IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.16033 of 2010

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1. Brij Bhushan Dwivedi S/O Late Gangadhar Dwivedi R/O Hardev Niwas, House Of Dr. Ranjan Kumar Singh, Shyam Mandir Road, New Bahadurpur, East Of Rajendra Nagar, Patna-800016

.... Petitioner/s

Versus

1. The Union Of India Through Its Secretary Null Ministry Of Civil Aviation, Govt. Of India, Rajiv Gandhi Bhawan, Safdarjung Airport, New Delhi-110003
2. Hotel Corporation Of India Ltd. Through Its Managing Director (An Air India Subsidiary) A Company Incorporated Under The Companies Act, 1956 And Having Its Registered Office At The Transport Annexe Building, Air India Complex, Old Airport, Santacruz-East, Mumbai-400029
3. M/S Inpac Travels (India) Pvt. Ltd. Through Its Director (Mr. Naresh Kumar Sharma) A Company Incorporated Under The Companies Act, 1956 And Having Its Office At Su-5-6, Dda Building, Bhikaji Cama Bhawan, 11, Bhikaji Cama Place, New Delhi-110066
4. Indo Hokke Hotels Pvt. Ltd. Through Its Managing Director, A Company Incorporated Under The Companies Act, 1956 And Having Its Office At Su-5-6, Dda Building, Bhikaji Cama Bhawan, 11, Bhikaji Cama Place, New Delhi-110066
5. The Manager, Indo Hokke Hotel, Rajgir

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. N. N. Ojha, Adv.

For the Respondent/s : Mr. Ravindra Kumar Sharma, C.G.C.

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

CAV JUDGMENT

Date: 08-01-2018

The prayers of the petitioner as made in para-1 of the writ petition read as under :-

> "1. That the present writ application is being filed for issuance of an appropriate writ or writs, order or orders, direction or directions for grant of the following reliefs :-
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> a) That, this Hon'ble Court be pleased to command the respondents to pay to the petitioner the amounts of Voluntary Retirement benefits alongwith all arrears etc. strictly in terms of VRS scheme of schedule 9 of

the agreement and terms & conditions of the service of the petitioner and agreement dtd. 26.03.2002 alongwith penal interest @ 18% p.a. from the date it was payable till the date of actual payment as one time full settlement to be calculated on the date of final settlement.

b) That, this Hon'ble Court be pleased to declare that the conduct of the Respondents No.1 to 3 jointly or severally failing to pay the predetermined VRS to the petitioner is ex-facie, arbitrary, discriminatory and violative of the petitioner's fundamental rights under Articles 14, 16 and 21 of the Constitution of India.

c) That, this Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction under article 226 of the Constitution of India directing the Respondent Nos. 1, 2 and 3 jointly and/or severally to pay the predetermined VRS as specifically undertaken and/or as per a share purchase agreement dtd. 26.03.2002 to the petitioner.

d) In the alternative, this Hon'ble Court be pleased to direct the respondent No.1 to independently float and pay VRS to the petitioner in accordance with their specific undertaking.

e) That, this Hon'ble Court be pleased to declare the share purchase agreement dtd. 26.03.2002 as arbitrary, unreasonable, contrary to the provisions of section 23 of the Contract Act and also violative of Article 14 of the Constitution by virtue of the judgment of the Hon'ble Supreme Court reported in (2007) 14 SCC

234 as the petitioner as well as the other employees of the respondent No.2 were transferred to private organization from a public sector undertaking without their specific consent and they were neither party to any tripartite agreement nor were they heard before changing their service conditions. If the respondents fail to make the VRS payment as stated above to the petitioner, in that case, the petitioner be allowed to remain in the service of the Respondent No.2 (seller) and he be paid his all the dues & benefits alongwith the interest since the date he was denied those benefits by the respondent No.3 (purchaser).

f) That, this Hon'ble Court be pleased to issue an appropriate writ, direction or order restraining the 3rd Respondent from in any manner selling leasing/transferring the shares of the said establishment or retrenching, transferring discharging or terminating the petitioner prior to the payment of VRS to him.

g) That, pending the hearing and final disposal of this petition this Hon'ble Court be pleased to restrain the 3rd respondent from retrenching, dismissing, transferring or terminating the services of the petitioner.

h) That, pending the hearing and final disposal of this petition this Hon'ble Court be pleased to restrain the 3rd Respondent from selling and/or leasing out the Indo Hokke Hotel at Rajgir, Nalanda, Bihar and/or from transferring the Shares or parting with possession/control of the same without first paying VRS to the petitioner.

i) That, for any other appropriate reliefs to which the petitioner may be entitled to."

