

(2009) 10 KAR CK 0032

In the Karnataka High Court

Case No : Writ Petition No's. 28700 of 2003 and 5791 of 2004

P. Muthu Pandey and K. Narayanan

APPELLANT

Vs

India Tourism Development Corporation Limited,
Kumarakrupa Frontier Hotels Private Limited and Bharat
Hotels Limited
 Shri. R. Manjunath Vs India Tourism
Development Corporation Limited, Bharat Hotels Limited and
Kumarakrupa Frontier Hotels Private Limited

RESPONDENT

Date of Decision : 14-10-2009

Acts Referred:

Companies Act, 1956 — Section 617
Constitution of India, 1950 — Article 13, 14, 17

Citation : (2010) ILR (Kar) 1175 : (2010) 5 SLR 265

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : Joshua H. Samuel in Writ Petition No. 28700 of 2003, D. Leelakrishnan, in Writ Petition No. 28700 of 2003 and Joshua H. Samuel, for Cariappa and Co. in Writ Petition No. 5791 of 2004, for the Appellant; Shweta Bharti, for Aamstel Law Associates for Respondent No. 2 in Writ Petition No. 28700 of 2003, K. Prabhakar Rao, in Writ Petition No. 28700 of 2003 and for Respondents 2 and 3 in Writ Petition No. 5791 of 2004 and N. Devadas, Sr. Central Government Standing Counsel for Respondent No. 1 in Writ Petition No. 5791 of 2004, for the Respondent

Judgement

Anand Byrareddy, J.—These petitions are heard and disposed of together having regard to the common circumstances involved.

2. In the first of these petitions the facts are as follows:

The Indian Tourism Development Corporation Limited (ITDC for brevity) was established in the year 1996 by the Government of India in the Ministry of Tourism, as an autonomous Public Sector Corporation-incorporated under the Companies Act, 1956. It is a Government Company u/s 617 of the Act.

The object of ITDC is to develop the infrastructure to promote tourism in India. It

has established a hotel chain known as The Ashok Group. It has hotels in almost all major cities of one India. Hotel Ashok Bangalore is one such. The corporation has secured other Divisions and allied activities. It is not in dispute that ITDC is amenable to the writ jurisdiction of this Court.

The Second-respondent is also a Government of India undertaking promoted by ITDC for the purpose of giving effect to a Scheme of Demerger. It was apparently incorporated to take over Hotel Ashok at Bangalore apart from certain other hotels in the country. It was incorporated in the year 2002.

The first petitioner had joined, the services of ITDC as Hotel Operation Trainee (Kitchen) in the year 1975. After training he was posted as Chef Grade - II, in the year 1978, at Kovalam Ashok Beach Resort. He was promoted as Sous Chef at Kovalam and Hotel Madurai Ashok, Madurai. He was then transferred to Hotel Ashok, Bangalore in the year 1989. He was promoted as Executive Chef Grade - II in the year 1993 and as Executive Chief Grade - I in the year 1998. He was working in that capacity as on the date of the petition.

The second-petitioner joined the services of ITDC in the year 1981 as an Assistant Manager (Engineering) and was posted to work at Hotel Ashok Bangalore. He was transferred to Lalit Mahal Palace Hotel, Mysore in 1985. In 1994 he was transferred to Kovalam Ashok Beach Resort.

In the year 1999, he was transferred to Hotel Ashok Bangalore and promoted as Manager. He was working in that capacity as on the date of the petition.

Soon after the incorporation of the Second respondent in the year 2001, a scheme of demerger was entered into between ITDC and the second respondent. But as the Department of Company Affairs had not given its formal approval of the Scheme, the second respondent did not hand over the properties of Hotel Ashok, Bangalore. Hence, the petitioners continued to be employees of ITDC.

In November 2001, the petitioners learnt that ITDC proposed to lease out Hotel Ashok Bangalore to the third respondent. The petitioners and others expressed their apprehensions in respect of such a move. ITDC replied to state that their interests would be safe-guarded. And by a lease-cum-Management agreement dated 29.11.2001, the second respondent leased Hotel Ashok Bangalore and Airport Restaurant Bangalore to the third respondent for a period of 30 years, and transferred all ITDC employees working therein, including the petitioners to the third respondent.

