

(1997) 10 AP CK 0057

In the Andhra Pradesh High Court

Case No : Writ Petition No. 22230 of 1996

V.S.R. Murthy and Others

APPELLANT

Vs

Engineer-in-Chief (Irrigation Wing), I and C.A.D. Department,
Govt. of A.P. and Others

RESPONDENT

Date of Decision : 15-10-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 16(1), 21, 226, 41
General Clauses Act, 1897 — Section 6
Industrial Disputes Act, 1947 — Section 2
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15
Sick Industrial Companies (Special Provisions) Amendment Act, 1993 — Section 18,
26, 32

Citation : (1997) 5 ALT 696

Hon'ble Judges : P.S. Mishra, C.J.; P. Ramakrishnam Raju, J.; G. Bikshapathy, J

Bench : Full Bench

Advocate : L. Ravichander, Chayanam Ravindranath, G. Vidyasagar, A. Radhakrishna and M.A. Radhakrishna, for the Appellant; A.G., for the Respondent

Judgement

P. Ramakrishnam Raju, J.—The petitioners in these writ petitions were all employees who have put in 8 to 10 years of service in Hyderabad Allwyn Limited (for short "HAL"), which is a State Government Public Sector Undertaking, who have been deployed in various Government Departments for the past three and half years in pursuance of a Scheme settled by the Board for Industrial and Financial Reconstruction (for short "BIFR"). As the Supernumerary posts created in various Government Departments and Corporations wherein the petitioners were absorbed are abolished under G.O.Ms. No. 192, Industries & Commerce (IFR.II) Department, dated 1-10-1996 some of the above writ petitions are filed questioning the said G.O. Later A.P. Ordinance No. 25/96 was promulgated, followed by Act 14/97 for the same purpose which were also challenged in other writ petitions.

2. In the counter-affidavit filed by the Deputy Secretary to Government,

Industries & Commerce Department, it is stated that M/s. Hyderabad Allwyn Limited (HAL) became sick, consequently, reference was made to the Board for Industrial & Financial Reconstruction (BIFR), u/s 15 of Sick Industrial Companies (Special Provisions) Act, 1985 "for short, "the Act", by the State Government. In fact the State Government was already on hunt for proper entrepreneur to take over the Company. A High Power Committee was constituted which negotiated with reputed industrial houses including M/s. Voltas Limited with whom fruitful settlement reached which resulted in arriving at a scheme, according to which M/s. Voltas agreed to take over two divisions, Refrigeration and Appliances out of four divisions and the other two divisions i.e., Watch and Auto Body Building had to be formed as separate Companies. During the preparation of the draft revival scheme for HAL for approval by BIFR, labour and employees unions were consulted and during negotiations, M/s. Voltas Limited agreed to take over 5000 employees working in Refrigeration and Appliances divisions. In this process 1486 employees of the erstwhile HAL were identified as surplus and out of these employees some were consolidated wage earners, others were drawing regular scale of pay in HAL. A Cabinet Sub-Committee was constituted, vide G.O.Rt. No. 1210, Industries & Commerce (PE Cell) Department, dated 25-11-1992, to discuss with the Unions and to recommend the modalities for redeployment of these employees. Accordingly the Sub-Committee recommended redeployment of these 1486 surplus employees in Government Departments, Public Corporations and also suggested that the Government shall constitute a Committee to evolve methods for permanent absorption and rehabilitation of these employees, including setting up of a Voluntary Retirement Scheme. Government accepted the recommendations in G.O. Rt. No. 383, Industries and Commerce (PE Cell) Department, dated 31-3-1993, and directed the Managing Director, HAL to identify the 1486 employees in terms of the guidelines set out in Annexure-I of the said G.O. for allotment to various Heads of Departments, and Corporations in accordance with the said G.O. It is further stated that suitable placement of the individuals taking into account their previous service, would be decided by a Committee constituted under G.O.Rt.No. 383, dated 31-3-1993, who submitted a report on 7-4-1993 for redeployment of these employees in various Heads of Departments and Government Corporations in accordance with the guidelines, which was also accepted by the Government, and accordingly, Government issued G.O.Ms. No. 180, Industries and Commerce (PE. Cell) Department dated 28-4-1993, creating supernumerary posts in Government Departments and temporary posts in Government Corporations/Autonomous Bodies. It was further made clear in the said G.O. that final placement would be based on the recommendations of Empowered Committee constituted under G.O. Rt.No. 399, Industries and Commerce (PE Cell) Department, dated 12-4-1993 which would go into the modalities of dovetailing the available man power against available vacancies and to find suitable placement for the 1486 employees and recommend accordingly. The Committee though held several meetings could not submit its report. Meanwhile several representations were received from various Unions like TNGOS Unions, JACE & T., A.P. Secretariat

