

Superintending Engineer and ors. Vs. Workmen of Machkund Hydro Electric Project and anr.

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Court : Orissa

Decided On : Nov-12-1959

Reported in : AIR1960Ori205

Judge : R.L. Narasimham, C.J. and ;S. Barman, J.

Acts : [Industrial Disputes Act, 1947](#) - Sections 2, 10, 10(1), 15 and 25G;
[Constitution of India](#) - Article 226

Appeal No. : O.J.C. Nos. 64, 132 to 135, 244, 245 and 247 of 1958

Appellant : Superintending Engineer and ors.

Respondent : Workmen of Machkund Hydro Electric Project and anr.

Advocate for Def. : Adv. General and ;A. Das, Govind Das and A.R. Mukherjee in O.J.C. No. 64 of 1958, ;N.V. Ramdas and D.N. Raju in O.J.C. Nos. 132 to 135 of 1958 and ;Adv. General and Govind Das in O.J.C. Nos. 244 to 24

Advocate for Pet/Ap. : N.V. Ramdas and D.N. Raju in O.J.C. No. 64 of 1958, ;A. Das, Govind Das and A.R. Mukherjee in O.J.C. Nos. 132 to 135 of 1958 and ;N.V. Ramdas and D.N. Raju in O.J.C. Nos. 244 to 247 of 1958

Judgement :

Barman, J.

1. These nine several writ petitions herein, challenging the validity and correctness of certain awards made by the Industrial Tribunal, Orissa arose out of certain industrial disputes between the Management of Machkund Hydro Electric Project and their workmen. In five of these writ petitions a preliminary point was taken, purported to have been taken on behalf of the Andhra Pradesh Government that the Orissa Government, who had made the reference in all these cases as aforesaid was not the 'appropriate Government' within the meaning of the [Industrial Disputes Act, 1947](#) (Act XIV of 1947) and accordingly the said reference having been invalid, it was contended that the awards made thereunder were made by the Industrial Tribunal, Orissa without jurisdiction. We propose to deal with the preliminary point first before we come to the merits of each of these petitions which were analogously heard.

2. The appropriate Government as defined in Section 2(a) of the [Industrial Disputes Act, 1947](#) (Act XIV of 1947) means :

'(i) in relation to any industrial dispute concerning an industry carried on by Or under the authority of the Central Government or by a railway Company or concerning any such controlled industry as may be specified in this behalf by the Central Government or in relation to an industrial dispute concerning a banking or insurance company, mine, an oil-field or a major port, the Central Government and

(ii) in relation to any other industrial dispute the State Government:'

It is not clear from the definition to what particular Government the 'State Government' refers whether it is the Government where the industrial dispute arises or whether it is the Government where the industry is situated Or whether it is the employer Government who owns the industry. Nor does the definition make it clear whether more than one Government are also contemplated by the term 'State Government' in the definition.' Under Section 10 reference is made by the appropriate Government to the Industrial dispute.

Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing, refer the dispute or refer any matter appearing to be connected therewith or relevant to the dispute where it relates to any matter specified in the Second Schedule or the Third Schedule of the Act, to a Tribunal for adjudication. The provision is quite simple in its terms and normally there is no difficulty in the way of interpretation and application of the Section to particular cases. But in the present case because of the peculiar situation of the industry, namely the Machkund Hydro-Electric Project with which we are concerned, there arises some difficulty.

3. In this context, at this stage, it is necessary to describe the situation of the project. Evidence shows that the Machkund Hydro-Electric Project is spread over the border areas of both the States of Orissa and Andhra Pradesh. Although there is no doubt that the substantial portion of the industry is in Orissa but it cannot be disputed that some portion of the concern is also in Andhra Pradesh. For clarification, the position is as follows :

The Project concerns river Machkund which falls down from over a hill and is locally known as Duduma Water Fall. The river as well as the country on either side of the project area originally appertained to the ex-zamindari of the Maharaja of Jeypore, portion of which was in the present Province of Madras when the Orissa State was formed in 1936. In a dispute between the States of Madras and Orissa regarding the question whether this river was within the limits of one State or the other, there was an agreed arbitration and it was decided that the middle line of the river was the boundary between the two States.

It was after this decision that a joint scheme agreement was reached in 1945 between the State of Orissa and the then composite State of Madras out of which Andhra Pradesh was carved out subsequently. The Project was to be worked out by both the States, Orissa contributing 30 per cent of the capital and consuming an equal percentage of the power generated and the other Government was to invest the rest 70 per cent of the capital and consume an equal percentage empower. The scheme was started somewhere in 1947 and by August, 1956 the power house functioned to work generating electricity which is being taken by the

States of Orissa and Andhra Pradesh which was by then formed.

