
(1976) 09 PAT CK 0017
In the Patna High Court
Case No : C.W.J.C. No. 390 of 1971

Sunil Kumar Roy	Vs	APPELLANT
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 14-09-1976

Acts Referred:

Constitution of India, 1950 — Article 258
Industrial Disputes Act, 1947 — Section 10, 2, 7A

Citation : (1977) 25 BLJR 257

Hon'ble Judges : S.K. Choudhuri, J;B.D. Singh, J

Bench : Division Bench

Judgement

S.K. Choudhari, J.—In this writ application the petitioner who was carrying on business under the trade name Bhowra Coke Company as the sole proprietor challenges the award of the Central Government Industrial Tribunal (No. 3) at Dhanbad, respondent No. 2 passed in reference case No. 79 of 1968 dated the 30th September, 1970 (annexure 13 to the writ application) by which the termination of the service of S.C. Chakravarty alias Sudhir Chandra Chakarvarty (respondent No. 3) has been declared to be unjustified and held entitled to be reinstated with full back wages, allowances, bonus and all other dues as if he was in employment throughout from the date of his suspension till his reinstatement. The petitioner also prays for issue of a writ of mandamus commanding upon the Union of India through the Under Secretary to the Government of India in the Ministry of Labour, Employment and Rehabilitation (Department of Labour and Employment, New Delhi, respondent No. 1) and the Presiding Officer, Central Government Industrial Tribunal No. 3 at Dhanbad (respondent No. 2) not to give effect to the aforesaid award.

2. In order to appreciate the points raised in this writ application I shall state the relevant facts:

The petitioner was carrying on business under the trade name Bhowra Coke Company and he had his coking plant at Bhowra, district Dhanbad. Apart from

the coking plant the petitioner had also a Fire-brick Plant within the same compound. According to the petitioner Respondent No. 3 was an employee of the petitioner and posted in the coking plant at Bhowra.

It may be stated here that the petitioner was a lessee under the Eastern Coal Company Ltd. in respect of land upon which the coke plant and fire-brick plant were situate. It is said that some time in the year 1953 the aforesaid Eastern Company Ltd. transferred their rights in the land to Bhowra Kankanee Collieries Ltd. It is said that after the aforesaid transfer the transferee company raised certain objections regarding the running of the fire-brick plant on the aforesaid lease-hold land by the petitioner. In consequence of which he was compelled to shift his fire-brick plant in 1958 to a place known as Kumar Juri, district Dhanbad about 30 miles from its original site.

3. By a letter dated the 16th August, 1960 (Annexure 1) issued by the Works Manager of the Bhowra Coke Plant to respondent No. 3, he was transferred from the coke plant at Bhowra to the fire-brick plant at Kumar Juri on the same emoluments which he was drawing over and above a personal allowance of Rs. 10/- only. He was also directed by the said letter to report to duty on 18th August, 1960 and vacate the quarter which he was occupying at Bhowra and occupy the quarter at Kumar Juri. It is said that respondent No. 3 did not obey the aforesaid order of transfer and wrote a letter on the next day, namely, the 17th August, 1960 (Annexure 2) asserting therein that his services were not transferable. Thereafter respondent No. 3 was served with a charge sheet contained in the letter dated the 20th August, 1960 (Annexure 3) asking him to show cause against the charges and if the same is proved why he should not be dismissed. In pursuance of the aforesaid charge sheet and the notice, the workman, respondent No. 3 showed cause, a copy of which is made annexure 4 to the writ application. Thereafter a departmental enquiry was held by the Works Manager of the Bhowra Coke Company in which respondent No. 3 participated, his statement was recorded which, according to the petitioner, respondent No. 3 refused to sign and ultimately the enquiry officer by his report on 3rd September, 1960 found him guilty and submitted the same along with the deposition of the workman recorded by him. The enquiry report and the deposition of the workman have been collectively marked as annexure 5. According to the petitioner, the report was thereafter considered and by letter dated the 6th. September, 1960 (Annexure 6) the service of Respondent No. 3 was terminated for mis-conduct which was proved against him. This letter of termination, it is alleged by the petitioner, was received by respondent No. 3 on the 9th September, 1960.