The Chairman of the third respondent, by a letter dated 29.11.2001, informed the Staff of Hotel Ashok Bangalore that the third respondent had taken over the management of the Hotel and Solicited co-operation of all concerned. This was followed by a similar letter from the Chairman and Managing Director of ITDC endorsing the above circumstance. The Staff in turn raised strong protests.

The petitioners and the Karnataka ITDC Hotels Officers Association, Bangalore filed a writ petition in W.P. No. 42641/2001 before this Court challenging the

above actions of the respondents. The same was disposed of on 28.12.2001 in the light of the decision of the apex Court in BALCO Employees Union (Regd.) Vs. Union of India and Others, . An appeal filed against the same is pending consideration along with several other matters.

Further by separate orders dated 10.06.2003 the third respondent has issued orders of transfers, transferring the first petitioner to the third respondent's Hotel Inter Continental the Grant Resort Goa as executive Chef and the second petitioner to the third respondent's hotel at Udaipur as Manager (Engineering).

It is the said orders of transfer that are challenged in the present petition.

3. In the second of these petitions, the petitioner was appointed as a waiter at Lalith Mahal Palace Hotel, Mysore by ITDC in the year 1978. He was later promoted and appointed as a Junior Executive Trainee. Thereafter he was promoted as Assistant Manager in the year 1989. It is the petitioner's case that in November 2003 ITDC introduced a Scheme of Voluntary Retirement for its employees, both Executive and Non-Executive. The petitioner found himself eligible to apply and made an application on 19th December 2003. But ITDC had failed to reply.

However, by a letter dated 09.01.2004 the petitioner was informed that he was transferred as Deputy Manager (Hotel Operations) to Srinagar - Inter continental, the Grand Palace, Srinagar. As the said hotel was not a unit of ITDC, the petitioner made a representation claiming that as an employee of ITDC he could be transferred only to any other unit of ITDC in India or abroad, as per the terms of his employment. He therefore reported for work at Hotel Ashok, Bangalore - but he was refused entry. He was informed that the third respondent had taken over the Hotel and he was now an employee of the third respondent and that he ought to abide by the order of the transfer of the Hotel at Srinagar which was a unit of the third respondent.

It is this action of the respondents, which is sought to be challenged in this writ petition.

4. The Counsel for the petitioners in these petitions contends as follows:

The action of the third respondent, in both the petitions, namely, M/s. Bharat Hotels has no authority to transfer the petitioners to one of its own units. The petitioners being employees of ITDC are bound by the Service Regulations of ITDC - which only provides transfer from one unit of ITDC to another.

The third respondent is only a lessee of Hotel Ashok Bangalore there is at best a transfer of Management and not a transfer of ownership. There is hence no jural relationship of employer and employee as between the petitioners and the third respondent.

It is contended even the very lease-cum-management Agreement does not authorize the third respondent to transfer employees of Hotel Ashok Bangalore to

any of the hotels of the third respondent.

It is also contended that there being no privity of contract between the petitioners and the third respondent - there can be no variance with the terms of service conditions existing between the petitioners and ITDC, on the footing that there is any agreement between ITDC and third respondent.

It is urged that the contingency of termination of the lease agreement between ITDC and the third respondent is not an impossibility. The petitioners who are sought to be transferred to other units of the third respondent - do report for if duty therein - and in the meanwhile" the lease agreement is terminated, the petitioners who continue to be employees of ITDC will have to be reverted. But may in fact be left in the lurch as there may be a situation of the petitioners not being capable of being accommodated in the mainstream of ITDC.

It is further contended on behalf of the petitioner, in the second of these petitions, that over 320 employees of ITDC have been offered the voluntary retirement scheme benefit but this petitioner is discriminated against and is denied the same.