Employees Co-ordination Committee who requested the Government not to absorb the employees of Public Sector Undertakings in the districts of Hyderabad and Ranga Reddy, as it would violate the Presidential Order, popularly called "6-Point Formula". Therefore, the Government constituted a Higher Power Committee under G.O.Ms. No. 46, General Administration (SW) Department, dated 28-1-1994, to go into this question and the High Power Committee accordingly advised the Government against absorption of surplus staff of Public Sector Undertakings into Government service as the same would create unrest among Government employees who are already in service, besides creating service problems, and the Government, accordingly accepted the said recommendations on 25-8-1994. Since it is difficult to absorb these surplus employees in Government and Public Sector Undertakings where there are large number of surplus employees, these employees do not fit into the structure of Government establishments, and even the voluntary Retirement Scheme as an option, is also not found feasible, as some of the workers are on consolidated wages, while many have not completed the stipulated minimum qualifying service, or age to attract the scheme. Accordingly Government issued G.O.Ms. No. 192, Industries & Commerce (IFR.II) Department, dated 1-10-1996 and ordered that all the supernumerary posts created under G.O.Ms. No. 180, dated 28-4-1993 in various Government Departments and Corporations in which 1486 surplus employees of erstwhile HAL are working shall stand abolished with effect from November 30, 1996, subject to the following conditions:

(i) A" Special Rehabilitation Payment will be paid to all the 1486 employees in the following manner:- 1-1/2 months" pay (means Pay + DA) for every year of completed service subject to a minimum amount of Rs. 30,000/- (Rupees Thirty Thousand only),

(ii) In addition, the employees will be eligible for statutory dues as per law,

(iii) Amounts recoverable from the employees towards loans/advances outstanding shall be deducted from the Special Rehabilitation Payment to be paid to them.

3. The tenor of the counter-affidavit further shows that the Cabinet Subcommittee while submitting its report in February, 1993 merely recommended re-deployment of 1486 surplus employees in Government Departments, Public Sector Undertakings as an interim measure and that the Government should constitute a committee to evolve methods for permanent absorption and rehabilitation of these employees, including feasibility of setting up a Voluntary Retirement Scheme. The High Power Committee recommended that these 1486 employees cannot be absorbed in Government Departments and Corporations for various reasons. Even under the Memorandum of Understanding reached between the Government of A.P., Voltas Limited and erstwhile HAL on 28-3-1993 all that is agreed is that with regard to employees numbering 1486, HAL will enter into satisfactory arrangement with the Government for their deployment elsewhere. Therefore, it is clear that the Government nowhere has

agreed or undertaken to regularise/absorb permanently 1486 surplus employees of HAL.

4. The undisputed facts are:- Under G.O.Ms. No. 192, dated 1-10-1996 it is stated that the Cabinet Sub-Committee in its report submitted in February, 1993 recommended for deployment of 1486 employees in Government Departments/ Public Sector Undertakings as an interim measure and the Government should constitute a committee to evolve methods for their permanent absorption and rehabilitation, and should also consider setting up of a Voluntary Retirement Scheme. It is further re-affirmed that the Government had accepted the recommendations of the Committee constituted under G.O.Rt. No. 383, dated 31-3-1993 for re-deployment of 1486 employees, and accordingly, the Government approved in G.O.Ms. No. 180, dated 28-4-1993 the creation of supernumerary posts in Government Departments and temporary posts in Government Corporations/Autonomous Bodies, and it was observed in the said G.O. that final placement would be based on the recommendations of the Empowered Committee set up under G.O.Rt. No. 399 dated 12-4-1993. A memorandum of Understanding was reached between M/s. Voltas Limited; (2) Government of A.P. and (3) HAL on 28-3-1993, and amongst other terms and conditions, it was specifically agreed under Clause 4(3) of the said Memorandum of Understanding that as regards employees numbering 1486, HAL will enter into satisfactory arrangement with the Government of A.P. for their deployment elsewhere. The BIFR in its hearing on 4-4-1994 in the presence of the representatives of the State Government, including Secretary, Industries, Secretary, Finance, etc., observed that the representatives of the State Government have submitted that out of 1486 workers identified in various categories, about 700 to 800 workers are Casual Labourers, and about 600 are in Supervisory/Mechanical/Senior Management levels. Keeping in view of the educational qualifications, experience and their age, besides rule of reservation, they had deployed the surplus workers and wherever possible the State Government has also considered concession in age if any particular employee was being absorbed in a Corporation, where he was to be considered as a new appointee or his service to be continued without break would be decided on the basis of past precedents. However, pay of the workers would be protected. Therefore, it is observed that the State Government has undertaken to make alternate arrangement for re-deployment of 1500 surplus labour. A scheme to amalgamate HAL with M/s. Voltas Limited is also arrived at, according to which the transferee Company viz., M/s. Voltas Limited had identified number of surplus employees of the transferor-Company who would be transferred and absorbed by the Government of A.P. and the Government, vide its G.O.Ms. No. 180 dated 28-4-1993 completed the modalities for placing 1486 employees in various Government Departments and state level Public Enterprises. It is further stated that the transfer of Watch Undertaking together with the transfer of employees engaged in Watch Undertaking as also transfer of employees in Auto Division and the surplus employees as identified would be completed before

