
(1964) 02 BOM CK 0013

In the Bombay High Court

Case No : Special Civil Application No. 1851 of 1963

Maharashtra State Electricity Board

APPELLANT

Vs

Industrial Tribunal, Bombay and Others

RESPONDENT

Date of Decision : 24-02-1964

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 18, 18(3), 25F, 25FF

Citation : (1964) 02 BOM CK 0013

Hon'ble Judges : H.L. Gokhale, J;D.G. Palekar, J

Bench : Division Bench

Judgement

Gokhale, J.—An industrial dispute relating to several matters was referred by the Government of Maharashtra to the industrial tribunal for adjudication, under the Industrial Disputes Act. This dispute was between the Poona Electric Supply Company, Ltd. (hereinafter referred to as the company), respondent 2 in this petition, and the workmen of that company. The industrial tribunal, to which this dispute was referred, was presided over by respondent 1 in this petition. During the tendency of the dispute, the company made an application to respondent 1 tribunal requesting the tribunal not to adjudicate upon three of the matters which were pending before the tribunal. By this application, the company drew the attention of the tribunal to an agreement executed between the company and the Maharashtra State Electricity Board (hereinafter referred to as the Board) on June 12, 1963. It was pointed out that by this agreement the company had agreed to sell to the Board the undertaking of the company, upon the terms and conditions mentioned in that agreement. The company had agreed to deliver possession of the company's undertaking to the Board on the date of the revocation of its licence by the Government of Maharashtra. It was the company's case that the Board was not liable to take over the workmen engaged by the company and the Board was to employ such workmen as they thought fit as fresh entrants on fresh terms and condition. Attention was drawn to one of the conditions in the agreement that the company was required to give notices of termination of the employments of its employees and to pay them such dues as

they were entitled to under the law. The application stated :

"The company is in a process of closing down its work within a short period."

2. On these grounds the company requested that demands for wage-scales, dearness allowance and classification, which were pending before the tribunal, should not be adjudicated upon. The Poona Electric Supply Company Kamgar Union, respondent 3, in this petition (hereinafter referred to as the union), submitted a reply to the company's application. This reply attempted to refute the company's request and requested the tribunal to direct the company to produce certain documents in order to show that the arrangement by which the company has agreed to deliver to the Board its undertaking was not in the nature of the closure of the business of the company, but was merely a transfer of a running business. It is not necessary for the purposes of this petition to refer to all the other contentions made in this reply, but one of the prayers made by the union was that the Board should be joined as party to the proceedings which were pending before the industrial tribunal. The industrial tribunal thereupon issued a notice addressed to the Chairman of the Board, calling upon him to show cause why the Board should not be joined as a party to the proceedings pending before the tribunal. In response to this notice, the Board filed its written statement before the tribunal. The Board objected to its being made a party to the proceedings on several grounds. The statement pointed out that the agreement between the Board and the company was reached as a result of tripartite negotiations between the company, the Government of Maharashtra and the Board, and as a result of these negotiations it was agreed, in the public interest, that the Board should take over the assets of the company on revocation of the company's licence, under S. 4 of the Indian Electricity Act, 1910. The principal contentions of the Board were that the Board was neither a proper nor a necessary party and since the assets of the company's undertaking were being taken over by the Board by operation of law, the Board was not a successor-interest of the company as contemplated by S. 18(3)(c) of the Industrial Disputes Act (hereinafter referred to as the Act). It was also contended, in the alternative, that even if it was held to be a successor-in-interest, the Board was not bound to employ the workmen of the company since the company had terminated the services of its employees and had agreed to pay all the dues of the workmen. The company also filed a statement in which it was contended inter alia that all the employees had been paid their salaries and were paid retrenchment compensation and the payment was accepted by each and every employee without protest. The tribunal has not passed any order on the company's original application requesting the tribunal not to adjudicate upon certain matters which were in dispute between the company and its workmen. We are, therefore, not concerned with that aspect of the matter. The tribunal, however, decided the question as to whether the Board should be joined as a party to the dispute and came to the conclusion that the Board should be added as a party. The tribunal held that the Board had taken over the undertaking of the company as a going concern. According to the tribunal, the agreement

entered into between the Board and the company was in substance a transfer of the company's business to the Board as a going concern. For coming to this conclusion the tribunal relied mainly on two circumstances : One was that the nature of the business was such that the arrangement must be for transfer as a going concern, since "there cannot be any break or interval or discontinuance in the supply owing to the handing over." The second circumstance was that the entire business and practically all the equipment and machinery were in fact being taken over by the Board. On these considerations, the tribunal observed as follows :

"So both the conditions that it should be taken over as a going concern and that it should take over all the equipment are fulfilled."