It is contended that the petitioners who have been employees in the public sector over the years have been forced into the private sector. And in the event of the nebulous agreement between the third respondent and ITDC being revoked for one reason or the other - the effect on transfers and re-location of employees of ITDC is not contemplated under the agreement and hence the same is opposed to public policy.

5. Per contra, Kumar Krupa Frontier Hotels Limited has contended that it is formed for the purpose of disinvestment of ITDC and pursuant to a Scheme of de-merger all employees of ITDC at Hotel Ashok became its employees on the same terms and conditions as applicable on the date of transfer. The appointed date being 31.03.2000.

Further, with effect from 29.11.2000 in terms of the lease-cum-management Agreement between itself and Respondent No. 3-all employees stood transferred to respondent No. 3. It is contended that Article 13 of the Agreement adequately safeguards their interest and hence there can be no complaint on the part of the petitioners.

6. Respondent No. 3 on the other hand contends that it is not an instrumentality of State and hence the writ petition is not maintainable against it. Further, the orders of transfer made by it could not be challenged in the present writ petition. It is contended that the Management of Hotel Ashok, Bangalore is taken over by it in entirety for a period of 30 years. This includes the services of the employees with continuity of service of terms and conditions not inferior to the terms and conditions applicable to employees on the closing date; As to whether there would be any employer-employee relationship between the petitioners and respondent No. 3 is no longer res-integra and stands concluded by a decision of

this court in W.P. No. 2501/2002 wherein it was held all those employees whose names find place at Annexure - B to the Lease-cum-Management Agreement dated 29.11.2001 would be employees of the third respondent. It is therefore contended that there is no bar to transfer the petitioners to any of its other hotels in India.

In the above background the questions that would arise for consideration is whether respondent No. 3 would be amenable to the writ jurisdiction of this court and secondly whether the impugned orders could be sustained in the face of material available on record.

While the competence and permissibility of ITDC entering into Scheme of De-merger through the medium of M/s. Kumar Krupa Frontier Hotels and the subsequent Lease-cum-Management Agreement as between the third respondent and the said company - though cannot be called in question, it is the scope and effect of the Agreement on the petitioners, which arises for consideration.

It is seen that the Agreement is for a prescribed term and is terminable in terms of Article 17 thereto. In which event, it ought to be construed that Respondent No. 3 acts as an agent of ITDC and has all the control that ITDC possessed over its employees, immediately prior to the appointed date of commencement of the agreement. And the same is clearly in respect of the business of Hotel Ashok, Bangalore and the Restaurant at the Bangalore Airport and does not concern any other unit either of ITDC or the third respondent.

Article 13 of the Agreement which is cited by the respondents is reproduced hereunder for ready reference:

13.1 The Lessee/Licensee shall offer employment to all the regular employees on the terms and conditions that shall not be inferior to the terms and conditions as applicable to the regular employees on the Closing Date and upon terms of continuity of service including with respect to the existing voluntary retirement scheme as applicable under the guidelines of the Department of Public Enterprises, if any, and terms set out in agreements entered into by the Lessor/Licensor in relation to such regular employees with staff/workers unions/associations. The Lessee/Licensee further covenants that:

(i) It shall not retrench any of its regular employees for a period of one year from the Closing Date other than any dismissal or termination of regular employees from their employment in accordance with the applicable staff regulations and standing orders of the Lessor/Licensor or applicable law.

(ii) The services of the regular employees will not be interrupted.

(iii) Any restructuring of the labour force in the Hotel shall be implemented in the manner recommended by the Board of Directors of the Lessee/Licensee and in accordance with applicable laws. In the event of any reduction of the strength of the regular employees, the Lessee/Licensee shall offer the regular employees an option to voluntarily retire or terms that are not in any manner, less favourable

than (a) the voluntary retirement scheme of the Lessor/Licensor as applicable as per the guidelines of the Department of Public Enterprises as of the Closing Date and (b) the benefits/compensation required to be statutorily given to an employee under applicable law. The compensation shall be determined on the basis that the services of the regular employees have been continuous and uninterrupted.