sanction of the scheme The learned Counsel for the petitioners, therefore, submits that transfer of surplus employees should be completed before the sanction of the scheme, which scheme was later sanctioned, would leave no doubt that surplus employees stand transferred to Government Departments/ Public Corporations as agreed to by the Government. However, learned Advocate-General maintains that the said transfer was only a tentative measure and no final decision was taken by the Government.

5. Therefore, the first question that falls for consideration is whether transfer of surplus employees was complete or only tentative, following Memorandum of Understanding between HAL, M/s. Voltas Limited and Government of A.P. on 28-3-1993 referred to above.

6. In G.O.Rt. No. 384 dated 31-3-1993 issued by the Government, it is stated that the Government issued the said order subject to the sanction of BIFR to effect placement of employees of Auto Division of HAL and 1486 other employees in accordance with the recommendations made by the Cabinet Sub-Committee. It is further stated that the Managing Director of HAL is requested to identify 1486 employees in terms of the guidelines set out in Annexure-I and allot the individuals to various Heads of Departments in accordance with Annexure-II. Of course it is mentioned that it is only an interim measure which would come into effect from 1-4-1993 and suitable placement of the individuals taking into account previous service rendered by them would be decided within a period of one month by the Committee constituted in G.O.Rt. No. 383 dated 31-3-1993. There is a direction to the Heads of Departments to whom the employees/workers, Supervisory Staff and Commercial staff allotted to employ them in a suitable need based manner in their offices and also in various Subordinate offices under their control situated within Twin Cities within a week of the receipt of the list of the individuals from the Managing Director, HAL. Under G.O.Rt. No. 399, dated 12-4-1993, Empowered Committee was constituted with the avowed object of dovetailing the available man power against available vacancies, to find suitable placement, consider and approve relaxation of rules as may be necessary and complete the task within a period of one month. The said Committee made its recommendations for allotment of these employees in various Government Departments/Corporations and the Government has accepted the said allotment as the best possible method of allotment in a short time frame, under G.O.Ms. No. 180, dated 28-4-1993. While accepting the said allotment, the Managing Director, HAL is requested to relieve the individuals to report to the Heads of Departments to which the individuals were allotted. Further it is mentioned that the Heads of Departments shall issue temporary posting orders to these personnel in a suitable need based manner in their own offices or in their Subordinate Offices located within Twin cities and inform the Managing Director, HAL accordingly. What is important is the Government in the said G.O. conceded that such temporary posting orders shall be in operation till final orders of allotment are issued in pursuance of the decision of the Empowered Committee referred to in Para (3) of the said G.O. This again implies

that the temporary posting orders are subject to the final orders of posting in suitable places only. Precisely the same was reiterated in G.O.Ms. No. 192 that the final placement would be based on the recommendations of the Empowered Committee set up under G.O.Rt. No. 399, dated 12-4-1993- It is the contention of the first respondent that the Committee although held several meetings could not submit its final report. In this backdrop we have to examine the effect of settlement arrived at between M/s. Voltas Limited, HAL and the State Government. It is relevant to note that in the proceedings of BIFR dated 4-4-1994 what is mentioned is that keeping in view of the Educational qualifications, experience and the age of these employees, besides rule of reservation, the State Government. had deployed the surplus workers and wherever possible it had considered concession in age and if any particular employee was being absorbed in a Corporation, whether it was a new appointment or his services continued without break would be decided on the basis of past precedents while protecting the pay of the workers. It is significant to note that the words "was being absorbed" as employed with reference to an employee, would unambiguously suggest that it was a past transaction and that the absorption was complete. What is more interesting is the statement of the Government representatives that they had deployed the surplus workers which means that they were already spread out among various Departments or Corporations. Inasmuch as the Government has informed BIFR that the transfer is complete by their representatives noted above, the Government cannot retrace its steps. However, the matter did not stop there, but it has culminated in rehabilitation, amalgamation, merger scheme by the BIFR in Case No. 631/92. It may not be out of place to mention that even as early as on 31-3-1993 in G.O.Rt. No. 384, the Government while accepting the recommendations made by the High Power Committee, the Cabinet Sub-Committee and the operating agency appointed by BIFR u/s 18 of the Act issued orders subject to the sanction of BIFR. Therefore, all the G.Os. or memos issued or decisions taken by the Government prior to 4-4-1994, are all done in anticipation of sanction of BIFR which sanction has come in the shape of a scheme in Case No. 631/92, referred to above.