4. It appears that after the dismissal of the workman, respondent No. 3 conciliation officer was approached. According to the petitioner the Assistant Labour Commissioner (Central) Dhanbad II, respondent No. 5 who was the conciliation officer called upon the petitioner to attend the conciliation meeting to be held on the 30th December, 1966, but the management by their letter dated

the 26th December, 1960 expressed their inability to negotiate as the dispute was initiated by an un-recognised trade union. According to the petitioner, the management received the notice dated the 3rd January, 1967 from the aforesaid conciliation officer intimating to it that the General Secretary of the Coke Plant Majdoor Seva Sangh, Bhowra (respondent No. 4) had raised a dispute about the wrongful dismissal of respondent No. 3 for which a conciliation would be held on the 30th December, 1966, but the management by their letter dated the 26th December, 1960 expressed their inability to sit with the aforesaid un-recognised union. A copy of the letter dated 3rd January, 1967 and the letter dated the 20th September, 1966 have been annexed to the writ application and collectively marked as annexure 7, Accordingly the conciliation proceeded ex-parte which resulted in failure. Thereafter by a notification dated the 3rd February, 1967 published in Part II of the Gazette of India, the Central Government in exercise of the powers conferred by Clause (d) of Sub-section (1) of Section 10 of the Industrial Disputes Act, 1947 referred the dispute mentioned in the said notification for adjudication to the Industrial Tribunal, Dhanbad constituted u/s 7A of the Act. The dispute as mentioned in the schedule of the said notification reads thus:

(a) Whether the termination of the employment of Shri S.C. Chakravarty, General Assistant by the management of Bhowra, Coke Company, Post Office Bhowra District Dhanbad with effect from the 6th September, 1960 was justified?

(b) If not to what relief is the workman entitled?

A copy of this notification is made annexure 8 to the writ application.

5. The Industrial Tribunal, Dhanbad, thereafter registered the said reference as reference case No. 10 of 1967 which was, thereafter transferred by an order of the Central Government to the Central Government Industrial Tribunal No. 2, Dhanbad, where it was registered as reference case No. 208 of 1967 which was again by the subsequent order of Central Government transferred to the Central Government Industrial Tribunal No. 3, Dhanbad (respondent No. 2) which recorded the said case as reference case No. 79 of 1968. Thereafter both the management and the workman filed their separate written statement, copies of which have been marked as annexures 9 and 10, respectively. A rejoinder was also filed by respondent No. 3 which is marked as annexure 11 to the writ application.

The tribunal, respondent No. 2 thereafter recorded the evidence adduced by the parties. On behalf of the workmen only the workman concerned, respondent No. 3 gave evidence and on behalf of the management the Works Manager and one of the workmen gave evidence. The copies of the entire evidence of the three persons have been collectively marked as annexure 12 to the writ application. After consideration of the evidence the tribunal, respondent No. 2 passed its award dated the 30th September, 1970 (Annexure 13). By the said award it held that the dispute in question was an industrial dispute, the management was

estopped from challenging that the Central Govt. was not an appropriate authority, the enquiries held by the management was neither proper nor fair and the order of transfer of respondent No. 3 by the management from Bhowra to the fire-brick plant at Kumar Juri was motivated, mala fide and illegal and was passed as an act of unfair labour practice and victimisation of the concerned workman for his union activities. It was further held that the industrial establishment namely Bhowra Coke Plant, Bhowra and the fire-brick plant at Kumar Juri were separate industrial establishments.

6. Before I state about the counter-affidavit it will be relevant to state here the undisputed fact that previously the State Government referred the dispute by notification dated the 11th November, 1961 in exercise of its powers u/s 10(1)(d) of the Industrial Disputes Act 1947 (herein after called the Act) to the Labour Court, Ranchi. The said court held that the reference passed was bad and therefore it had no jurisdiction to adjudicate upon the dispute referred to it. Against the said order of the labour court the matter came up before this Court in a writ jurisdiction at the instance of the petitioner which was recorded as M.J.C. No. 1009 of 1964. (A Bench of this Court) by an order dated the 29th April, 1966 (pointed out that originally) by notification dated the 6th May, 1958 the Central Government in exercise of power conferred on them by Clause (1) of Article 258 of the Constitution entrusted the State Government the function of the Central Government under the Act in so far as they related to an industrial dispute concerning the industrial establishments specified in the schedule and one of the establishments specified was Bhowra Coke Plant of Bhowra Coke Company; but by subsequent notification dated the 4th, October, 1960 the Central Government modified the aforesaid schedule by omitting Bhowra Coke Plant of Bhowra Coke Company from the list of the industrial establishment in respect of which the Central Government's function was entrusted with the State Government. Thus their Lordships pointed that by virtue of the said amended notification the "State Government ceased to have jurisdiction to exercise the function of the Central Government in so far as it related to industrial disputes concerning Bhowra Coke Plant of Bhowra Coke Company". Accordingly this Court held that the reference by the State Government to the Labour Court was without jurisdiction and quashed the order of reference of the State Government including the order of the Labour Court holding that it had jurisdiction to try the reference case.