(iv) In respect of contract employees the terms and conditions of the relevant contracts shall be fully observed by the Lessee/Licensee and it shall keep the Lessor/Licensor and ITDC indemnified against damages, losses or claims resulting on account of the Lessee/Licensee failing to observe any of the terms and conditions of such contracts.

It is clear from the above that respondent No. 3 is required to continue the regular employees in service in the "Hotel" (as defined in Article 111(o) of the Agreement. There is no provision for transfer to any other hotel. The alternative to reduce the employee strength at Hotel Ashok is made available to the third respondent by offering an option to voluntarily retire on terms that are not in any manner, less favourable than the voluntary retirement scheme of the lessor as on the closing date.

Hence respondent No. 3, claiming the authority to transfer the petitioners to other units belonging to it is not to be found under the agreement, on a plain reading of the same.

Further, a decision of the Apex Court in the case of BCPP Mazdoor Sangh and Another Vs. N.T.P.C. and Others, ? which has considered similar questions clinches the case in favour of the petitioners. In that case, the appellants were employers of National Thermal Power Corporation (NTPC). It transpires that when steps were being taken to transfer them to Bharat Aluminum Company Limited (BALCO) which was originally a Public Sector Undertaking - the Government of India under a policy of disinvestment had vested the entire management to M/s. Sterlite, a Private Sector Undertaking. Aggrieved by the transfer from a Public Sector Undertaking to a privately managed unit, they had approached the High Court of Chattisgarh, Bilaspur by way of a writ petition. They primarily challenged/Clause under an agreement which unilaterally changed their service conditions when they were not parties to the agreement. The Apex Court while dealing with the issues has held as follows:

21. It is not in dispute that NTPC is a public sector undertaking wholly owned by the Government of India. Likewise, initially BALCO was also a public sector undertaking and BCPP is wholly owned by BALCO which was set up for production of power for their units. Subsequently in the year 2001, by virtue of disinvestment policy of the Government of India, BALCO including BCPP were transferred to M/s. Sterlite which is a private concern. Though the agreement between BALCO and NTPC was entered into on 22.05.1990 enabling the NPTC to manage, operate, supervise, maintain and control BCPP in all aspects, as per

Clause 21.0, the terms and conditions deemed to come into operation from 29.06.1987. Learned senior Counsel appearing for the appellants, by placing the relevant materials, submitted that most of the employees were appointed prior to the agreement dated 22.05.1990, however, admittedly they were not parties to the agreement. In other words, according to the employees, the said agreement was only bipartite i.e., between BALCO and NTPC and that they were on the rolls of NPTC on the date of the said Agreement without there being party various terms and conditions which affect their services are not enforceable against them. The appointment letters of employees are annexed in Vol.II of the appeal paper book which clearly show that they were appointed in the year 1987. It is not in dispute that the Agreement was executed on 22.05.1990. In order to bind these employees, the management could have executed a tripartite Agreement by taking their consent. At this juncture, it is relevant to mention that even as per the Agreement, particularly, Clause 16.3 insists that in the event of transfer to the successor organisation or new management, the terms and conditions of such transfer shall not be inferior to those enjoyed by the employees on the date of transfer. Learned senior Counsel appearing for the employees pointed out that inasmuch as these persons provided more benefits as per the Standing Orders/Rules of NTPC and if the transfer is implemented, all the non-executive employees have to work with a private concern with less benefits and privileges compared to NTPC which is a public sector undertaking.

22. The bipartite Agreement between NTPC and BALCO was entered into on 22.05.1990. It is brought to our notice that the appointments of 236 employees are made prior to 22.05.1990 and at the time of recruitment and appointment by NTPC, no agreement between NTPC and BALCO was in existence empowering NPTC to make recruitment and appointment on behalf of BALCO. Therefore, as rightly pointed out by learned senior Counsel for the employees, the provision made in Clause 21.0 of the Agreement, the effective date and duration of Agreement w.e.f. 29.06.1987 is contrary to the provisions of Section 23 of the Indian Contract Act and also violative of Article 14 of the Constitution of India. By virtue of the aforesaid clause, the service condition has been admitted to be changed to the employees by giving effect to the Agreement dated 22.05.1990 w.e.f. 29.06.1987. Even during the course of arguments made prior to 22.05.1990 cannot be termed in furtherance of the Agreement dated 22.05.1990. In such circumstances, the finding of the High Court that the services of the employees appointed by NTPC are transferable to BALCO in the light of the provisions made in Clauses 8.2 and 16.3 of the bipartite Agreement dated 22.05.1990 between NTPC and BALCO is not acceptable. Even for the sake of argument, it was admitted that the power of attorney was given to NPTC pursuant to the Agreement dated 22.05.1990 and 29.05.1991, it is only those employees who have been appointed by NPTC on behalf of BALCO, pursuant to the said power of attorney, can only be transferred to BALCO.