7. Whether the transfer is complete or not can be found in the terms of the scheme itself. Sub-clauses (c) & (d) of Clause 9 of the Scheme of Memorandum can be usefully extracted:

"(c) The transferor Company has identified the number of surplus employees of the Transferor Company who would be transferred and absorbed by the Government of Andhra Pradesh. The Government of Andhra Pradesh has vide its Order G.O. Ms. No. 180 dated 28th April, 1993 completed the modalities for placement of 1486 employees in various Government Departments and State level Public Enterprises.

(d) The aforesaid transfer of the Watch Undertaking to the Watch Company together with the transfer of the employees engaged in or connected with the

Watch Undertaking as also the transfer of the employees in the Auto Division and the surplus employees identified as aforesaid would be completed before the sanction of this Scheme."

Therefore, these clauses in the Memorandum should set at rest the controversy regarding the finality and completion of transfer of these employees. This view of ours is reaffirmed in the scheme itself in unequivocal and categorical terms which records that the State Government has undertaken to make alternate arrangements for re-employment of 1500 surplus labour. Therefore, we are not prepared to accept the contention of the learned Advocate-General that the word "deployment" as employed either in the G.Os. mentioned supra or in the scheme referred to above would only mean temporary deployment and the Government never intended to absorb them permanently, or implementation of the scheme is incomplete. Even Sub-clause (c) of Clause 9 of the Scheme refers to G.O.Ms, No. 180, dated 28-4-1993 issued by the Government states that the surplus employees have been identified and the Government has completed the modalities for placement of these 1486 employees in various Government departments and State level Public Enterprises. Therefore, there cannot be any manner of doubt that the surplus employees have been identified and their placement in various Government departments and Public Sector Undertakings is complete.

8. In the above setting, we have to examine the next contention of the learned Counsel for the petitioners that whether the impugned Act is valid, legal and binding on the petitioners. To be more precise, the contention of Sri S. Ramachandra Rao, learned Counsel appearing for some of the petitioners in this behalf is two fold, viz., (i) the impugned enactment is beyond the legislative competence of the State Legislature; inasmuch as it trenches upon the Central Legislation, viz., Industrial Companies (Special Provisions) Amendment Act, and (ii) in view of the operation of non-obstante clause contained in the Act, the scheme envisaged u/s 18 of the Act has the same effect as a Statute and as such the State Act cannot override the Act of Parliament.

9. No doubt subjects like "State Public Services" and "State Public Service Commission" are included under item 41 of List-II in the Seventh Schedule to the Constitution. Learned Advocate-General, submits that as the subject - Public Services, is included in the State list, the State Legislature alone is competent to legislate with reference to the same. As already seen, the Parliament has already enacted Sick Industrial Companies (Special Provisions) Act, 1985. The question then is when the Central Legislation has already occupied the field, the State legislature can trench upon it. While responding to this claim, the learned Advocate-General places reliance on a decision of the Supreme Court in State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., In the said decision the main question that was raised before the Supreme Court was whether A.P. Prohibition (Amendment) Act, 1995 is beyond the legislative competence of A. P. Legislature, in view of Central enactment viz., Industries

(Development and Regulation) Act, 1951. While answering the said contention, the Apex Court held that the impugned amendment comes within the four corners of Entry 8 read with Entry 6 in List-II; inasmuch as prohibition of production and manufacture of intoxicating liquors squarely falls within those entries. The apex Court further held that when once when a particular matter is within exclusive competence of the State Legislature, it becomes prohibited field for the Union. The test propounded by the Supreme Court is that whenever a piece of legislation is challenged being beyond the competence of State Legislature, one must apply the rule of Pith & Substance and see whether the legislation falls within any of the entries in List-II. If it is so, no further question would arise and the attack upon the ground of legislative competence shall fail. Precisely this is not the case on hand. When once the scheme is approved by BIFR, the same becomes part of Statute which is binding on all parties, including the State Government. Authority can be found in Civil Appeal No. 3629 of 1997, dated 9-5-1997.

10. Sick Industrial Companies (Special Provisions) Act is a Special Act. The objects & reasons of the said enactment can be spelt out which are to rehabilitate, revive and financial restructuring of the sick industries. Section 18 empowers BIFR to frame a scheme in respect of sick industries for transfer, amalgamate, winding up, revival of sick industry. The provisions of the Act have overriding effect in view of Section 32 of the Act.

11. As some of the petitioners have challenged Ordinance No. 25/96, it is necessary to examine the provisions of the Ordinance which was published on 26th November, 1996 which inter alia, expresses that absorption of employees of Public Sector Undertakings into Public Services is not in public interest, and accordingly, expresses its disapproval of absorbing employees of Public Sector Undertakings into Public Services on the sole ground that such undertaking has become sick, or is likely to become sick, or is closed, or is likely to be closed; consequently all orders issued by the Government or other authority appointing such employees to any post in public services on any such ground shall stand cancelled with effect from 30th November, 1996. The said Ordinance was followed up by Act 14 of 1997 substantially more or less on the same lines as the Ordinance.