7. A counter-affidavit has been filed on behalf of respondents No. 3 and 4 in which they have alleged that respondent No. 3 was an employee of the Coke Plant at Bhowra. They supported the award passed by the tribunal, respondent No. 2 and have submitted that the dismissal/termination order of the workman respondent No. 3 was mala fide and passed as a result of victimisation. It has been asserted therein that the transfer order in question was illegal and the job of the workman concerned was not transferable. It is also alleged that two establishments, namely, Coke Plant, Bhowra and the fire-brick plant at Kumar Juri were separate establishments and one had nothing to do with the other. In

the counter-affidavit it has also been alleged that the enquiry was not held in presence of the concerned workman and he never participated nor made any statement in the enquiry. They have also supported that the order of reference made by the Central Government was valid and that the petitioner is estopped from challenging the competency of reference.

8. Mr. K.D. Chatterjee, learned Counsel appearing on behalf of the petitioner in the first instance contended that this Court on the previous occasion in M.J.C. 1009 of 1964 decided on 29.4.66 having quashed the reference and no dispute having been raised there after, the Central Government was not justified in referring the said original dispute, which had by that time become stale and dead, to the Industrial Tribunal by publishing a notification dated the 3rd February, 1967 contained in annexure 8. He elaborated his argument by contending that respondent No. 3 was dismissed as far back as in the year 1960, and therefore after the order of the High Court quashing the previous reference by the State Government to the Labour Court, it was necessary in law that respondent No. 3 or the Union, respondent No. 4 would have raised the dispute in question again with the management by making a demand. He pointed out that no such demand was made before the management nor the management refused the same. He referred before us a letter dated the 20th September, 1966 (Part of annexure 7) written by the General Secretary of the Union, respondent No. 4 to the Assistant Labour Commissioner (Central), Dhanbad wherein it was stated that respondent No. 3 was a permanent employee of the Bhowra Coke Plant as a General Assistant and that he had been dismissed by the management by a letter dated the 6th September, 1960 in a most arbitrary and illegal manner to victimise him for his trade union activity. According to the learned Counsel this letter was the basis of reference and was considered by the authorities concerned to be a dispute raised on behalf of respondent No. 3. He therefore contended that the conciliation proceeding started on the basis of this letter by respondent No. 5 and the consequent reference made to the Industrial Tribunal under annexure 8 on failure of the conciliation proceeding were illegal and without jurisdiction.

9. Mr. Ranen Roy, learned Counsel, appearing on behalf of respondents 3 and 4, namely, the workman concerned and the Union contended that the point raised by learned Counsel for the petitioner that the reference was bad as no dispute was raised with the management has been taken for the first time before this Court and it was not at all raised before the tribunal. He pointed out by referring to the award, annexure 13 that the only point that was argued before the tribunal was that the dispute in question was an individual dispute and not an industrial dispute. The non-maintainability of the reference was not at all challenged there and as such the petitioner should not be allowed to raise this point for the first time before this Court. He further pointed out that the question whether demand was raised with the management on behalf of the workman concerned or not is a question of fact and if the said objection would have been taken before the tribunal then respondents 3 and 4 would have got an