2. The admitted facts of the case are that the petitioner was appointed as Accounts Assistant-cum-General Cashier with effect from 10.11.1984 by the Centaur Hokke Hotel, a single unit at Rajgir, Nalanda of Indo Hokke Hotels Limited, a subsidiary of Hotel Corporation of India Limited. The service of the petitioner was confirmed on the said post with effect from 01.05.1985 by the Centaur Hokke Hotel, Rajgir. He was promoted to the post of Front Office Receptionist with effect from 01.11.1987 and confirmed to the said post with effect from 01.05.1988. Again he was promoted as an Accountant with effect from 19.03.1997 and confirmed on the said post with effect from 19.09.1997. He was then promoted on the post of Assistant Manager (Accounts) with effect from 10.05.2001 vide order dated 11.05.2001.

3. The Ministry of Civil Aviation, vide its letter dated 01.06.2001 addressed to the Hotel Corporation of India Limited informed that pursuant to its proposal for introduction of a Voluntary Retirement Scheme (for short 'VRS') in the eventuality of disinvestment, it has been decided that all the bidders should have to

give VRS to the existing employees as per the guidelines issued by the Department of Public Enterprise and the terms of such VRS would not be inferior to the scheme framed by the Department of Public Enterprise. Subsequently, a cabinet committee on its disinvestment approved the proposal regarding disinvestment of the Hotel Corporation of India and, accordingly, the petitioner as well as other employees of Indo Hokke Hotel Limited were paid as per their pay scales along with the benefits of D.A., H.R.A., Service Charge, annual increment, revision of pay, leave, Medical, Hospitalization, LTC and Leave Encashment facilities etc.

4. Learned counsel for the petitioner submitted that on 26.03.2002, a share purchase agreement was signed between the Hotel Corporation of India Limited and M/s Inpac Travels (India) Pvt. Limited and Indo Hokke Hotels Limited for sale of shares of Indo Hokke Hotels Limited to M/s Inpac Travels India Pvt. Limited as per decision conveyed by the Government of India. Thus, on 26.03.2002, the ownership of Indo Hokke Hotel Limited was taken over by M/s Inpac Travels India Pvt. Limited from Hotel Corporation of India Limited and accordingly the single unit Centaur, Rajgir of Indo Hokke Hotel Limited was privatized.

5. He submitted that on 07.10.2002 the VRS was notified by the respondent no.3 providing therein that 50% payment would be

made in one time and the remaining 50% in installments or in the form of Bonds, which was contrary to the share purchase agreement dated 26.03.2002. The petitioner made an application for voluntary retirement on 10.10.2002 in response to the circular dated 07.10.2002. He mentioned in his application that since payment against VRS was meant for resettlement of the employee concerned along with all his family liabilities and keeping in view the same clause IV of the VRS providing 50% payment in installments or bonds was not acceptable to him as his resettlement in installment or in bonds was not possible. He requested the respondent no.3 to settle the total payment of his account in one time in cash only. He submitted that the respondent no.3 settled the amount in one time to seven Union category staff and one head office based officer under the VRS but the petitioner along with other local officers was discriminately left out by the respondent no.3 and they were assured by the respondents that their settlement would be done in second phase after arranging funds and till that time they would continue with the respondent no.3 as it needed experienced and skilled staff to run and expand its business.