12. Sri S. Ramachandra Rao, learned Senior Advocate submits that these 1486 surplus employees of erstwhile HAL are not appointed or absorbed to any post in public services on or after 30th November 1996 on the sole ground that a Public Sector Undertaking in which they are working has become sick, or is likely to become sick, or closed, or is likely to be closed. The learned Counsel submits that the Government had admitted that it has deployed surplus workers wherever possible following rule of reservation etc. He further submits that inasmuch as re-deployment or transfer of these employees is complete they remain no longer the employees of the erstwhile HAL, but they have undergone transformation and became the employees of the State Government or its

Undertakings. Therefore, the Ordinance or the Act has no application to such employees. It is also contended that only the employees of those Public Sector Undertakings which have become or likely to become sick, or closed or likely to be closed alone are attracted by the provisions of this Act. Erstwhile HAL has no legal existence from or on the date of coming into force of the Ordinance or the Act, i.e., 30-11-1996 or 26-11-1996 as the case may be. The said Public Sector Undertaking which was sick once upon a time was already amalgamated and its employees transferred. He also submits that the Government in the G.Os. referred to above directed creation of supernumerary posts for purpose of allotment of petitioners and G.Os. clearly indicate that orders are issued to effect placement of these employees which in no uncertain terms clearly point out that the scheme relating to transfer of employees is complete and placement alone remains. Even in G.O.Ms. No. 180 dated 28-4-1993 it is mentioned that Heads of departments are directed to issue temporary posting orders and not orders of absorption. A conjoint reading of the earlier G.Os. read with the Scheme as settled would lead to an irresistible inference that the petitioners are no longer employees of the erstwhile HAL; that HAL itself has not become sick on the date of coming into force of the Ordinance or the Act, or is likely to become sick or closed or is likely to be closed, and as such, the provisions of the Act have no application to the petitioners. Even assuming that the transfer or absorption is not complete, even then the terms of the Scheme as envisaged under the Act will be binding on all the parties to the Scheme including the State Government.

13. Under the Sick Industries (sic. Industrial Companies) (Special Provisions) Amendment Act, 1993 any Scheme would be as good as a Statute. Such scheme is statutory in nature in view of the provisions of Section 32 of the Act. Further there is also bar of jurisdiction of a Court u/s 26 of the Act, in addition to overriding effect created u/s 32 of the Act. In view of these provisions, the Scheme is Statutory in nature and as such, any such Scheme approved under the said Act which is a Central Act cannot be defeated by a State Legislation. In case of repugnancy between Central and State Acts, the Central Act alone prevails.

14. The learned Advocate-General submits that the State has power to enact law in respect of services of its employees or public at large. It has equally power to create or destroy posts. The learned Advocate-General places reliance on a decision reported in M. Ramanatha Pillai Vs. The State of Kerala and Another, in support of his contention that the Government has the right to create or destroy posts. The question whether abolition of post is dismissal or removal within the meaning of Article 311 of Constitution of India, the apex Court observed that although abolition of post may have the consequence of termination of service, but once termination is not dismissal or removal within the meaning of Article 311 and there is no stigma, and as such, the opportunity of show cause against the penalty of dismissal or removal does not arise as there is no conferment on the person any right to hold the post after it is abolished. This decision in our view does not advance the contention of the first respondent.

15. The next decision on which reliance is placed by the learned Advocate General is in *K. Rajendran and Others Vs. State of Tamil Nadu and Others*, . The apex Court held that abolition of posts of Village Officers which was feudalistic in character and anachronisms in the modern age cannot be said to be arbitrary or unreasonable, and therefore, the impugned legislation is not a colourable one.

16. There cannot be any dispute that the Government has the power to create or destroy posts. The learned Advocate-General cited a decision reported in *I.N. Saksena v. State of M.P.*, AIR 1976 SC 2250. The Madhya Pradesh Legislature passed *M.P. Shasakia Sevak Anivarya Sevanivritti Ka Vidhimanyata Karan Adhiniyam* (5 of 1967) validating retrenchment of certain Government services, including that of the appellants thereunder despite the judgment of the Supreme Court. The Supreme Court while disposing of the appeal observed that the State Legislature derives its competence not only from Article 309, but also from Entry 41 of List-II of the Seventh Schedule, to enact a law with respect to any of the matters enumerated in List-II of the Seventh Schedule, and as such, the State Legislature has exclusive plenary power of Legislation by virtue of Article 246(3) of the Constitution. True, the competence of the State Government to enact a law in respect or any of the matters enumerated in List-II of the Seventh Schedule cannot be questioned, but the real controversy is whether the State Legislature can trench upon when the Parliament has occupied the field.

