establishment: Where the ownership or management of an establishment is transferred, whether by agreement or by operation of law, from the employer in relation to that establishment to a new employer, every employee who has been in continuous employment for not less than six months in that establishment immediately before such transfer shall be entitled to the notice and the service compensation in accordance with the provisions of sub-section (1) of Section 47.

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 -

Provided that nothing in this section shall apply to an employee 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

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

(b) the terms and conditions a 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

(b) the terms and conditions of service applicable to the employee after such transfer are not in any way less favourable to that employee 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.

(c) the new employer is, under the terms of such transfer or otherwise, legally

liable to pay to the employee, in the event of termination of his services, service compensation on the basis that his service has been continuous and has not been interrupted by the transfer.

24. The Apex Court in *Anakapalla Co-operative Agricultural and Industrial Society Limited Vs. Workmen*, clearly held that in a case of this nature, no claim can be made against the transferee of the concern. It was held:

"The scheme of the proviso to Section 25FF emphasises the same policy. If the three conditions specified in the proviso are satisfied, there is no termination of service either in fact or in law, and so there is no scope for the payment of any compensation. That is the effect of the proviso. Therefore, reading Section 25FF as a whole, it does appear that unless the transfer falls under the proviso, the employee of the transferred concern are entitled to claim compensation against the transferor and they cannot make any claim for re-employment against the transferee of the undertaking. Thus, the effect of the enactment of Section 25FF is to restore the position which the legislature had apparently in mind when Section 25FF was originally enacted on September 4, 1956. By amending Section 25FF the legislature has made it clear that if industrial undertakings are transferred, the employees of such transferred undertakings should be entitled to compensation unless, of course, the continuity in their service or employment is not disturbed and that can happen if the transfer satisfies the three requirements of the proviso.

In this connection, it is necessary to point out that even before Section 25FF was introduced in the Act for the first time, when such questions were considered by industrial adjudication on general grounds of fair play and social justice, it does not appear that employees of the transferred concern were held entitled to both compensation for termination of service and immediate re-employment at the hands of the transferee. The present position which results from the enactment of Section 25FF, as amended, is therefore, substantially the same as it was at the earlier state."

25. The contention of the learned counsel for the workmen in that case was that questions of fair play and social justice demanded that they are to be re-employed by the transferee company was negated holding:

"In the present case, however, the position is entirely different. As soon as the transfer is effected u/s 25FF, all employees are entitled to claim compensation unless, of course the case of transfer falls under the proviso, and if Mr. Chari is right, these workmen who have been paid compensation are immediately entitled to claim re-employment from the transferee. This double benefit in the form of payment of compensation and immediate re-employment cannot be said to be based on any considerations of fair play or justice. Fair play and justice obviously mean fair play and social justice to both the parties. It would, we think, not be fair that the vendor should pay compensation to his employees on the ground that the transfer brings about the termination of their services, and the vendee

should be asked to take them back on the ground that the principles of social justice require him to do so. In this connection, it is relevant to remember that the industrial principle underlying the award of retrenchment compensation is, as observed by this Court in the case of the Indian Hume Pipe Company Ltd. v. Their Workmen and Anr. 1959-II-LLJ-830, to give partial protection to workmen who are thrown out of employment for no fault of their own, to tide over the period of unemployment".

26. The said principle was reiterated in South Arcot Electricity Distributing Company Ltd. v. N.K. Mohd. Khan 1970 (21)FLR 174.

"It appears to us that the language of that principal clause makes it perfectly clear that if the right to retrenchment compensation accrues under it, it must be alright to receive that compensation from the previous employer who was the owner upto the date of transfer. It is implicit in the language of that clause. The clause lays down that every workman mentioned therein shall be entitled to notice and compensation in accordance with the provisions of Section 25-F as if the workman had been retrenched".

27. In Central Inland Water Transport Corporation Limited Vs. The Workmen and Another, , it was clearly held that:

"In the present case, there is no actual change of employers by reason of the transfer, nor do the 3 sub-clauses apply. Therefore, prima facie, the claim of the workmen would for compensation u/s 25FF, be directed, not against the Corporation, but against the Company of which they were formerly the employees. As a matter of fact the scheme itself shows that the employees of the company who were not taken over by the Corporation were to be paid by the Company all money due to them under the law. The scheme further shows that the company was to be put in possession of funds by the Government of India for satisfying the liabilities to the workers.