3. Aggrieved by this order made by the tribunal, the Board has approached this Court under Arts. 226 and 227 of the Constitution of India.

4. In order to understand the transaction evidenced by the agreement between the company and the Board, it is necessary to refer to some of the important conditions contained in the agreement signed by the parties on 13 June, 1963. The property, which is the subject-matter of the transaction, is described in Clause (2) of the agreement, which is as follows :

"(2) The vendor is seized and possessed of, as part of its said business and otherwise well and sufficiently entitled to -

(a) the several pieces of land, hereditaments, buildings and all the plant, machinery and equipment including receiving stations, substations, tanks, wells, structures, equipments (including controlling and transmitting equipment), transmission and distribution system, service lines and associated equipment together with drains, watercourses, lines, liberties, privileges, rights, easements and appertaining to the said premises or any part thereof actually or by reputation belonging or therewith now or at any time heretofore held or enjoyed by the vendor for the purpose of its business of supplying electrical energy and all the estate, right, title, interest, claim and demand of the vendor into and upon the said premises;

(b) loose machinery, tools, spare parts, stores of and belonging to the vendor and relating to the said business of supply electrical energy.

(c) transport and other vehicles (excluding the vendor's motor-cars except the two cars used by the officers of the vendor), materials, furniture, office-equipment and all the other assets of the vendor's said business of supplying electrical energy situated within the area of supply.

All the abovementioned assets in (a), (b) and (c) are hereinafter for brevity's sake called the "the undertaking" or "the said undertaking" (which expression shall specifically exclude the vendor's investments in shares, debentures and securities and the tenancy rights, furniture and office-equipment of the vendor's office at Moledine Road, Poona, and the vendor's motor- cars except the two

cars used by the officers of the vendor referred to in Sub-clause (c)."

5. Then Cls. (3) and (4) provide as follows :

"(3) The vendor has offered to transfer the said undertaking to the purchaser and the purchaser has agreed to accept the transfer of the said undertake for the price and on the terms and conditions hereinafter mentioned.

(4) For the purpose of effectuating the transfer and not for any other purpose the vendor has agreed to the State Government revoking the said licence, 1917, "dated the 30 day of October, 1917, as the whole area of supply".

6. The assets in Paras. (a), (b) and (c) of Clause (2) are defined as "the undertaking" but the vendor's investments in shares, debentures and securities and the tenancy rights, furniture and office-equipment of the vendor's office, the vendor's motor-cars except the two cars used by the officers of the vendor, are specifically excluded from this definition. It is this property which is agreed to be transferred to the Board for the price and on the terms and conditions subsequently stated in the agreements. In order to give effect to this transfer the company had agreed to apply to the State Government for revoking the licence in respect of the whole area of supply. The agreement provides that the Board shall purchase the undertaking.

"free from all encumbrances, claims debts, mortgages or any obligations whatsoever of the vendor or attached to the undertaking at or for the price and upon the terms and conditions".

set out in the agreement. The manner of determining the consideration for the transfer and sale of the undertaking is also provided in the agreement. It is not necessary to reproduce, at this stage, the clauses which provide for the method of making the valuation of the undertaking and of determining the price. Within seven days from the date of the agreement the company had agreed to hand over to the Board's solicitors all the title-deeds in the company's possession or power of and relating to the lands, buildings and hereditaments in the nature of immovable property for investigation of the company's title to such property. The company had agreed to transfer, assign and deliver to the Board, from the date of taking possessions of the undertaking, the benefit and burden of such contracts and orders together with import licences there of which the Board might desire to be assigned in their favor. The company had agreed to make an application to the State Government for revocation of the licence, to give effect to the agreement and also to convene an extraordinary general meeting of the shareholders to obtain their terms and conditions set out in the agreement. The possession of the undertaking was to be handed over to the Board on the date of the revocation of licence by the State Government. Condition 8(a) is material and may be reproduced as follows :

"8. (a) The purchaser shall not be liable to take over and or fulfill any contract, obligation or liability of the vendor in respect of the supply of energy in the

vendors" said business of supplying electrical energy. All such contracts, obligations and liabilities shall be determined pr terminated by the vendor by individual notices to all, consumers including the municipality and also by a public notice before possession of the undertaking is taken over by the purchaser."