opportunity to meet the said point by adducing evidence to the effect that in fact demand was made from the management which was refused and thereafter a letter was written to the conciliation officer, the respondent No. 5 to take up the matter. He, therefore, contended that it being a question of fact and if this point is allowed to be raised before this Court for the first time then respondents 3 and 4 would be greatly prejudiced. In my opinion this submission of Mr. Roy has great force and has to be accepted. Apart from fact of prejudice, on perusal of the previous judgment of this Court passed in M.J.C. 1009 of 1964 dated the 29th April, 1966 it is manifest that this Court did not enter into the merits of the case but decided the same on a point of law. It accordingly quashed the reference made by the State Government to the Labour Court holding that the State Government had no jurisdiction to refer the dispute. There also, the point that no dispute was raised on behalf of the workman concerned and therefore the reference made by the State Government was illegal, and without jurisdiction was not raised. It has not been argued by Mr. Chatterji that, no dispute was even raised before 11th November, 1961, on which date for the first time the State Government referred the dispute in question to the Labour Court. In my opinion, once having raised the dispute after the termination of the service of respondent No. 3 the same would continue unless the management shows that such dispute was either settled or ended by compromise or otherwise. In this case the learned Counsel for the petitioner has failed to point out any material to show that the dispute which was initially raised before 11th November, 1961 regarding the illegal termination of service of respondent No. 3 was at any time ended and therefore after the judgment of this Court in M.J.C. 1009 of 1964 dated the 29th April, 1966 it was necessary for respondents No. 3 and 4 to raise the same again in order to make the reference contained in annexure 8 competent.

Mr. Chatterji tried to support his contention by citing the case of *Members of the Sasamusa Workers Union Vs. State of Bihar and Others*, and *Sindhu Resettlement Corporation Ltd. v. Industrial Tribunal of Gujrat* AIR 1968 S.C. 1529 I will show immediately that both the cases are distinguishable on facts and are not authorities in support of the proposition raised by Mr. Chatterji. In the Patna case 44 specific demands were mentioned in the notice of strike served on the factory management. The Labour Officer made enquiries and submitted a report. The Labour Commissioner wrote to the Secretary of the Workers Union requesting him to attend a meeting and intimating that the strike would be illegal in view of the fact that the conciliation proceeding had already started. It appears that shortly there after the State Government referred four matters out of the aforesaid 44 matters as industrial disputes u/s 10(1) of the Act. It was contended before the High Court that the State Government could have referred only four matters leaving others. While negating the said contention their Lordships pointed out that there was no material in that case that there was industrial dispute with reference to 44 demands specified in the strike notice nor the counsel could point out that the notice of strike was in fact served upon management or that reasonable opportunity was given to the latter to comply

with the demands. Their Lordships therefore held "it is impossible to hold upon the materials furnished that there was "industrial dispute" with reference to the "44 demands" within the meaning of Section 2(k) of the Industrial Disputes Act". This this case is distinguishable on its own facts.

In the aforesaid Supreme Court case it was argued that no dispute relating to retrenchment having been actually raised before the reference was made to the industrial tribunal by the Government of Gujrat the reference itself was without jurisdiction. Their Lordships of the Supreme Court while dealing with the said point pointed out that the respondent in that case put forward before the management appellant claim for payment of retrenchment compensation and did not raise any dispute for reinstatement and the "State Government was not competent to refer a question of reinstatement as an industrial dispute for adjudication by the tribunal". In that decision it has also been held. "If no dispute at all was raised by the respondents with the management, any request sent by them to the Government would only be a demand by them and not an industrial dispute between them and their employer. An industrial dispute, as defined, must be a dispute between the employers and employers, employers and workmen, and workmen and workmen. A mere demand to a Government, without a dispute being raised by the workmen with their employer, can not become an industrial dispute".

10. The dictum laid down in the aforesaid Supreme Court decision has not been challenged by Mr. Roy, learned Counsel appearing on behalf of respondents 3 and 4. It has been rightly pointed out by him, as already discussed by me above, that the question whether a dispute was raised or not is a question of fact and if allowed to be raised before this Court the workman concerned would be prejudiced. It has also been rightly pointed out that it is no body's case that the dispute was not raised regarding the dismissal of respondent No. 3 before the reference was made by the State Government on the 11th November, 1961. In view of the reasons discussed above I negative this contention of Mr. Chatterjee and hold that the tribunal had rightly decided that the reference made under annexure 8 to the industrial tribunal of the disputed question was valid in law.