17. The learned Advocate-General next placed reliance on a decision reported in *Thinibuvanam Silk Handloom Weavers, etc. v. State of Tamil Nadu*, 1992 LaW 145. We do not find any analogy in the facts of the reported case to the facts of the case on hand.

18. Sri K.G. Kannabiran, learned Senior Advocate submitted on behalf of some of the petitioners that the impugned legislation is a colourable one. The expression colourable device has been subject-matter of a plethora of decisions. Justice Krishna Iyer in *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, speaking for the Court observed as follows:-

"Before scanning the decisions to discover the principle laid down therein, we may dispose of the contention which has appealed to the High Court based on "colourable device. Certainly, this is a malignant expression and when flung with fatal effect at a representative instrumentality like the Legislature, deserves serious reflection. If, forgetting comity, the Legislative wing charges the Judicative wing with "colourable" judgments, it will be intolerably subversive of the rule of law. Therefore, we too must restrain ourselves from making this charge except in absolutely plain cases and pause to understand the import of the doctrine of colourable exercise of public power, especially legislative power. In this branch of law, "colourable" is not "tainted" with bad faith or evil motive"; it is not pejorative or crooked. Conceptually, "colourability" is bound up with incompetency. "Colour", according to Black's Legal Dictionary, is "an appearance, semblance or simulacrum, as distinguished from what which is real.....a deceptive appearancea lack of reality". A thing is colourable which

is, in appearance only and not in reality, what it purports to be. In Indian terms, it is maya. In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law although the label of competency is stuck on it, and when it is colourable legislation. It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. To put it more relevantly to the case on hand, if a legislation, apparently enacted under one Entry in the List, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable. In other words, the letter of the law notwithstanding, what is the pith and substance of the Act? Does it fall within any entry assigned to that legislature in pith and substance, or as covered by the ancillary power implied in that Entry? Can the legislation be read down reasonably to being it within the legislature's constitutional powers? If these questions can be answered affirmatively, the law is valid. Malice or motive is beside the point, and it is not permissible to suggest Parliamentary incompetence on the score of mala fides."

19. A Division Bench of the Madras High Court (to which one of us Justice P.S. Mishra, as he then was, is a member) while considering the judgment of the Supreme Court in *P. Vajravelu Mudaliar Vs. Special Deputy Collector, Madras and Another*, , observed that "when it is said that Legislation is a colourable one, what it means is that the Legislature has transgressed its legislative power in a covert or indirect manner", in *Thinibuvanam Silk Handloom Weavers, etc. v. State of Tamil Nadu* (5 supra).

20. Therefore, what is to be seen is whether the State Legislature is incompetent to enact the impugned Legislation. This contention has to be decided on the touch stone of Article 14 of the Constitution. Legislative wisdom cannot be questioned except in exceptional circumstances. A Larger Bench consisting of Seven Judges of the Supreme Court in *Budhan Choudhry and Others Vs. The State of Bihar*, , considered the scope and amplitude of Article 14 permitting judicial review with reference to Legislative competence of the State. The following passage is worth reproducing:

"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question."

The Supreme Court again in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, reiterated the scheme of Article 14, thus:

"What is the content and reach of the great equalising principle enunciated in this article. There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."

The Supreme Court in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, had an occasion to consider the parameters of Article 14, and observed thus:

"It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the Courts is not paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

21. In view of those classic pronouncements of the Supreme Court, law is fairly well-settled that judicial review can encompass within its ambit legislative actions which are arbitrary. Arbitrariness is writ large in this case. Learned Advocate-General strenuously contended that these surplus employees are a class by themselves, and grouping them into a class without there being invidious discrimination cannot fall foul of Article 14. Even then these surplus employees cannot be brought under a reasonable classification, muchless there is no rational nexus with the objective sought to be achieved. There is no rational intelligible differentia made out if the object is to uproot the petitioners and throw them overboard. The Government has drafted them into Governmental Departments or Corporations. It cannot sack them for no fault. There must be a pronounced object before them for fulfilment of which alone they can be removed. Have they become unfit to work, or become surplus suddenly? Has any

mistake occurred in appointing them? What is the justification to remove them after the Scheme is approved by BIFR in pursuance of the Memorandum of Understanding to which the Government is a party, and after issuing so many G.Os.? On answering these questions, there is no escape from the conclusion that the action is irrationably arbitrary or unreasonable, and thus, hit by Article 14.

22. The Supreme Court in K.C. Gajapati Narayan Deo and Others Vs. The State of Orissa, , ruled, "the whole doctrine of colourable legislation is based upon the maxim that you cannot do indirectly what you cannot do directly. If a legislature is competent to do a thing directly, then the mere fact that it attempted to do it in an indirect or disguised manner, cannot make the Act invalid". Applying this test, we have no hesitation to come to the conclusion that the Act in so far as it displaces 1486 employees is concerned, there is no public purpose which the legislature is going to achieve, but at the same time we may not be justified declaring the whole Act as invalid, as it may be valid prospectively i.e., in respect of workers of Sick Industries which have fallen sick, or likely to fall sick or closed, or likely to be closed.