7. The subsisting contract between the company and the Poona Municipal corporation in respect of electrification of the Hadapsar Industrial Estate was not be terminated by the company, but the benefit there of was to be assigned to the Board. With regard to the employees of the company, the following was the important condition :

"9. The purchaser shall not be liable to take over any staff or workman engaged by the vendor in its said business of generating and or supply electrical energy and shall not be responsible for the payment of their wages in arrears or retrenchment compensation or any dues or other payment whatsoever to such employees and the vendor shall indemnify the purchaser against all such claims, costs and consequence thereof. The purchaser may, however, employ such staff and workmen out of the list furnished by the vendor to the purchaser as the purchaser may think fit as fresh entrants on such terms and conditions as the purchaser may think fit."

8. The company had agreed to give the requisite notice of termination of the service in accordance with the Industrial disputes Act or any other law applicable to all such employees and it had also agreed to pay all the dues including retrenchment compensation and or any other dues under any award or settlement or agreement made or to be made in any pending proceeding or negotiations section 18 makes provision to make awards law. Settlements in industrial disputes binding was not referred to in that section. Sub of the provides that a settlement arrived the company at between the employer and Under condition, than in the course of responsible in any manner shall be binding on which the company may Sub-Section (2) recover from the consumers for word which prior to the last month before taking on scion for which the company was to made its own arrangement for recovery. Certain reserves, however, as provided in the Electricity (Supply) Act, 1948, were agreed to be transferred to the Board. Condition 21 is as follows :

"The vendor (the company) declares and agrees to transfer the said undertaking to the purchaser free from all claims and encumbrances and undertakes to release pr discharge the charge created by the Debenture Trust Deed dated 30 November, 1951 for securing Rs. 8 lakhs within one month from the date of taking possession of the undertaking by the purchaser."

Similarly, under condition 22, the company was to be responsible for all claims and responsibilities arising out of accidents, if any, which may have occurred or which may occur before possession of the under taking was taken by the Board and the company was to keep the Board indemnified against all such claims and

responsibilities. These are the conditions which are material for consideration of the purpose of this petition.

9. On October 14, 1963 the Government of Maharashtra issued a notification revoking with effect from 16 November, 1963, "the Poona Electric Licence, 1917. As amended from time as to the whole area of supply." On the same day a resolution was passed by the Government of Maharashtra revoking the licence of the company. Prior to the revocation of the licence but after the execution of the agreement with the Board, the company gave notices to some of its employees intimating them of the agreement to sell and transfer the undertaking and the assets comprising the business of the undertaking to the Board and informing them that after one month from the date of the notice, the services of the employees would stand terminated. The notice stated :

"The reason for the termination is the inability of the company to continue its business of supplying electrical energy within the area of supply specified in the said licence by reason of the revocation of the said licence by the Government of Maharashtra."

10. The notice ends in the following way :

"This notice is given to you under the provisions of the Industrial Disputes Act, 1947, and your services will be retrenched or be deemed to be retrenched by the company under the provisions of the said Act from November 1, 1963. Compensation and other legal dues will be paid to you by the company in accordance with the applicable provisions of the law."

11. After the revocation of the licence, the company gave another notice to the employees on October 15, 1963, stating as follows :

"The Government of Maharashtra have now made an order in accordance with powers conferred by Sub-section (2) of S. 4 of the Indian Electricity Act, 1910, revoking the licence held by the company known as Poona Electric Licence, 1917, with effect from 16 November, 1963. Accordingly this notice is given to you that the company will not be able to continue your services, and your services with the company will stand terminate as at end of 14 November, 1963. Your services will be retrenched or deemed to be retrenched by the company under the provisions of the Industrial Disputes Act, 1947, with effect from 16 November, 1963.

Compensation and other legal dues will be paid to you by the company in accordance with the applicable provisions of the law.

Subject to the modification herein mentioned, this notice should be read along with the notice dated 30 September, 1963 already served on you."

12. It is the company's case that in pursuance to this notice the company has paid all the dues of the employees to whom notices were given and the employees have passed receipts of acceptance of their dues.