And has further held as follows:

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

...It is now a well established principle of law that there can be no deprivation or curtailment of any existing right, advantage or benefit enjoyed by a Government servant without complying with the rules of natural justice by giving the Government servant concerned an opportunity of being heard. Any arbitrary or whimsical exercise of power prejudicially affecting the existing conditions of service of a Government servant will offend against the provision of Article 14 of the Constitution. Admittedly, the employees of C0R1L were not given an opportunity of hearing or representing their case before the impugned circular was issued by the Board of Directors. The impugned circular cannot, therefore, be sustained as it offends against the Rules of natural justice.

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

7. ...The Centre of Post-Graduate Studies was set up at Imphal as an activity of the appellant-University. To given expression to that activity, the appellant-University set up and organised the Centre at Imphal and appointed a teaching and administrative staff to man it. Since the Centre represented an activity of the appellant-University the teaching and administrative staff must be understood as employees of the appellant-University. In the case of the respondent, there can be no doubt whatever that he was and continues to be, an employee of the appellant-University. There is also no doubt that his employment could not be transferred by the appellant-University to the Manipur University without his consent notwithstanding any statutory provision to that effect whether in the Manipur University Act or elsewhere. The contract of service entered into by the respondent was a contract with the appellant-University and no law can convert that contract into a contract between the respondent and the Manipur University

without simultaneously making it, either expressly or by necessary implication, subject to the respondents consent. When the Manipur University Act provides for the transfer of the services of the staff working at the Centre of Post-graduate Studies, Imphal, to employment in the Manipur University, it must be construed as a provision enabling such transfer of employment but only on the assumption that the employee concerned is a consenting party to such transfer. It makes no difference that the respondent was not shown in the list of Assistant professors of the appellant-University or that the provision was not indicated in its budget: that must be regarded as proceeding from an erroneous conception of the status of the respondent. The position in law is clear, that no employee can be transferred, without his consent, from one employer to another. The consent may be express or implied. We do not find it necessary to refer to any case law in support of this conclusion.

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

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

7. In the light of the above and in the circumstances of the case ITDC is not absolved of its obligation to be answerable to the petitioners merely on account of the Scheme of de-merger and transfer of its properties at Hotel Ashok Bangalore in favour of respondent No. 3 insofar as the petitioners are concerned.

Respondent No. 3 acts in the stead of ITDC insofar as their service conditions are concerned - it can also be said that respondent No. 3 is not however, conferred with any authority to transfer the petitioners to any other unit either of ITDC or its own. Such an agreement which has in effect changed the service conditions of the petitioners without their consent would require the impugned orders to be set at naught.

Accordingly, the impugned orders at Annexure - M and N in W.P. No. 28700/2003 and Annexure - E and H in W.P. No. 5791/2004 and hereby quashed.

One other contention of the petitioner in respect of his letter of resignation having been withdrawn before it could be accepted is found tenable. Hence, the letter dated 24.12.2003, issued by the third respondent is quashed, as the resignation was withdrawn prior to the same.

The petitioners shall be continued in service on the same terms and conditions. In the light of the petitioners not having rendered any service during the pendency of these petitions, they shall be entitled to 40% of their salary from the date of the petition till date. The respondent No. 3 shall also consider the

application of the petitioner in W.P. No. 5791/2004 seeking Voluntary Retirement, prospectively, from the date of this order.