As for the cost of the various works of the Machkund Hydro-Electric Scheme, it appears that as per the latest revised estimate sent for administrative sanction of the Government concerned, out of Rs. 15,38,78 (in lakhs) the approximate value of, works situate on the Orissa side of the Project is Rs. 12.35.38 (in lakhs) and the approximate value of work situate on the Andhra Pradesh side was Rs. 3,03.40 (in lakhs). Thus it appears that 4/5ths of the estimated cost is for works situated in Orissa and only 1/5th of the entire estimated cost is-for certain establishments on the side of Andhra: Pradesh.

The project consists of the Power House, Wynch House and offices at Onakadeli in Orissa; the Diversion Dam, Machkund Offices, the Jalput Dam, the Soil Conservation Works. The Power House is just at the bed of the river above 1,000 feet below from the Ghat Road and 800 to 850 workers are employed there, besides about 150 mechanical and electrical workmen. This entire work is within the geographical limits of Orissa State. The Diversion Dam is on the river between Onakadeli and Machkund where there is a Labour Colony and some offices. This Dam is across the river and as such it is situated in Orissa as well as in the Andhra Pradesh.

The Offices, however, are situated entirely in Orissa area. In Machkund (Orissa) there is the office and establishment of the Superintending Engineer who directly controls the whole Project and is employed by the Andhra State to which he is subordinate. At Machkund there are also other connected offices, work-shop and garage --all situated in Orissa Area. About 350 mechanical and electrical workmen besides 155 ordinary workers are engaged both at Machkund and at the Diversion Dam.

In Jalaput Dam a huge masonry Dam about two furlongs long is in the process of construction across the river and a reservoir covering about 26 sq. miles is to be formed. At present 5000 workmen of various classes are employed here besides 150 mechanical and electrical persons. There are Labour Colonies on either side of the river but the workshop, garage, Inspection Bungalow, Hospital and Offices are on the Orissa side. The Soil Conservation Works at Araku is within Andhra

State and it is said that the work is carried on in both the Andhra as well as in Orissa State. That apart, there is the Pilot Scheme in this valley which is within the Andhra State and is aided by the finance of the Central Government.

It is noticed that there are no mechanical or electrical workers at Araku, but 250 other workers. are there for the main scheme as well as the Pilot Scheme, the latter, however having nothing to do with the Hydro-Electric Project. In all there are 620 technical workers, 6000 other workers working under the Project. This, in short, is the set up of the Industrial project with which we are concerned.

4. The crucial question now is which Government under Section 10 of the Act is the 'appropriate Government' to form an opinion that any industrial dispute exists or is apprehended and accordingly is to refer the dispute to the Industrial Tribunal for adjudication. In the present case, as it appears, both Andhra Pradesh and Orissa are interested in the Project. The question is which Government --whether Orissa or Andhra Pradesh-- is to make the reference under the Act it is to be noticed that the Act, as it stands, does not contemplate a joint reference by the two States, that is to say, by more than one State.

It was contended that under the General Clauses Act the singular should mean plural, so that the 'State Government' in the definition of the 'appropriate Government' might be interpreted to mean State Governments in appropriate cases. There is a good deal of substance in this contention although it is likely to lead to certain anomalies in reconciling certain other sections of the Act. On the other hand to give the section literal meaning is also likely to lead to some similar anomalies.

5. Mr. D. Narasuraju, learned Advocate-General, Andhra-Pradesh, on this point contended that it was Andhra Pradesh Government alone which was the employer Government under the agreement and that the Orissa Government was not the employer. According to this view if the Orissa Government is accepted as the 'appropriate Government' and the Andhra Pradesh Government as the employer Government, then certain anomalies will arise in giving effect to Section 7B, 10(1A) and 17A of the Industrial Disputes Act. In this Particular case, the employer Government, according to him, cannot be the situs Government, namely, the

Orissa Government.

In this connection our attention was drawn to Section 2(k) defining 'industrial dispute', Section 2(g) defining 'employer' and also Section 2(s) defining 'workman'. Apparently, the intention of the Legislature was to refer to industry in the different provisions of the Act to mean such industry carried on by the Government in which the industry was situated, namely, the situs Government. Therefore, an industrial dispute arises where the industry exists. From this it follows that if the industry exists in two States then the dispute arises in the two States.

Indeed, it was to meet such a situation that Section 10(1A) was introduced in the Act by the amending Act of 1956 which was enforced on August 29, 1956 after the reference, the subject-matter of O. J. C. No. 64 of 1958, was made in July, 1956. Mr. Narasuraju contended that where the dispute arises in both the States, the appropriate Government is both Governments acting jointly. Each should not act to the exclusion of the other. It relates to both and it is indivisible.