13. Sri Khambatta contends that respondent 1 was in error in coming to the conclusion that the business of the company was taken over by the Board as a running concern. His grievance is that the conclusions of respondent 1 that the entire machinery of the company was taken over by the Board is not correct and that the fact that there could not be any break or interval or discontinuance in the supply of electricity owing to the handing over of the undertaking was not decisive of the question whether the business was taken over as a going concern. He contended that the agreement between the company and the Board showed that the Board was not the successor-in-interest of the company's business. The company continued its business, but only the electricity undertaking was agreed to be transferred or sold to the Board. He relied on the agreement to show that there was a complete change of ownership and management of the business of supplying electrical energy to the city of Poona. On account of the revocation of the licence of the company there was a complete bona fide closure of the company's business of supplying electrical energy and the company had, therefore, a right in law to terminate the services of its employees, which right the company did, in fact, exercise. Since it was a closure of the company's business of supplying electrical energy, says Sri Khambatta, the workmen were not entitled to anything but retrenchment compensation under S. 25F read with S. 25FF of the Act. According to him, respondent 1 had no jurisdiction to add the Board as a party to the proceedings, as the business of the Board will be entirely a new business unconnected with the company's business. He also argued alternatively that even if the Board were held to be a successor-interest of the company, the employees who were retrenched and who took the benefit of S. 25FF of the Act could not claim continuity of employment under the Board. The tribunal, in Sri Khambatta's submission, could not join the Board as a party, since the Board was neither a necessary nor a proper party to the proceedings pending before the tribunal.

14. Before examining these contentions, it would be pertinent to consider the relevant provisions of the Act under which the tribunal may have power, under certain circumstances, to add parties to an industrial dispute before it. In the Act there is no specific provision empowering the tribunal constituted under the Act to summon any party to an industrial dispute pending before it. The power to summon a party to appear in the proceedings is to be inferred by implication because of S. 18 of the Act. Section 18 runs as follows :

"18. (1) A settlement arrived at by agreement between the employer and workmen otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement.

(2) An arbitration award which has become enforceable shall be binding on the parties to the agreement who referred the dispute to arbitration.

(3) A settlement arrived at in the course of conciliation proceedings under this Act or an award of a labour court, tribunal or national tribunal which has become enforceable shall be binding on - (a) all parties to the industrial dispute;

(b) all other parties summoned to appear in the proceedings as parties to the dispute unless the board, labour court, tribunal or national tribunal, as the case may be, records the opinion that they were so summoned without proper cause;

(c) where a party referred to in Clause (a) or (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates;

(d) where a party referred to in Clause (a) or (b) is composed of workmen or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part."

15. Section 18 makes provision to make awards or settlements in industrial disputes binding on persons referred to in that section. Subsection (1) provides that a settlement arrived at by agreement between the employer and workmen otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement. Sub-section (2) provides that an arbitration award which has become enforceable shall be binding on the parties to the agreement who referred the dispute to arbitration. Sub-section (3), however, is wider in its scope and makes an award or a settlement binding not only on the parties to the industrial dispute but, in certain circumstances, even on other persons. A settlement arrived at in the course of conciliation proceedings under the Act or an award of a labour court, tribunal or national tribunal is made binding on all parties to the dispute. It is binding on all other parties summoned to appear in the proceedings as parties to the dispute, unless the board, labour court, tribunal or national tribunal, as the case may be, records the opinion that they were so summoned without proper cause. In the case of an employer who was a party to the industrial dispute or who was summoned to appear in the proceedings as a party to the dispute, his heirs, successors or assigns in respect of the establishment to which the dispute relates are bound by the award. On the other hand, if the party to the dispute was composed of workmen, all the workmen who were summoned to appear in the proceedings as parties to the dispute or persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part, are bound by the award or settlement. The consequence of any party being summoned to appear in the proceedings as a party to the dispute is that the benefits, rights or liabilities arising under the award or the settlement accrue on such party. Clause (b) of Sub-section (3) of S. 18 is the only provision in the Act by which power is given to the tribunal, by implication, to summon parties, other than parties to the industrial dispute, to appear in the proceedings as parties to the dispute. Under that clause the tribunal, of course, can record the opinion that the party was so summoned without proper cause. The question, therefore, as to who are the other parties who can be summoned by the tribunal to appear in the proceedings as parties to the dispute, assumes some importance. Can the tribunal summon any party unconnected with the