11. The next question raised by Mr. Chatterji, learned Counsel appearing for the petitioner was that the finding of mala fides given by the tribunal, respondent No. 2 is based on the sole ground that respondent No. 3 was dismissed from service by letter dated the 16th August, 1960 (Annexure 1), as he formed a union, intimation of which was given to the management on the 9th August, 1960 and therefore the said finding cannot be sustained in law. He contended that there should be strong grounds for coming to a finding of mala fides and the tribunal misdirected itself in holding mala fide the action of the management on the sole ground stated above. It has been pointed out by Mr. Chatterji that the Letter dated the 9th August, 1960 under which, according to respondent No. 3 an intimation was given to the Personal Assistant of the Works Manager was challenged on behalf of the management to be a fabricated document. He drew

our attention to the evidence of respondent No. 3 recorded before the tribunal, respondent No. 2 wherein it was suggested that the said document which was marked as Ext. W/16 and the purported receipt marked as Ext. W/17 which is alleged to have been granted after handing over of the letter dated the 9th August, 1960, were fabricated. Our attention was drawn to paragraph 17 of the award (annexure 13) wherein the tribunal itself noted the management's case that the union, respondent No. 4 was registered on the 27th December, 1960 and information regarding its formation was given to the management on the 26th September, 1960 (Vide annexure M/16). Learned Counsel for respondent No. 3 on the other hand tried to support the finding of mala fides by contending that the said finding is a finding of fact not vitiated by any error of law. We were taken through the relevant portion of the award (Annexure 13) wherein this point has been discussed. It has been rightly pointed out by Mr. Chatterji that the management challenged the letter Ext. W/16 and the receipt Ext. W/17 to be fabricated documents and that the management got exhibited a document as Ext. M/16 which has not been taken into consideration at all and the tribunal decided the issue of mala fides taking the aforesaid letter Ext. W/16 and the receipt Ext. W/17 as genuine. No other evidence has been pointed out by learned Counsel appearing on behalf of respondent No. 3 to support the finding of mala fides recorded by the tribunal nor it has been shown that the tribunal has taken into consideration any other relevant material to come to such a finding.

Mr. Chatterji, drew our attention to the case of The Management of the Syndicate Bank Ltd. Vs. The Workmen, and to the case of Bareilly Electricity Supply Co. Ltd. v. Sirajuddin 1960 I LLJ 556 both being the decisions of the Supreme Court, for the proposition that a finding of mala fides should be reached by the Industrial Tribunal only if there was sufficient and proper evidence to support such a finding and should not be reached capriciously or on flimsy grounds. After coming to the Conclusion that the finding of mala fides is not supportable in law the Supreme Court set aside the said finding recorded in the Syndicate Bank's Case (supra) and allowed the appeal In that case the principle laid down in Bareilly Electricity Supply Co's. case (supra) has been followed.

12. After giving my considered opinion keeping in mind the principle laid down in the aforesaid decisions, I am of the opinion, that the finding recorded by the tribunal that the order of transfer was mala fide cannot be supported in law and has to be set aside.

13. The next important question which falls for consideration is as to whether the transfer order dated the 16th August, 1960 contained in annexure 1 was valid and passed in accordance with law. It may be stated here that by annexure 1 respondent No. 3 who was working as an employee of Bhowra coke plant was transferred to fire-brick plant at Kumar Juri a distance of 30 miles from Bhowra. It has been argued by Mr. Chatterji that the two establishments, namely, the coke plant at Bhowra and the fire-brick plant at Kumar Juri were owned at the relevant time by the same person, namely, the petitioner and initially those two

establishments were situate within the same compound. He further contended that some of the fire bricks which were used to be produced in the fire brick-plant, were utilised in the coke plant at Bhowra. According to the learned Counsel the service condition of both the plants were governed by a common standing order, a copy of which has been made annexure 14 to the writ application and there was unity of employment and management and therefore the management was entitled to transfer respondent No. 3 from one establishment to another. It may be pointed out here that Mr. Chatterji was right in contending on the basis of Supreme Court decision in *Workmen Lakheri Cement Works Ltd. v. Associated Cement Co. Ltd.* 1970 38 F.I.R. 342 that the standing Order, annexure 14 could not make a provision for transfer of an employee from one establishment to another as the said matter not being mentioned in the schedule of the Industrial Employment (Standing orders) Act, 1946, would be a complete nullity. According to him an employee from a coke plant to the fire-brick plant can be transferred under the service condition or under any statutory provision. He further contended that the right of transfer was an inherent right in the management and should not be inferred otherwise.