The effect of Section 25FF which is explained by this Court in Anakapalli Co-operative Agricultural and Industrial Society Ltd. v. Workmen 1962-II-LLJ-621 in so far as it is relevant, as follows: (1) the first part of the section postulates that on a transfer of the ownership or management of an undertaking, the employment of workmen engaged by the said undertaking comes to an end and compensation is made payable because of such termination; (ii) in all cases to which Section 25FF applies, the only claim which the employees of the transferred concern can legitimately make is a claim for compensation against their employers. No claim can be made against the transferee of the said concern; (iii) by the present Section 25FF the Legislature has made it clear that if Industrial undertakings are transferred, the employees of such transferred undertakings should be entitled to compensation, unless, of course, the continuity in their service or employment is not disturbed and that can happen if the transfer satisfies the three requirements of the proviso, and (iv) since Section 25FF provides for payment of benefit on the basis that the services of the

employees stand terminated, neither fair play nor social justice would justify the claim of the employees that they ought to be re-employed by the transferee. That being the position in law u/s 25FF, the former employees of the company who were not absorbed by the Corporation can hardly make out a claim against the transferee Corporation either for compensation on termination of their service following the transfer or for re-employment. The claim at any rate of the employees in List II as against the Corporation u/s 25FF was clearly misconceived."

28. Yet again in *N.T.C. (South Maharashtra) Limited Vs. Rashtriya Mill Mazdoor Sangh and Others*, it was held:

"However, such transfer may not in all cases amount to the termination of employment. It was, therefore, necessary to provide as to in what circumstances the transfer by itself would not be considered as termination of employment and the workmen need not be paid the retrenchment compensation. Those conditions have been taken care of by the proviso to Section 25FF. The reading of Section 25FF as a whole, therefore, shows that unless the transfer falls under the proviso, the employees of the undertaking concerned are entitled to claim compensation against the transferor and they cannot make any claim for re-employment against the transferee of the undertaking. In other words, when the transfer falls under the said proviso, the transfer does not result in the termination of the contract of employment. A reference in this connection may be made to the decision of this Court in *Anakapalli Co-operative Agricultural and Industrial Society Limited v. Workmen* (supra)."

29. The above position has recently been reiterated in *Inland and Steam Navigation Works" Union and Another Vs. Union of India and Others*, wherein it was held at p. 734:

"Even assuming that on investigation, conclusion could be drawn that the Corporation is a successor the matter will not be settled because, the transferee, even as a successor would be liable neither to pay compensation nor to re-employ the workmen whose employment stood automatically terminated on the transfer. Where by operation of law the employment of workmen stands terminated, it may be difficult to sustain it on the basis of a term in a settlement prohibiting retrenchment, though statutorily binding on the transferee as a successor. Therefore, the view taken by the Tribunal that the Corporation is not liable to pay either compensation or to absorb the workmen in question is unexceptionable. As rightly held by the High Court, the workmen in question are entitled to compensation in case of closing down of an undertaking. Here there has been no transfer of the undertaking from the company to the Corporation as found by the Tribunal and upheld by the High Court because by order made by the Company Court the Scheme of Arrangement was to close down the Company and what was taken over by the Corporation was a separate arrangement. Therefore, in the eye of the law what is to be held is that the undertaking is closed down on account of unavoidable circumstances beyond the control of the

employer and every workman who has been in service for more than ten years in that undertaking immediately before such closure shall be entitled to notice and compensation in accordance with the provision of Section 25-F as if the workman has been retrenched. In case where an undertaking is closed down by reason of financial difficulties as was the position in the present case, it cannot be deemed to have been closed on account of unavoidable circumstances beyond the control of the employer".

30. Learned counsel appearing on behalf of the respondents, however, has placed strong reliance upon a decision of the Apex Court in *Karnataka Power Transmission Corporation Ltd. v. Amalgamated Electric Company Ltd.* 2001-I-LLJ-556. In that case, the Apex Court was dealing with transfer by way of statute. The Apex Court was considering the provisions of *Karnataka Electricity Undertaking (Acquisition) Act, 1974*. Section 11 thereof reads thus:

""Provisions respecting the Officers and employees of the Company: (1) Subject to the provisions of Sections 10 and 13, every officer or other employee (except a Director, Advisor, Consultant or Auditor) employed before the vesting date in connection with the affairs of the undertakings which have vested in the Government by virtue of this Act, shall become as from that date, an officer or other employee as the case may be, of the Government and shall hold his office of service by the same tenure, at the same remuneration and upon the same terms and conditions and with the same rights and privileges as to pension, gratuity and other matters as he would have held under the company if its undertakings had not vested in the Government and shall continue to do so unless and until his employment under the Government is terminated after giving him three calendar months notice in writing or paying him three months pay in lieu of such notice or until his remuneration, terms and conditions including the privileges to pension and gratuity are altered by rules or, orders made by the Government.