industrial dispute to appear before it as a party to the dispute, or is this power limited to summoning only those who are necessary or proper party to the dispute ? Is a successor-in-interest a necessary or a proper party ? Clause (c) of Sub-section (3) of S. 18 seems to show that the heirs, successors or assigns of an employer in respect of the establishment to which the dispute relates may be bound by the award or the settlement, whether or not they were summoned to appear before the tribunal as parties to the dispute. Similarly, Clause (d) of Sub-section (3) seems to that in the case of workmen who were parties to the industrial dispute or who may have been summoned by the tribunal to appear in the proceedings as parties to the dispute, all persons who were employed in the establishment or part of the establishment, as the case be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part shall be bound by the award. Sri Khambatta contends that under this section the power to summon a party to appear in the proceedings as a party to the dispute can be exercised only in respect of those persons who are necessary or proper parties to the dispute. He does not dispute that the heirs, successors or assigns of an employer will be necessary or proper parties. His contention is, firstly, that the board was not a successor-in-interest of the company and was, therefore, not a necessity or a proper party to the dispute, and, secondly, that even if they were held to the successor-in-interest, the tribunal could not make an effective award in respect of workmen whose services were lawfully terminated by the purchaser-in-interest and who, if compensation was paid to them under S. 25F read with S. 25FF of the Act, were not entitled to claim re-employment or continuity of employment under the successor-in-interest.

16. It was contended on behalf of the workmen that the tribunal has applied the correct tests in deciding that the Board was a successor-in-interest of the company. They emphasize that there was no break in the business and that the entire machinery of the company was purchased by the Board. It was contended, on behalf of the Board, however, that these are not decisive tests, but the real test was to ascertain whether the business which was transferred to the Board was identical with the business of the company and whether it was taken over by the Board as a going concern. The question as to whether the purchaser of an industrial concern can be held to be a successor-in-interest of the vendor was considered by the Supreme Court in *Anakapalla Co-operative Agricultural and Industrial Society Limited Vs. Workmen*, . Undoubtedly some of the tests laid down by the Supreme Court do apply in the present case. The business of the Board is to be carried on as at the same place as before, namely, the city of Poona. The business is to be carried on without a substantial break in time. The business in the hands of the Board is similar to the business which was in the hands of the company. The agreement shows that a substantial part of the machinery of the company utilized in its electricity undertaking was agreed to sold to the Board. It is not possible to accept Sri Khambatta's contention that all the machinery was not sold. Clause (2) of the agreement which we have

reproduced above would show that the undertaking, as defined therein does comprise of a substantial part of the company's machinery. Only the company's investments in shares, debentures and securities and the tenancy rights, furniture and office-equipment of the company's office and company's motor-cars were not agreed to be sold. The substance of the agreement, therefore, is that a substantial part of the machinery was part of the transaction of the transfer of sale, and only an insignificant portion was not the subject matter of the sale. If these factors were decisive, it was another matter. In our view, the other factors in this transaction unmistakably indicate that the Board is not the successor-in-interest of the company. The sale to the Board was free from all encumbrances, claims, debts, mortgages or any obligations whatsoever of the company or attached to the undertaking. There is an obligation in the agreement on the company to furnish to the Board a list of the contracts or orders for imported and indigenous supply entered into by the company prior to the execution of the agreement and of all import licences obtained or applied for in respect of such orders. The Board had to inform the company within fifteen days from the receipt of the list of all contracts and orders which it desired to be assigned by the company to itself as part of the undertaking. The benefit and burden of only such contracts and orders together with import licences therefore which the Board desired to be assigned to itself were to stand transferred and assigned and delivered to the Board as from the date of taking possession of the undertaking. It was, therefore, the Board's option to select which contracts and orders should be assigned by the company. The Board was not liable to take over and/or fulfill any contract, obligations or liability of the company in respect of the supply of energy in the company's business of supplying electrical energy. The agreement expressly stated that Board shall not be liable to take over any staff or workmen engaged by the company in its business and that the Board shall not be responsible for the payment of their wages in arrears or bonus or provident fund or gratuity or retrenchment compensation or such other dues. The company had agreed to terminate the services of its employees in accordance with the Act or any other law applicable to such employees. Similarly, the company had also agreed to pay all dues including retrenchment compensation to the employees according to law. The provisions of the agreement would show that the liabilities of the company were not to be taken over by the Board and only such assets as were specifically mentioned in the agreement were to be sold. The undertaking was agreed to be sold free from all encumbrances, claims, debts, mortgages or any obligations whatsoever. The consideration for the transfer and the sale of the undertaking was to be determined and calculated as provided in Clause 12 of the Poona Electric Licence, 1917, and S. 7A, Sub-section (4), of Indian Electricity Act, 1910. It is important to note that the sales or transfers of electricity undertakings are governed by the Indian Electricity Act, 1910 (IX of 1910). Under S. 3 of the Act, the State Government has power to grant a licence to any person to supply energy in any specified area, subject to the provisions of that section. Section 4 of the Act empowers the State Government to revoke a licence so granted under certain circumstances. In this case, the licence of the company