14. On the other hand it was contended by Mr. Roy on behalf of the workman, respondent No. 3 that the service condition of the workman concerned did not permit him to transfer from the coke plant to the fire-brick plant and that there is no statute under which such transfer could be made. He further refuted the contention put forward by Mr. Chatterji regarding the unity of employment and management in the two establishments in question. He strongly objected to the action of the management in not producing the relevant documents which were in the custody of the petitioner to support the contentions, if any, put forward by Mr. Chatterji to show that there was a functional integrality or general unity between the two establishments.

15. Several decisions were cited at the Bar namely the *The Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani Vs. Their Workmen*, *Management of Pratap Press, New Delhi Vs. Secretary, Delhi Press Workers' Union and Its Workmen*, and *Management of the D.C.M. Chemical Works Vs. Their Workmen*, to show that the Court has to consider as to how far there was "functional integrality" meaning thereby such functional interdependence that one unit cannot exist conveniently and reasonably without the other and on the further question whether in the matters of finance and employment the employer had actually kept two units distinct or integrated. In the case of *Management of Pratap Press (supra)* their Lordships referred to the case of *Associated Cement Company (supra)* and has laid down the proposition which reads thus:

...Of all these tests the most important appears to us to be that of functional "intergrality" and the question of unity of finance and employment and of labour. Unity of ownership exists ex hypothesi. Where two units belong to a proprietor there is almost always likelihood also of unity of management. In all such cases therefore the Court has to consider with care how far there is "functional

integrality" meaning thereby such functional interdependence that one unit cannot exist conveniently and reasonably without the other and on the further question in matters of finance and employment the employers has actually kept the two units distinct or integrated.

Again Mr. Roy, learned Counsel appearing for the workman, respondent No. 3 has not challenged the aforesaid proposition but he contended that he would show that the aforesaid two establishments could not at any time be considered to be one unit. It has been pointed out with reference to the evidence of the two persons examined on behalf of the management that initially in 1946 when Bhowra Coke Company took lease from Eastern Coal Company there was no fire brick plant in the lease hold property but the same was established thereafter. Reference was made to the evidence of Mr. C.S. Mukhetji who stated that in 1946 the lease was taken by Bhowra Coke Company from Eastern Coal Company. The other witness namely Khedu Mahto who is working in the Coke plant since before the purchase by Bhowra Coke Company stated that formerly the Coke plant belonged to an English Firm. He further stated that the fire-brick plant was not there when it was owned by the English Firm. The tribunal in its award has also expressly stated that fire brick plant was not in existence when the Eastern Coal Company granted lease in the year 1946 and that the fire-brick plant was not in their original lease. The tribunal has further recorded that the fire-brick plant came into existence after the lease was granted to Bhowra Coke Company in the year 1946. This position has not been challenged by Mr. Chatterji learned Counsel appearing for the petitioner. It further appears that Mr. Roy was correct in his submission when he pointed out that the case of the management that both the plants were under one manager was not true. In support of this contention he referred to us a letter of transfer annexure 1 itself wherein it is stated that respondent No. 3 was directed to report to duty before the "fire-brick plant manager." Thus it appears that in fact there were two managers, one for the coke plant at Bhowra and the other for fire-brick plant at Kumar Juri.

It also appears that the management has failed to prove that there was unity of employment and that there was common management of the two establishments in question. The tribunal has considered this point elaborately in its award in annexure 13 after the discussion of all the materials on the record. From the standing order Annexure 14 it appears clear that the said order would govern all the employees of the coke plant at Bhowra. On the basis of this express provision in the said standing order it is difficult to accept the contention put forward on behalf of the petitioner that the said standing order was also applicable to the case of the employees of the firebrick plant. We were taken through the relevant portion of the award where this point has been discussed elaborately, namely, from paragraph 63 onwards. I have already stated that the tribunal noted the fact that the fire-brick plant came into existence after lease was taken by Bhowra Coke in 1946. The Tribunal also pointed out that fire-brick plant on objection being raised by the transferee lessor Karamchand Thappar (P.) Ltd. to the continuance of the firebrick plant in the premises at Bhowra, the petitioner had