6. He submitted that the breach of promise was again committed by the respondent no.3 as vide letter dated 09.05.2003 with effect from May, 2003 the respondent no.4 consolidated the

salary of the petitioner as basic and stopped all his previous terms, conditions and benefits of livelihood i.e. increase in DA, HRA, total benefit of variable service charges, Medical/ Hospitalization etc. The petitioner made several representations between the period m2003 and 2009 to the respondents claiming one time full settlement under VRS as per the share purchase agreement dated 26.03.2002 and Schedule 9 of the agreement and requested therein for early disposal of his VRS application but to no avail. He submitted that the sale of the Hotel to the respondent no.3 was made upon an express representation by the Government of India and the respondent no.3 that the VRS amount would be paid to every employee and, thus, the Government of India is under obligation to compel the respondent no.3 to perform the promise undertaken by the Government and the purchaser jointly. He submitted that the case of the petitioner is squarely covered by the judgment of the Supreme Court in similar facts and circumstances in ***Balco Captive Power Plant Mazdoor Sangh & Anr. Vs. National Thermal Power Corporation & Ors. [(2007) 14 SCC 234]*** wherein on the maintainability of the writ petition under Article 226 of the Constitution of India, the Supreme Court held that transferring the employees to private organization from a public sector undertaking without their specific consent is arbitrary and unreasonable and also of the settled position that alternative remedy is rule of discretion and not the rule of law. He submitted that the Supreme Court further held that the appellant employees were neither party to tripartite agreement nor they were heard before changing their service condition. In order to bind them, there must have been a tripartite agreement. Since there was no tripartite agreement, the transfer from one employer to another cannot be effected. He submitted that in the present case also the employees of the Centaur Hokke Hotel, a singled unit at Rajgir were transferred to M/s Inpac Travels (India) Private Limited without their specific consent. Such transfer was arbitrary and unreasonable.

7. The respondents have contested the claim of the petitioner. They have filed their respective counter affidavits. The respondent Union of India in its counter affidavit stated that while examining the proposal for VRS for employees of Hotel Corporation of India Limited in the eventuality of disinvestment, the Government had consciously decided that all the bidders would be given the Scheme of VRS as per the guidelines of Department of Public Enterprises applicable to PSUs and all the bidders would be obliged to introduce a VRS when successfully purchasing the property within a year of takeover, the terms of which would not be inferior to the Schemes of the Department of Public Enterprises. Therefore, interests of the employees were duly protected by the Government

while going for disinvestment.

8. The respondent Hotel Corporation of India in its counter affidavit contended that vide a share purchase agreement dated 26.03.2002 the respondent no.2 transferred its stake in Indo Hokke Hotels Limited to Inpac Travels (India) Pvt. Limited along with all its assets and liabilities on “as is where is basis” including the employees therein in favour of Inpac Travels (India) Pvt. Limited and the respondent no.3 while purchasing the said shares as well as other liabilities, expressly agreed to offer each of the employees VRS within a period of one year from the date of transfer and, accordingly, the assets were valued.

9. Mr.Anil Kumar Sinha, learned counsel appearing for the respondent no.2, referring to the counter affidavit filed on behalf of the respondent no.2, submitted that the assets valuation was absolutely in accordance with the guidelines framed by the Ministry of Disinvestment wherein the mandatory provision was made to safeguard the interest of the employees and their terminal/VRS dues. Accordingly, the value of the assets was proportionately reduced to meet the liability of the terminal/VRS dues of the employees concerned. Thus, the respondent no.3 has already received the amount equal to VRS and other dues of the concerned employees. It is now the duty of the respondent no.3 to distribute the amount so

received to the respective employees towards the terminal/VRS dues. He submitted that the petitioner himself admitted that the respondent no.3 had offered VRS in which it was provided that 50% payment would be made in one time and remaining 50% in installments or in the form of bonds. As the petitioner had applied for VRS on 10.10.2002 with a counter condition that entire VRS dues should be paid in one installment without challenging the conditional VRS circular dated 26.03.2002 notified on 07.10.2002, the dispute, if any, is purely between the petitioner and the respondent no.3. The dispute is restricted to payment of VRS dues at once or in part which is between the respondent no.3 and the petitioner. He submitted that there is no cause of action to invoke writ jurisdiction of this Court nor there is any cause of action whatsoever against the respondent nos.1 and 2. He also contended that the facts of the case of ***Balco Captive Power Plant Mazdoor Sangh*** (Supra) as well as the facts of the present case are totally different. In the present case, the petitioner is an individual having personal differences with the respondent no.3 as to the mode of payment of VRS dues and, hence, the ratio laid down in the case of ***Balco Captive Power Plant Mazdoor Sangh*** (Supra) shall not be applicable to the facts of the present case.