was revoked by the State Government on an application made by the company. It is clear that the business of supplying electrical energy cannot be carried on without a licence from the State Government. The business of the licensee of supplying energy must, therefore, come to an end when the licence is revoked. In the petition it is stated that some time in March, 1963, a disastrous explosion resulting in the loss of many lives and cutting of electric supply to the city of Poona for a number of days at Ganesh kind Receiving Station within the area of supply of the company (sic). Similarly instances had also occurred on prior occasions and there was a public demand for revocation of the licence of the company. In compliance with the said public demand, the Maharashtra State Government desired the Board to take over the supply of electricity within the licence area from the company on revocation of its licence. The Board, therefore, entered into negotiation with the company as a result of which the agreement of 13 June, 1963 was entered into. The revocation of the company's licence was, therefore, under these circumstances. Section 5 of the Indian Electricity Act, 1910, contains provisions where the licence of the licensee is revoked. On the revocation of the licence taking effect, the State Government is required, under this section, to enquire from the Board, and where the licensee is not a local authority, also from any local authority, constituted for the area within which the whole of the area of supply is included, whether it is willing to purchase the undertaking. If the Board is willing to purchase the undertaking, the State Government has, by a notice in writing, to require the licensee to sell and thereupon the licensee is required to sell the undertaking to the Board. It is only when the Board is unwilling to purchase the undertaking that, according to the order of priorities mentioned in the section, the undertaking has to be sold to other persons. The purchaser has to pay the price of the undertaking to the licensee determined in accordance with provisions of the Act. The purchase price is determined as laid down in S. 7A of the Act. Under Sub-section (1) of S. 7A the purchaser price of the undertaking is its market value at the time of purchase or, where the undertaking has been delivered before the purchase, at the time of the delivery of the undertaking. Any difference or dispute regarding purchase price is to be determined by arbitration. Sub-section (2) of S. 7A is the material part laying down the principles in accordance with which the market value is to be determined. But this sub-section expressly excludes from consideration any addition to the market value in respect of compulsory purchase or of goodwill or of any profits which may be or might have been made from the undertaking. The question of same of the goodwill of the undertaking cannot arise when an electricity undertaking is sold in accordance with the provisions of the Act. These provisions show that the transfer and sale of the electricity undertaking is not a transaction between two willing parties, since the law gives first preference to the Board to opt in favour of purchasing the undertaking belonging to a licensee. The licensee, under these circumstances, has no option to refuse to sale the undertaking to the Board. The price of the undertaking also is not fixed as between two bargaining parties, but is fixed in accordance with the provisions of the Act. The sale of an electricity undertaking, therefore, is not comparable with

an ordinary sale of a business between two parties who are free to sell or buy. Once the licence is revoked, there is no question of the same business being continued since on the revocation of that licence the business of the licensee must come to an end. Even if the undertaking is purchased, including the machinery and other property, it cannot be said that it is the sale of the business as a whole. Reliance was placed on *New Gujarat Cotton Mills v. Labour Appellate Tribunal* 1967 II L.L.J. 194 on behalf of the workmen. In that case Justice Sri Shah who delivered the judgment, held, that the transaction in question was of a transfer of the business as a going concern and even though there was no direct contractual relation between the employer and the new company who were the successors of the business of the old company, a claim made by the employees for re-employment was maintainable. Sri Dudhia also referred to *N. J. Chavan v. P. W. Sawarkar* 1958 I L.L.J. 36. In that case Justice Sri Tendolkar in his judgment observed (at p. 39) that employees of a business continue to be entitled to all the rights and privileges acquired by them by reason of past services even after a transfer of business, provided

(1) there is continuity of service, and (2) there is identity of business.