to shift the said plant to Kumar Juri in 1957, a distance of 30 miles from Bhowra. It will be relevant to state here that not a chit of paper was produced on behalf of the management to show that the employees of one plant were used to be transferred or exchanged with the employees of the other plant. Not a single instance has been cited wherein it has been shown that an employee of the coke plant from Bhowra was transferred to fire-brick plant. The oral testimony of the two witnesses examined on behalf of the petitioner which could very well be supported by the production of the papers by the management in their possession to show the functional intergrality between the two establishments. In the said circumstances the mere oral testimony was not sufficient. It has been rightly pointed out by Mr. Roy that if the Coke plant would have depended upon the existence and production of the fire-brick plant, then the petitioner could not have sold the fire-brick plant to a third party. Further there was no fire-brick plant initially in 1946 when lease was taken by the petitioner and still the coke plant could smoothly run without a fire-brick plant. It has therefore, in my opinion been rightly held by the tribunal that the two establishments were different establishments and employee of one establishment could not be transferred to the other establishment. The petitioner has thus failed to show functional integrality between the two establishments. No law or statute has been shown to support the transfer order contained in annexure as valid neither any condition of service was shown under which respondent No. 3 could be transferred from the coke plant to fire-brick plant. The only evidence which was led on behalf of the management and that also oral in nature was that some workmen were used to be carried from Bhowra to Kumar Juri on a truck and they used to be brought back to Bhowra again the same day. This action of the management, in my opinion can by no stretch of imagination be said to be transfer of some of the employees from the coke plant to the fire-brick plant. In my opinion the petitioner has miserably failed to prove the ingredients laid down by the Supreme Court for constituting two units as one. I therefore uphold the finding recorded by the tribunal to the effect that the two establishments in question were completely separate and employee of one could not be transferred to the other establishment and therefore the order of transfer contained in annexure 1 was illegal; consequently the order of termination (annexure 6) which was passed on the basis of the enquiry held for disobedience of the said order of transfer was also bad in law.

15. I will deal here the two decisions which were referred to by M. Chatterji which I have already referred to earlier while dealing with the point of mala fide. They are the Syndicate Bank case (supra) and Bareilly Electricity Supply Co. Ltd. v. Sirajudding (supra). I will presently show neither of the two decisions support the proposition put forward by Mr. Chatterji that transfer could be made from one establishment to the other. In the Syndicate Bank case a clerk of the branch Vijayawada was transferred to the branch of Banganpalli on the same scale of pay and allowance, it appears from the decision that the order of transfer was mainly challenged on the ground of mala fides. It has been observed in that case

that it was the duty of the management to distribute its employees between the different branches it appears that in that case transfer was permissible from one branch to the other and therefore the transfer order was not challenged on the ground that the management had no authority to transfer a clerk from one branch to the other. This case is thus distinguishable on its own facts and has no application to the proposition put forward by Mr. Chatterji. In Bareilly Electricity Supply Co. Ltd. a coolie was transferred from the main department of the electric supply undertaking to the meter department. Subsequently he was retransferred to its original department. The order of retransfer was challenged. It has been held in that case that transfer of a coolie from one department to another was a matter of internal arrangement and the tribunal should be very careful before they could interfere with the orders made in the discharge of management's function in that behalf. Here also the transfer was permissible but the order was challenged on the ground of mala fides. Their Lordships however negatived the said contention and allowed the appeal. Thus the decision also has no application to the present case.

16. Mr. Chatterji also contended that the tribunal was not justified in holding that the inquiry was not made in accordance with law and as such the order of termination of service was invalid. It is not necessary for me to go into this question as I have already held that the transfer order contained in annexure I was not valid in law and consequently the order of termination of service for disobedience of the aforesaid order of transfer was illegal.

17. The only question now remains for decision is as to whether the tribunal was justified in ordering reinstatement of respondent No. 3 and payment of back wages, allowance, bonus and all other dues. It has been contended by Mr. Chatterji that the tribunal by ordering reinstatement and payment of back wages and other dues has not taken into consideration the circumstances of the present case. He contended that on the facts and in the circumstances of the case respondent No. 3 could not have been ordered to be reinstated, he, being employed elsewhere immediately after the termination of service. I may state here that Bharat Coking Coal Ltd. (B.C.C.L.) was impleaded by the order of this Court dated 10th November, 1975 as one of the respondents as the petitioner company had by that time been taken over by the Central Government under the Coal Mines Nationalisation Act, 1970 who thereafter handed over the management of the coke plant at Bhowra to B.C.C.L. Mr. Bindabanshini Pd. Sinha, learned Counsel accepted notice on behalf of the aforesaid B.C.C.L. and appeared at the time of hearing. He fully supported the argument put forward by Mr. Chatterji. He, besides supporting Mr. Chatterji, also contended that the award of the tribunal for reinstatement of respondent No. 3 could not be enforced against B.C.C.L. and therefore the said award should be set aside.