Provided that nothing contained in the sub-section shall apply to any officer or employee who has by notice in writing given to the Government or to any person nominated in this behalf by the Government, within thirty days from the appointed day intimated his intention of not becoming an officer or other employee of the Government.

(2) Notwithstanding anything contained in the *Industrial Disputes Act, 1947* (Central Act 14 of 1947), or in any other law for the time being in force, the transfer of the services of any officer or other employee of the company by virtue of this Act shall not entitle any such officer or to her employee to any compensation under this Act or other law and no such claim shall be entertained by any Court, Tribunal or other authority."

In that case, the Amalgamated Electrical Company had been taken over pursuant to the provisions of the Act, as a result whereof, all the assets and the liabilities vested with the Electricity Board and thus the Board was the successor-in-

interest and was obliged to honour the award of the Tribunal. A bare perusal of Section 11 of the Act, as noticed supra, clearly contemplated that the employees would be continued on the same terms and conditions and in that view of the matter the said decision cannot be held to have any application in the instant case and the same is clearly covered by Anakapalli Co-operative Society Ltd. case. Further, a finding of fact has also been arrived by the Court to the effect that the workers had been illegally denied employment although the transferred company was bound to reinstate the workers as far back on March 25, 1971.

31. This aspect of the matter has been considered by a Division Bench of this Court in W.P. Nos 13056 and 7640 of 1999 wherein this Court observing that a statutory functionary before exercising its discretionary power pose with itself the right question so as to acquaint itself with the correct state of affairs with a view to reach a right conclusion failing which it would be guilty of committing misdirection in law, noticed thus:

"A Division Bench of the Calcutta High Court in *Santiniketan Society v. State* 2001 (1) ICC 449 has noticed what would constitute an error of law thus:

In *DE SMITH, WOOLF AND JOWELL ON JUDICIAL REVIEW OF ADMINISTRATIVE ACTION*, 5 Edn. page 286, it is stated:

The concept of error of law includes the giving of reasons that are bad in law of (where there is a duty to give reasons) inconsistent, unintelligible or substantially inadequate. It includes also the application of wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, exercising a discretion on the basis of any other incorrect legal principles, misdirection as to the burden of proof, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence. Error of law also includes decisions which are unreasonably burdensome or oppressive. Thus whether or not the drawing of an inference from the primary facts, or the application of a statutory term to the facts and inferences drawn therefrom, is held or assumed to be a matter of tact (or fact and degree) or a matter of law, the Court may still hold the decision erroneous in points of law if any of the above defects is present.

This aspect of the matter has also been considered in *Sushil Kumar Sasmal v. State of West Bengal*, reported in 1999(1) CHN 92 wherein it has been held:

If a statutory authority takes into consideration irrelevant fact and fails to take into consideration relevant fact, an error on the fact of the record is committed) see *DE SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION*, 4th Edn. page 136). It is further well known that a statutory authority must pose unto himself the correct question so as to acquaint himself with the fact of the matter with a view to answer the jurisdictional question, failing which he would be guilty of commission of misdirection in law."

In *Secretary Of State v. Tameside* 1976 (3) All ER 665 it was held:

"Had there been factual foundation on the basis of which reasonable conclusion could be arrived at that the petitioners were guilty of actual misappropriation, it would have been a different matter. Here it appears that the authority passing the impugned order did not ask itself the right question and take reasonable step to acquaint itself with the relevant information to enable it to answer it correctly. This amounts to misdirection in law."

32. The relationship of master and servant must be brought about by express or implied contract of service. Even a contractor's employee is not an employee of the principal employer. See *Employers in relation to the Management of Reserve Bank of India Vs. Their Workmen*, , *Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra*, , *Chintaman Rao and Another Vs. The State of Madhya Pradesh*, .

33. Learned counsel appearing on behalf of the respondents, however, submitted that the appellants herein did not produce the agreement entered into by them despite several adjournments and thus an adverse inference should be drawn. Although such adverse inference is permissible to be drawn, but, herein, the admitted case of the parties is that the services of the workers were terminated by respondent No. 2 or respondent No. 3 and not by the appellant. The employees- respondents admittedly could not bring any materials on record to show that relationship of master and servant came into existence by reason of any agreement or otherwise.