17. It was held that although a successor of a business will necessarily be a transferee, there may be a transferee of a business who is not necessarily a successor. It was observed that the correct test is not whether there is succession to the business but the correct test is whether the business has been transferred without disturbing the identity of the business and its continuity. But the learned Judge explained what is identity of business in following terms :

"Regarding identity of business, what is required is that the same business, which was carried on by the transferor, must be carried on by the transferee. It is not sufficient that the business is similar or of the same nature."

Therefore, the mere similarity of business is not the decisive test. It is not enough that the business should be of the same nature, but it must be the same business which is carried on by the transferor. As we have pointed out, the liabilities of the company were not taken over by the Board. The transfer was effected in accordance with the provisions of the Indian Electricity Act, 1910. The services of the employees were agreed to be terminated prior to the agreement of June 13, 1963. The transferee reserved to itself the right to take over only such benefits or burdens or contracts and orders secured by the transferor. We have already referred to the relevant parts of the agreement and the statutory provisions governing the transfer of business of an electricity undertaking. The legal effect of the revocation of the licence of a licensee of an electricity undertaking is that he cannot carry on the business and his business in respect of supply of electrical energy must come to an end. It is, therefore, not possible to accept the contentions made on behalf of the workmen that the two tests, namely, of continuity and the transfer of a substantial part of the machinery, are decisive. It has also been stated in the judgment of the Supreme Court in *Anakapalla Co-operative Agricultural and Industrial Society Limited Vs. Workmen*,

referred to above, though all the factors which were referred to by the Court were relevant, the importance of any one of these factors could not be exaggerated and the presence or absence of any one of them was not decisive of the matter one way or the other. On an evaluation of all the factors, we are of the view that the conclusion to which the tribunal reached, namely, that the Board was a successor-in-interest of the company, cannot be sustained.

18. Sri Dudhia appearing for the workmen, however, argued that even though the Board may not be a successor-in-interest, the Board would be necessary or a proper party to the dispute which was referred to adjudication by the tribunal. He contended that though the services of the employees were terminated by the company, a large number of employees would be required to be absorbed by the Board for the same or similar type of work. Although the Board may not be, in law, a successor-in-interest, the Board will carry on the work of supplying electricity to the city of Poona. The employees, if they are deprived of their legitimate demands, may have to raise a fresh dispute and with a view to avoiding industrial unrest the Board should be made a party to the proceedings, as a necessary or a proper party. He emphasized that Sub-section (3) of S. 18 of the Act gives wide powers to the tribunal to summon any party to appear in the proceedings as a party to the dispute. According to his submission, this wide power is given to the tribunal in the interest of industrial harmony and the power of the tribunal in this respect is unfettered. It is pertinent to see the scheme of S. 18 of the Act to appreciate this argument. When once a party has been summoned to appear as a party to the dispute, the consequence is the party as well as the heirs, successors or assigns of that party, if the party is an employer, and all persons who were employed in the establishment on the date of the dispute as well as all persons who subsequently become employed in the establishment, if the party are workmen, are bound by the award or the settlement. If parties, who are not necessary or proper parties, are allowed to be summoned as parties to the dispute, the result will be that the scope of the dispute itself will be enlarged. It could not have been the intention of the legislature that the tribunal would be given the power to enlarge the scope of the dispute so as to make it a dispute between parties, between whom no industrial dispute existed before. The power of the tribunal to add parties under S. 18 of the Act is not disputed. What is, however, contended is that power is limited only to adding necessary or proper parties. Sri Khambatta argued, and in our view rightly, that S. 18 could not be said to have given the power to the tribunal to change the character of the dispute which existed between the two parties who were originally parties to the dispute, by adding a third party, so that the dispute will not only be between the original parties but between the new party and the workmen. Section 10 of the Act provides for the reference of disputes to boards, courts or tribunals. The appropriate Government can refer an industrial dispute to the tribunal, if it is of opinion that any industrial dispute exists or is apprehended. This would presuppose that the dispute must exist or must have been apprehended at the time when the Government formed the opinion that it