In case of disagreement between the two situs Governments resulting in a deadlock it is not that the parties were without any remedy. In such a contingency Article 263(b) of the [Constitution of India](#) could be readily invoked if at any time it appeared that the public interests would be served by the establishment of a Council charged with the duty of investigating and discussing subjects in which the two States concerned had a common interest. It was contended that this was a jurisdiction which could be invoked suo motu having regard to the common interests of the two States.

6. In course of argument, Mr. Narasuraju however fairly accepted the position that Section 10(1A) and Section 17A, --which came into force after the reference in O. J. C. No. 64 of 1958, had no application to this case. Therefore, this Court has to decide the said writ petition on the law as it stood before 29-8-1956. According to him, both Governments are appropriate Governments and both Governments could enforce the award. In this context our attention was drawn to different sections of the Act to show that the term, 'industrial establishment' in the Act is not co-extensive with the industry.

The fact that the Machkund Hydro-Electric Project was to be run under a common contract could not be the deciding factor. The question is whether each unit constituting the Project was a separate industrial establishment within the meaning of the Act. The learned Counsel, for this purpose, led us through the various sections of the Act including Sections 25A, 25B and 10(1A) to show that the term 'industrial establishment' was used throughout the Act in its limited restricted sense.

Thus considered, the Soil Conservation works at Araku in Andhra Pradesh and Jalaput Dam with Labour Colonies on either side are each separate industrial establishments within the meaning of the Act, This aspect of the question came to be incidentally considered in a recent Madras case in *Management of India Tyre and Rubber Co. (India) Private Ltd. v. Workers of the India Tyre and Rubber Co., (India) Private Ltd.*, AIR 1958 Mad 205, where the facts are that a Tyre and Rubber Company manufactures and sells tyres, among other rubber goods, in India with its head office at Bombay.

One of its Branch Offices is at Madras with jurisdiction over the territorial area known as Madras District which extends over areas lying outside the State, in Kerala, Mysore and Andhra Pradesh--the sub-depots being at Ernakulam, Bangalore and Vijayawada within the District of Madras. The company ordered retrenchment of certain employees in Madras office. The Workers' Union challenged the Company's right to retrench them.

The Government of Madras referred the dispute to an Industrial Tribunal, Madras for adjudication. On these facts Rajagopalan J., delivering the judgment observed to the effect that if the sub-depots of the Company's Industrial concern at Ernakulam, Bangalore and Vijayawada would be treated as part of the industrial establishment at Madras, then the appropriate Government would not be the Madras Government competent to make the reference; and the learned Judge also expressed that it was of interest to notice that provision was made by the Amending Act of 1956 (Act 36 of 1956) in Section 10(1A) for the adjudication of disputes, if an industrial concern consists of industrial establishments lying in more than one State. On the strength of all these, Andhra Pradesh claimed that Orissa

Government was not 'appropriate Government'.

7. The Orissa Government, on the other hand, claimed to be the 'appropriate Government', competent to make the reference. The gist of the contentions of Mr. Banchhanidhi Mohapatra, learned Advocate-General appearing for Orissa, briefly stated, was this: Orissa and Andhra Pradesh having been the joint owners of the Project, the management of the Project was one on behalf of both the States. The scheme as contained in the Agreement dated 14-1-1954, was to be carried out by the Orissa Government.

In this connection Clauses 9, 10, 13, 14 and 16 of the said Agreement clearly show that the active management of the Project was expressly intended to be on behalf of both States. The object of both the States, as expressed in the said Agreement, was the same with regard to the carrying out of the Scheme by the Orissa Government. With regard to the alleged stand that it was the Andhra Pradesh Government alone which was the employer Government, Mr. Banchhanidhi Mohapatra contended that Orissa was a joint owner carrying on the undertaking on behalf of both the States.

Accordingly, if Orissa Government had power to make the reference as one of the joint owners, the Industrial Tribunal, Orissa, -- to whom the industrial dispute had been referred by the Orissa Government, -- had jurisdiction to adjudicate. Thus the taking of consent of the Andhra Pradesh Government, as the employer Government, prior to the reference is repugnant to the definition of 'appropriate Government' under the Act. The State Government in the definition refers to the executive Government of the place -- the situs Government. A Government which has executive Power in the State is the only State Government which is the appropriate Government competent to make the reference.

It is true that under the Industrial Disputes Act, the Government may itself be an employer. The appropriate Government referred to in Sections 10 and 12(5) of the Act is not the Government which is acting as an employer in a particular case. The Government is the executive power of the State. When the Legislature entrusts certain power to a Government, it does so in the hope and expectation that that power would be exercised in the interest of the people at large. When a

Government is functioning under Section 10 or Section 12(5) of the Act, it is not functioning in the interest of the employers or of the employees. It is functioning in the interest of industrial peace and in order to bring about a fair and equitable settlement of the disputes between the parties. Therefore, it cannot be assumed that in any dispute -- even in a dispute to which Government as employer is a party -- Government would not act with that sense of duty and responsibility which the Legislature requires of it. (*Engineering Staff Union v. State of Bombay*, AIR 1959 Bom 390).