10. Mr. Pradeep Kumar, learned counsel appearing for the respondent nos.4 and 5, referring to the counter affidavit filed on

behalf of the respondent nos. 4 and 5, submitted that the writ petition filed by the petitioner is fit to be dismissed as in para-1(a), (b) and (c) the petitioner has based his case over Schedule-9 of the agreement dated 26.03.2002 whereas in para-1(e) he has sought the agreement dated 26.03.2002 to be declared arbitrary, unreasonable as also violative of law. He submitted that the prayer of the petitioner is not sustainable as being hit by doctrine of waiver since the petitioner has never challenged the validity of the agreement dated 26.03.2002 earlier and kept on continuing in service despite disinvestment by the respondent no.2 and takeover of Hotel by the private respondents. He submitted that the writ petition filed by the petitioner is also not maintainable against private respondents after disinvestment by virtue of agreement dated 26.03.2002. The Hotel in question has been taken over by the respondent no.3 M/s Inpac Travels (India) Pvt. Limited, which is a private concern and has got nothing as of public duty to be discharged from its end and, therefore, would not fall within the category of State as envisaged under Article 12 of the Constitution of India. He submitted that since privatization, except the specific stipulations contained in the agreement dated 26.03.2002, the respondent no.3 has got full control over the constitution, finance, employment and administration of the Hotel in question. He submitted that during pendency of the writ petition before this Court, a show cause notice was issued to the petitioner by the respondent no.4 for submitting forged medical claim bills and after receiving reply to the show cause, an enquiry was conducted against the petitioner relating to the charge of misconduct, which was found to be true and, after issuance of notice on proposed punishment, service of the petitioner was terminated by recording a finding that optical shop from which medical bills were raised for reimbursement does not exist vide order dated 19.01.2012.

11. In reply, learned counsel for the petitioner submitted that the petitioner had regularly raised his grievance for VRS but the respondent nos.4 and 5 always gave him false hope that his case for VRS payment was either being considered or would be considered and at the same time several other similarly situated employees were given the VRS payment. He submitted that the conduct of the private respondents in discriminating the petitioner in the matter of VRS payment is highly arbitrary, illegal and unsustainable in law. He contended that after filing of the present writ petition, due to malafide intention, the service of the petitioner was terminated by the respondent no.4 by making a false allegation against him and the aforesaid termination order has already been challenged before this Court by filing another writ petition. He submitted that the delay in approaching the Court can in no way be construed as a waiver of

right and every provision of the share purchase agreement is binding upon the parties. He submitted that it is wrong to say that the petitioner never objected to the action of the authorities but it has to be appreciated that a person of petitioner status was not in a position to register his grievance before the concerned authorities impending such share transfer agreement contrary to the principle laid down by the Supreme Court in ***Balco Captive Power Plant Mazdoor Sangh*** (Supra) wherein by discussing the various provisions of Indian Contract Act and the Constitution of India, it has been held that the employment of any employee cannot be transferred in the hands of others without seeking their consent, which in the present matter has been done, which is sufficient to hold the action of the respondents contrary to law.

12. I have heard learned counsel for the parties and perused the record.

13. It is not disputed that vide share purchase agreement dated 26.03.2002 the respondent no.2 transferred its stake in Indo Hokke Hotel Limited to Inpac Travels (India) Pvt. Limited and the respondent no.3 while purchasing the said shares as well as other liabilities expressly agreed to offer each of the employees VRS within a period of one year from the transfer date and accordingly the assets were valued. Article VI of the share purchase agreement deals

with the purchasers agreement towards employees, which reads as under :-

"ARTICLE VI

EMPLOYEES

The list provided by the seller in Schedule 4 is an exhaustive list of employees who are under the employment of the Company as on the Closing.