23. The learned Advocate-General fervently appeals that these employees are counter-productive as they have no necessary equipment, as such, the Legislature is justified in showing them their way. The answer to this statement is found in Articles 41 & 43 of the Constitution.

Article 41: Right to work, to Education and to Public Assistance in certain cases:

The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of underserved want;

Article 43: Living Wage, etc.. For Workers:

The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

It is too late in the day that the State would be justified in abdicating its functions in securing right to work and to public assistance in case of unemployment etc. Therefore, the impugned legislation in so far as petitioners are concerned is certainly hit by Article 14, and as such, inoperative in the teeth of Articles 41 and 43 which are Directive Principles of State Policy. In fact the Scheme referred to above is one arrived at in furtherance of these Articles, while the impugned Act is their abnegation.

24. The learned Advocate-General submits that transferred malice is unknown to

law. To put it differently, his submission is that even if the Executive has malice against these employees, it cannot be transferred to Legislature. There is no dispute to this proposition, and we are not prepared to go that far. As seen in *K. Nagaraj and Others Vs. State of Andhra Pradesh and Another*, , the Supreme Court observed, "even assuming that the executive, in a given case, has an ulterior motive in moving a legislation, that motive cannot render the passing of the law mala fide. This kind of "transferred malice" is unknown in the field of legislation". Following the Division Bench judgment of the Madras High Court in *Thirithuvanam Silk Handloom Weavers, etc. v.. State of Tamil Nadu* (5 supra) we have no hesitation to hold that the judicial review may extend to the legislative intent when by executive fiat of its head, the legislature assumed itself the role of the executive. A legislation may be a colourable legislation, but it may not be colourable exercise of power. Circumstances under which the posts are created by the executive may not be gone into by the Legislature. It is within the realm of Executive, touching the right of the petitioners for appointment. When the Act of the Legislature is arbitrary offending Articles 14, 16(1), read with Article 21 of the Constitution, since the legislature brought out an irrational legislation, legislative intent can be examined by way of judicial review, though the subject is within the competence of the State Legislature. Legislature acting covertly by entering an area which is prohibited can be interfered with by way of judicial review if the Act is irrational or arbitrary. The petitioners who are surplus employees of HAL were already absorbed and they are the employees of the State alone. They can no longer be employees of a sick industry as there cannot be two employers. Although they were once the employees of sick unit, after redeployment before and after the Scheme envisaged by BIFR, they no longer continue to be the employees of HAL. Therefore, the impugned Act or the Ordinance cannot affect their rights.

25. The bone of contention of the learned Advocate-General all-through appears to be that the State has no economic capacity to absorb the petitioners which is a matter of subjective satisfaction of the State alone. According to him the Directive Principle contained in Article 41 is not a uniform principle of invariable application, but it is subject to economic capacity of the subject State. For this reliance is placed on the judgment of the Supreme Court in *Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc.*, , where the Supreme Court observed thus:

"The right to education further means that a citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development. By saying so, we are not transferring Article 41 from Part IV to Part III. We are merely relying upon Article 41 to illustrate the content of the right to education flowing from Article 21. We cannot believe that any State would say that it need not provide education to its people even within the limits of its economic capacity and development. It goes without saying that the limits of economic capacity are, ordinarily speaking, matters within the subjective satisfaction of the State."

This argument does not commend itself to us. It is not as if the State Government does not know about its economic capacity when they enter into Tripartite agreement viz., Memorandum of Understanding on 28-3-1993 or when several G.Os. are issued by that time, or when submitted for a sanctioned scheme.. It is not as if the economic capacity of the State has dropped subsequently. No such averment or plea was put forth. In fact the State Government knew pretty well its financial capacity when it undertook to implement the Memorandum of Understanding or the Scheme. Therefore, this argument cannot be countenanced.

26. Learned Advocate-General submits that if the surplus employees are absorbed in Government departments, they will be governed by the Rules framed under Article 309 of the Constitution of India, and they will be deemed to be Civil Servants whose service conditions cannot be the subject-matter of writ petitions under Article 226 of the Constitution, and in which event, provisions of Industrial Disputes Act will be attracted, since Government departments are neither Industries, nor the petitioners workmen.

27. In Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, (Larger Bench) a Seven Judge Bench of the Supreme Court has elaborately considered the scope of "Industry", as defined in Section 2(j) of the Industrial Disputes Act, 1947. The Supreme Court laid down "triple tests", as follows:

"(a) Where (i) systematic activity, (ii) organized by co-operation between employer and employee (the direct and substantial element is chimerical), (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss i.e., making, on a large scale prasad or food) prima facie, there is an industry in that enterprise."