34. The learned counsel appearing for the employees submitted that since alternative remedy is available to the appellants, the same should be taken recourse. In *Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others*, , it was held:

"It is well established that an alternative remedy is not an absolute bar to the maintainability of a writ petition. When an authority has acted wholly without jurisdiction, the High Court should not refuse to exercise its jurisdiction under Article 226 of the Constitution on the ground of existence of an alternative remedy. In the instant case, the Vice-Chancellor had no power of review and the exercise of such a power by her was absolutely without jurisdiction. Indeed, the order passed by the Vice-Chancellor on review was a nullity; such an order could surely be challenged before the High Court by a petition under Article 226 of the Constitution and, in our opinion, the High Court was not justified in dismissing the writ petition on the ground that an alternative remedy was available to the appellant u/s 68 of the U.P. State Universities Act."

The said decision cannot be said to have any application whatsoever in the facts and circumstances of this case.

35. The question which survives for consideration is as to whether alternative remedy is available to the appellant? The answer to the said question must be rendered in negative. Having regard to the fact that an appeal in terms of Sub-section (2) of Section 48 of the Act lies against the employer, the employer itself

is an aggrieved person. No doubt under Sub-section (3) of Section 48 of the Act, a second appeal lies against any decision of the authority under Sub-section (2). But, the appellant herein is aggrieved by the jurisdictional error committed by the 1st respondent herein insofar as it directed the appellant to reinstate the workmen with full back wages. Such a finding of fact has been arrived at, as noticed hereinbefore, without any pleading or even no relief has been prayed for against the appellant and despite the same such a relief has been granted. It is not a case where the relief could be directed to be moulded as no action of the appellant herein was under challenge before the 1st respondent. The 1st respondent, therefore, must be held to have acted wholly illegally and without jurisdiction and in such a case, in view of the decisions of the Apex Court, it would not be proper to direct the parties to avail the alternative remedy. It is now a trite law that the question as to whether the party should be asked to avail an alternative remedy depends on the discretion of the Court. There is no hard and fast rule in this behalf. Discretion has to be considered keeping in view the facts and circumstances of each case. Even if the appellant herein is directed to avail the alternative remedy, having regard to the clear position of law, the result would be the same.

36. In *K. Gopala Krishna Murthy v. Banda Krishna Vijaya Bhaskara Rao* 2001 (1) LS 63, this Court while dealing with the question of maintainability of the writ petition vis-a-vis existence of an alternative remedy held:

"The learned counsel then contended that the writ petitioner has an alternative remedy of appeal under the Licensing Order; consequently, the impugned order is not sustainable. We find no force in the submission of the learned counsel. It is well established principle of law that alternative remedy of appeal is not an absolute bar to approach this Court and this Court in exercising the extraordinary writ jurisdiction under Article 226 of the Constitution is well within its limits to pass appropriate orders in the facts and circumstances of a case especially in a case where the facts are not in dispute and on the face of the order itself, it suffers from the infirmity of being without jurisdiction."

37. In *Sakal Gore v. Secretary Bar Library Club*, High Court, Calcutta 2001-I-LLJ-1594, the Calcutta High Court held that where the order of an authority impugned in a Writ Petition was passed without jurisdiction, the writ petition, despite existence of an alternative remedy, would be entertained. Further more, in a case of this nature, even if the writ petition was filed by the appellant questioning the show cause notice, this Court might have refused to entertain the same as determination of the jurisdictional fact by the Tribunal whose jurisdiction is in question can be allowed. However, upon determination upon such jurisdictional fact, a writ petition may be held to be maintainable having regard to the fact that such questions have to be determined by way of preliminary issue or otherwise. In the instant case, we found, on the basis of the admitted facts, that the first respondent herein lacked inherent jurisdiction to entertain the application filed by the concerned employees u/s 48 of the said Act.

This Court, therefore, cannot, at this stage, refuse to entertain the application on the ground that there exists a forum of appeal which can be availed of.

38. In *Shri Swapan Ray v Indian Airlines Limited* 1996 (1) CHN 147 one of us (S.B. SINHA, CJ) held:

"The submission of Mr. Mazumdar to the effect that the petitioner should have taken recourse to the provisions of the Industrial Disputes Act cannot be accepted. There cannot be any doubt that in a case of this nature the delinquent employee should normally take recourse to the provisions of the Industrial Disputes Act. However, that does not mean that only because there exists alternative remedy, this Court will refuse to exercise its discretionary jurisdiction. Alternative remedy as is well known is a self-imposed restriction. Rule was issued in this writ application on April 21, 1987. The matter has been pending in this Court for more than 8 years. To ask the petitioner to avail alternative remedy at this juncture in my opinion would be wholly improper."