The Purchaser shall ensure that after Closing :

6.2.1 the transfer of the said shares will not interrupt the service of any Employee.

6.2.2 that the terms and conditions of service applicable to the Employee are in no way less favourable to the Employee than those applicable immediately prior to the transfer of the said Shares and that there will be no adverse change in such terms and conditions for at least one year after the Closing.

6.2.3 No Employee shall be retrenched, dismissed, terminated, laid off, for a period of one year from the Closing other than in terms of the applicable staff regulations in force immediately prior to the Closing and the applicable law.

6.2.4 Notwithstanding anything to the contrary in this Agreement, the Purchaser shall be bound to ensure that the Company offers each of the Employees a Voluntary Retirement Scheme on terms that will be no less favourable than the terms set out in Schedule 9 hereto within a period of one year from the Closing.

6.2.5 Notwithstanding anything to the contrary in this Agreement, and without affecting the Purchaser's obligation to ensure that the Company offers as Voluntary Retirement Scheme under Article 6.2.4 above, the Purchaser may at any time after the Closing if it so desires allow the Company to offer the Employees one or more Voluntary Retirement Schemes, provided that the terms of any such Voluntary Retirement Scheme will be no less favourable than the terms set out in Schedule 9 hereto."

14. It is admitted by the petitioner that the respondent no.3 had offered VRS vide circular dated 26.03.2002 notified on 07.10.2002 and it was provided in the said circular that 50% payment would be made in one time and 50% in installment or in the form of bonds. The case of the petitioner is that he applied for VRS on 10.10.2002 with a condition that the entire VRS dues should be paid in one installment. Thus, the petitioner had not accepted the offer made by the respondent no.3. The petitioner did not even challenge the conditional VRS notified on 07.10.2002. A perusal of Article VI of the share purchase agreement dated 26.03.2002 as noted hereinabove would make it clear that it does not specify the mode of payment of VRS amount. Thus, it has rightly been argued on behalf of the respondents that the dispute, if any, is purely private between the petitioner and the private respondents as the petitioner had not accepted the VRS offer made by the respondent no.3. The dispute is mainly on the mode of payment of VRS dues between the petitioner and the respondent no.3. The petitioner never raised any objection regarding transfer of shares by the respondent no.2 in favour of the respondent no.3. On the contrary, he continued working for the respondent no.3 all along and received salary in lieu thereof. The petitioner having accepted the terms and conditions of share purchase

agreement and having accepted the employment with the respondent no.3 all along for eight years has certainly waived his right to challenge the said share purchase agreement and it has rightly been submitted on behalf of the respondents that the dispute is purely a money dispute between the petitioner and the respondent no.3 and there is no cause of action to invoke writ jurisdiction of this Court nor is there any cause of action against the respondent nos.1 and 2.

15. I also find that the facts of this case are totally different to that of the facts of the case in ***Balco Captive Power Plant Mazdoor Sangh*** (Supra). In the present case the petitioner being an individual has personal differences with the respondent no.3 as to the mode of payment of VRS dues. He has not challenged the action of the respondent no.2 in this case nor has he raised any finger upon the respondent Union of India. The entire attempt of the petitioner is focused on respondent nos. 3, 4 and 5 only, who are not exercising any public function nor do they carry any character of public duty. As such, these three respondents are not the State within the meaning of Article 12 of the Constitution of India. That apart several disputed facts have been raised in the present petition, which cannot be ascertained and adjudicated in writ jurisdiction.

16. In view of the above findings, the writ petition, being devoid of any merit, is dismissed. However, if so advised, in respect

of the claim of VRS benefits, the petitioner would be at liberty to invoke other remedies available in law.

(Ashwani Kumar Singh, J)

Pradeep/-

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	09-01-2018
Transmission Date	