should be referred to the tribunal. This power is only of the Government and it could not have been intended that by a subsequent order of the tribunal to add parties to the dispute the scope of the dispute, as it existed at the time of the reference, could be enlarged. The same view has been taken in 1958 II L.L.J. 725 . Sri Khambatta contended that even if order 1, rule 10, of the Civil Procedure Code, was applicable, the Board could not be considered as necessary or a proper party. Any award made in the dispute between the company and its workmen, says Sri Khambatta will not be rendered nugatory. The scheme of the Act is to provide a machinery for settlement of industrial disputes with a view to bringing about industrial peace. If necessary or proper parties are not before the tribunal, that object cannot be achieved, as the award would be rendered nugatory. But even then, the object can only be the settlement of the dispute which was initially before the tribunal and not a dispute between parties unconnected with the dispute. The object of giving power to add parties could not have been to enlarge the scope of the dispute and to alter its character. The reasonable interpretation, therefore, of the scope of the powers of the tribunal to add parties under S. 18 would be that only necessary or proper parties can be summoned to appear before the tribunal as parties to the dispute. In P.G. Brookes Vs. The Industrial Tribunal, Madras and Others, , Justice Sri Subba Rao, in his judgment, observed as follows (p. 9) : "Clause (b) [of Sub-section (3) of S. 18] refers to other parties summoned to appear as parties in the dispute. The other parties can only mean parties other than those mentioned in Clause (a), i.e., the original parties. They must be summoned as parties to the dispute, i.e., as persons who are affected by or interested in the dispute. A party to a dispute is either a necessary or proper party. A person against whom a relief is claimed is a necessary party to a proceeding. A person against whom though no relief is claimed, whose presence is necessary for a complete and final decision of the question involved, is a proper party as distinguished from a necessary party. We should think that Clause (b), though apparently wide in terms, is intended to take in only necessary or proper parties. It could not have been in the contemplation of the legislature to include parties against whom either no relief is claimed or whose presence is not necessary for adjudicating the disputes between the parties ... It is intended to enable parties whose presence is necessary or proper for completely disposing of the disputes raised before the tribunal to be impleaded as parties."

19. The parties, whose presence is not necessary for the adjudication of a dispute which is pending before a tribunal cannot, therefore, be parties who can be summoned by the tribunal under Sub-section (3) of S. 18. Sri Dudhia contended that the presence of the Board is necessary since the employees whose services have been terminated by the company, would be entitled to claim re-employment or reinstatement by the Board. We do not think that there is any force in this contention. The Industrial Disputes Act was amended and S. 25FF was added by S. 3 of the Industrial Disputes (Amendment) Act, 1957. Section 25FF is as follows :

"25FF. Where the ownership or management of an undertaking is transferred, whether by an 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 S. 25F, as if the workman had been retrenched :

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

- (a) the service of the workman has not been interrupted by such transfer;
- (b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and
- (c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer."

20. In Anakapalla Co-operative Agricultural and Industrial Society Limited Vs. Workmen, the Supreme Court, after considering the object underlying S. 25FF of the Act, observed as follows :

"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 S. 25FF as a whole, it does not appear that unless the transaction falls under the proviso, the employees 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 S. 25FF is to restore the position which the legislature had apparently in mind when S. 25FF was originally enacted 4 September, 1956. By amending S. 25FF, the legislature has made it clear that if industrial undertakings are transferred, the employees of such 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."

21. It was also observed that the transfer is fictitious or benami, S. 25FF had no application. In such a case there will be no change of ownership or management and, despite an apparent transfer, the transferor-employer continues to be the real employer and there has to be continuity of service under the same terms and conditions of service as before and there can be no question of compensation. But when the transfer is not fictitious or benami, the employees cannot sustain a claim for re-employment after the insertion of S. 25FF in the Act. They would be entitled to compensation if the conditions stated in the

proviso to that section do not apply. There is, therefore, no substance in the contention of Sri Dudhia that the Board was a proper party, as in its absence the dispute cannot be adjudicated upon. It is also not correct to say that the employees would be entitled to claim re-employment from the Board, since the company had offered to pay compensation as required by the Act. It was contended it could not possibly be contended that the transaction between the company and the Board was fictitious. We are, therefore, unable to accept the argument that the Board was a proper party, if not a necessary party. The dispute between the company and the workmen is capable of adjudication without the presence of the Board as a party to the dispute.

22. In the view which we have taken, the order made by the tribunal summoning the Board to appear before it as a party to the dispute will have to be set aside. Rule made absolute. No orders as to costs.