In *Miss Maneck Gustedji Burjarji Vs. Sarafazali Nawabali Mirza*, , the Apex Court had held:

"It is true that this principle is not rigid and inflexible and there can be extraordinary circumstances where despite the existence of an alternative legal remedy, the High Court may interfere in favour of an applicant, but this was certainly not one of such extra-ordinary cases."

In *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, , the Apex Court has held:

"But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narain could have moved the Commissioner in revision, because at date which the petition was moved the period prescribed by Section 33-A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income Tax Officer u/s 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits".

Reference in this connection may also be made to *Dr. Bal Krishna Agarwal v. State of U.P. and Ors.* reported in 1995 Lab IC 1396 wherein it has been held:

"Having regard to the aforesaid facts and circumstances, we are of the view that the High Court was not right in dismissing the Writ Petition of the appellant on the ground of availability of an alternative remedy u/s 68 of the Act especially when the Writ petition that was filed in 1988 had already been admitted and was pending in the High Court for the past more than five years. Since question that is raised involved a pure question of law and even if the matter is referred to the Chancellor u/s 68 of the Act it is bound to be agitated in the Court by the party aggrieved by the order of the chancellor, we are of the view that this was not a case where the High Court should have non-suited the appellant on the ground of availability of an alternative remedy".

It is further well known that when a Tribunal has acted ultra vires or where the order has been passed in violation of the principles of natural justice the High Court may entertain a Writ application in its discretion, See Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, .

39. In J.M Baxi and Co. v. Commissioner of Customs, New Kandla 2000 AIR SC W 1871, it was held:

"Normally the High Court ought not to interfere in exercise of its jurisdiction under Article 226 when adequate alternative remedy is available. But in the special facts of this case when the demand was raised and the same had been challenged on the ground that it was barred by time and where the demand is nearly 46 lakhs of rupees which will have to be deposited before any appeal can be filed, we are of the opinion that the High Court ought to have exercised its jurisdiction and determined the questions which were raised in the writ petition on merits. In dealing with the contentions raised by the appellant, the High Court would necessarily have to consider the contentions of the respondents as well.

40. Yet again, in Filterco and Another Vs. Commissioner of Sales Tax, Madhya Pradesh and Another, it was held:

"We are of the opinion that the High Court should have examined the merits of the case instead of dismissing the Writ Petition in limine in the manner it has done. The order passed by the Commissioner of Sales-tax was clearly binding on the assessing authority u/s 42-B(2) and although technically it would have been open to the appellants to urge their contentions before the appellate authority namely, the Appellate Assistant Commissioner, that would be a mere exercise in futility when a superior officer namely, the Commissioner, has already passed a well considered order in the exercise of his statutory jurisdiction under Sub-section (1) of Section 42-B of the Act holding that 21 varieties of the compressed woolen felt manufactured by the appellants are not eligible for exemption under Entry 6 of Schedule I of the Act. Further Section 38(3) of the Act requires that a substantial portion of the tax has to be deposited before an appeal or revision can be filed. In such circumstances we consider that the High Court ought to have considered and pronounced upon the merits of the contentions raised by the parties and the summary dismissal of the Writ Petition was not justified. In such a situation, although we would have, ordinarily, set aside the judgment of the High Court and remitted the case to that Court for fresh disposal, we consider that in the present case, it would be in the interests of both sides to have the matter finally decided by this Court at the present stage itself especially since we have had the benefit of elaborate and learned arguments addressed by the counsel appearing on both sides."

This aspect of the matter has also been considered in Anisminic Ltd. v. Foreign Compensation Commission, 1962 Appeals Cases 147.

41. In these cases, apart from the fact that the writ petitions were admitted and

have been pending for a long time before this Court, since the order of the authority was clearly without jurisdiction, in our opinion, it would not be proper not to entertain the writ petitions in exercise of the discretionary jurisdiction of this Court. In this view of the matter, we are of the view that no case has been made out for refusing to entertain the writ applications. The order of the learned single Judge, therefore, cannot be sustained and it is accordingly set aside. The Writ Appeals are accordingly allowed, but, in the facts and circumstances of the case, there shall be no order as to costs.