The Supreme Court finally took the view that education is an industry. While reaching the said conclusion, the Supreme Court has taken into consideration several factors including the one that employment of labour was a necessary concomitant for running an educational institution apart from technical staff. But, in this case the petitioners continued to be workmen notwithstanding the fact that they were deployed in Government Departments or State Undertakings and they do not cease to be the workmen merely because they are employed in those departments. Some of them are engaged in A.P. State Electricity Board or A.P. Road Transport Corporation. Even if some of them are engaged in Government Departments, it cannot be said that they have become non-workmen. In our view they still continue to be workmen only, and there is no proof that they have turned to be non-workmen. However, the learned Physical Research Laboratory Vs. K.G. Sharma, . and Sub-Divisional Inspector of Post, Vaikam, and others Vs. Theyyam Joseph, etc., , in support of his contention. In view of the larger Bench decision of the Supreme Court in Bangalore Water Supply v.. A Rajappa (13 supra), these decisions do not help the respondents.

28. Even then the learned Advocate-General submits that if the petitioners are workmen working in Government Departments, there is no impediment for the Government to retrench them following the procedure prescribed u/s 25(F) of the Industrial Disputes Act, 1947, and in this case the said provision has been amply satisfied as the petitioners are being paid more than one month's salary towards retrenchment compensation in lieu of one month's notice contemplated under the said provision. Therefore, the action of the Government is justified in view of Section 25(F) of the Industrial Disputes Act. We cannot accept this contention, since the ground on which the services of the petitioners are sought to be terminated is not on account of any retrenchment following the provisions of the Industrial Disputes Act, but on the ground that the Industry has become sick or likely to become sick or closed or likely to be closed. Therefore, this contention, in our view does not carry conviction.

29. As already noticed, learned Advocate-General was harping much upon the fact that under the Tripatrie agreement what is agreed to by the Government was only deployment of petitioners as a temporary measure before making a final settlement, and that the final settlement did not go through, as the High Power Committee did not submit its report. We have held that the Scheme for absorption of the petitioners is complete and implemented. Even assuming that final placement of the petitioners is yet to be done, we are of the view that the Government is bound to complete this exercise in pursuance of the understanding reached by them. In this context it is relevant to notice Section 6 of the General Clauses Act, 1897.

"6. Effect of Repeal:- Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c)....."

Therefore, the repeal of an earlier enactment shall not affect the operation of the repealed enactment or anything done or suffered thereunder. While explaining the phrase "things done" a Constitution Bench of the Supreme Court in *Universal Imports Agency and Another Vs. The Chief Controller of Imports and Exports and Others*, , observed thus:

"By reason of the Indo-French Agreement the Government of India made the Order under the Foreign Jurisdiction Act applying the Indian laws to Pondicherry. The effect of that Order was that the French laws were repealed by the application of the Indian Laws in the same field occupied by the French laws

subject to a saving clause. The position is analogous to that of a statute repealing another with a saving clause. If the English decisions apply to the latter situation, we do not see how they do not apply to the former. In both the cases the pre-existing law continues to govern the things done before a particular date. We, therefore, hold that the words "things done" in paragraph 6 of the Order are comprehensive enough to take in a transaction effected before the merger, though some of its legal effects and consequences projected into the post-merger period."

In view of this authoritative pronouncement, we hold that while implementing the scheme though some of its legal effects and consequences projected into post enactment period, still the scheme would not be affected and the enactment shall not have any damaging effect on the subject as incorporated in the scheme. Accordingly, the writ petitions are allowed and the G.O.Ms. No. 192 Industries & Commerce (IFR.II) Department, dated 1-10-1996 is set aside. The A.P. Ordinance No. 25/96 or A.P. Act 14/97 will not affect the rights of the petitioners as protected under the scheme propounded by the Board for Industrial and Financial Reconstruction in Case No. 631/92. There shall be no order as to costs.

30. A prayer is made for certificate for appeal to the Supreme Court as contemplated under Article 134A of the Constitution of India on grounds inter alia that the case involves substantial question of law as to interpretation of the Constitution as well as a substantial question of law of general importance and that the said question needs to be decided by the Supreme Court. We do not, however, see any substantial question of law as to interpretation of the Constitution which needs to be decided by the Supreme Court or any such substantial question of law of general importance which needs to be decided by the Supreme Court as we have proceeded to determine the questions which have arisen in the instant proceeding in accordance with the settled principles of law and followed the authoritative pronouncements of the Supreme Court in the matter of interpretation of some of the provisions of the relevant Acts and the rules framed thereunder. We thus find no reason to grant the certificate for appeal to the Supreme Court as prayed for. Oral prayer in this behalf is thus rejected.