18. In support of the aforesaid argument put forward by Mr. Chatterji, respondent No. 3 was employed elsewhere after the termination of his service by the petitioner. He drew our attention to the evidence of respondent No. 3 wherein he

has stated as follows:

I am working for the Colliery Mazdoor Sangh at the Bhowra Colliery at the instance of the Union and they pay me Rs. 35/- (thirty-five) per week. I am not working under the K.C.T. in their Colliery.

Khedu Mahto who is one of the employees of the coke plant at Bhowra and examined on behalf of the management has specifically stated as follows:

At present he is working at Bhowra Colliery of K.C.T. As soon as he left his job at Bhowra Coke Company he is working at Bhowra Colliery of K.C.T.

It appears that no cross-examination was made on this point to this witness. Mr. Chatterji has contended that the evidence quoted above has not been taken into consideration at all by the tribunal while passing the order of reinstatement and payment of back wages and other dues. He contended that according to the admission of respondent No. 3 at least this much has been proved that he is working in the union and getting Rs. 35 per week i.e. Rs. 140 per month regularly and is employed there. It has been pointed by the counsel for the petitioner that while respondent No. 3 was in the employment of the petitioner he was getting Rs. 135 per month. This fact was not disputed on behalf of Respondent No. 3 by Mr. Roy. The submission of the learned Counsel for the petitioner is that since the termination of the service of the respondent No. 3 by the management he is working elsewhere and earning his livelihood has therefore to be accepted as correct. Under these circumstances it is not possible to uphold the order of reinstatement passed in favour of respondent No. 3 by the tribunal. It has been rightly pointed out that the tribunal while passing the aforesaid order of reinstatement did not take into consideration the evidence quoted above and also the previous conduct of respondent No. 3 for which he was dismissed twice and there after again reinstated. Apart from the aforesaid emolument which respondent No. 3 is earning by serving elsewhere, he by the order of this Court passed at the time of hearing the stay matter is getting Rs. 130 per month from 1st. October, 1970, that is, immediately the next day of passing of the award (Annexure 3) by the tribunal. It appears that the order of this Court was carried out regularly by the petitioner and the deposits have been withdrawn from time to time by respondent No. 3. The last withdrawal which has been made as appears from the order sheet is a sum of Rs. 910 on 15.1.1976. All the previous amounts which were deposited in this Court by virtue of the aforesaid order appear to have been withdrawn by respondent No. 3. As it has been established that respondent No. 3, since the termination of his service, is earning regularly Rs. 35 per week i.e., Rs. 140 per month which is more than his monthly emoluments which he was getting as an employee of the coke plant at Bhowra, the tribunal was not justified in passing an order for back wages from the date of his termination of his service and other dues. Taking these facts and circumstances of the case, I am of the opinion that though the transfer order of respondent No. 3 contained in Annexure 1 was not justified in law and consequently the termination of his service was also not legal and valid,

respondent No. 3 cannot be ordered to be reinstated with back wages and other dues as ordered by the tribunal as he is serving elsewhere and earning more than what he was getting from the petitioner.

19. As I have the last point in favour of the petitioner and against respondent No. 3 this application has to be allowed in part and the order of the tribunal annexure 13 has to be quashed to the extent indicated above.

20. In the result the application is allowed in part and the order of the tribunal annexure 13 dated the 30th September, 1970 is quashed to the extent indicated above. I would however like to make it clear that the petitioner would have no claim against respondent No. 3 with regard to the amounts which were deposited in this Court by virtue of an order passed at the time of the stay and withdrawn by respondent No. 3. It is further made clear that the deposit which have been made by the petitioner after the last withdrawal by respondent No. 3 will also be withdrawn by respondent No. 3. In the circumstances of the case I would make no order as to cost.