8. Thus the fact that a particular Government happens to be the employer Government is wholly irrelevant for the purpose of deciding what is the appropriate Government. In case of joint ownership, as in the present case, it is that Government with reference to the territory which is the appropriate Government. It is the territorial Government of the State where the industry is situated that is the appropriate Government. Nowhere in the Industrial Disputes Act there is any provision that a Government can be appropriate Government by virtue of its ownership of the industry concerned.

In the present case, the territorial nexus of a particular industry, namely, the Hydro Electric Project, is in Orissa. That is to say, the place wherefrom the Project is being controlled is in Orissa -- the Power House which generates electricity is in Orissa -- the machinery, works etc. are all in Orissa. The Act does not contemplate a joint reference by two Governments. In fact, no joint appropriate Government is contemplated by the statute. Where the Industry is in Orissa, namely the location of the Power House, a portion of the Dam etc. and the reference had, in fact, been made by Orissa Government to the Industrial Tribunal, Orissa, such, a reference cannot be challenged.

That apart, there is another aspect, namely that the primary consideration in this case is the existence of the industrial dispute. The Legislature calls the statute the Industrial Disputes Act and accordingly it is the settlement of such an industrial dispute either by conciliation Or failing conciliation, by adjudication which is the primary object of the statute. This readily leads us to consider where exactly the industrial dispute arises. In this particular case the notice of retrenchment was

given from Orissa.

The dispute arose at Machkund which is in Orissa. It is the Machkund Office that controls the affairs of the Project. In the present case the Industrial Tribunal in his award on the preliminary issue of the Orissa Gazette on February 5, 1958 clearly gave his finding on facts in detail as to the administration of the project from Machkund in Orissa.

9. The learned Advocate General for Orissa in the ultimate analysis urged that the Industrial Disputes Act never contemplated more than one Government as appropriate Government. In support of his contention the learned counsel led us through various sections of the Act. Section 4 provides that the appropriate Government may appoint Conciliation Officer for mediating and permitting the settlement of industrial disputes. Supposing there is disagreement between two States both claiming to be appropriate Government, a dead-lock will be created and the Act is silent as to what would happen in such a contingency.

Similarly with regard to the constitution of Board of Conciliation and Court of Enquiry by appropriate Government as provided respectively in Sections 5 and 6 of the Act, no question of the two Governments acting jointly can arise. The same difficulties will also arise for appointment of Labour Courts and Tribunals by appropriate Government as provided respectively in Sections 7 and 7A of the Act if more than one Government are permitted to claim to be appropriate Government. Then with regard to the power of the Government to exempt certain industrial establishment from the provisions of Section 9A requiring notice of change of conditions of service as provided in Section 9A of the Act, Section 9B gives power to the appropriate Government to exempt certain classes of establishments.

In case two States are appropriate Government, if one State gives exemption and the other does not agree then it will result in a dead-lock and the purpose of the Act thus cannot be carried out. Section 12(4) provides that if no settlement is arrived at, the Conciliation Officer shall send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and the reasons on account of which a settlement could not be arrived at. Then Section 12(5) provides that if the

appropriate Government does not make a reference it is required to record and communicate to the parties concerned its reasons therefor.

There also if more than one state constitute appropriate Government, one may be willing to communicate and the other may not and thus a deadlock will eventually ensue. Thus viewed, it is clear that the Act, as it stands, does not leave any scope for joint reference. With regard to Section 17A which came into force on August 29, 1956 it was contended that it does not show that both Governments should be appropriate Governments. It deals with the position where the appropriate Government is itself the employer Government and it is a party to the dispute. Certainly any other interpretation would be unworkable.

With regard to Section 10(1A), the learned Advocate General for Andhra Pradesh laid special stress to show where industrial establishments are situated in more than one State, a reference to National Tribunal for adjudication of the dispute was expressly provided for by the amending sub-section introduced by the Act of 1956. The answer to this contention as given on behalf of the Orissa Government was that the term 'industrial establishment' in Section 10(1A) is used in the sense of industry taken as a whole and that it did not contemplate industrial establishments taken separately spread over both the States as in the present case. In other words, the Orissa Government interpreted the term 'industrial establishment' in its wider sense and not in its limited sense.

10. On this point, a decision of the Supreme Court in *Lipton Ltd. v. Their Employees*, AIR 1959 SC 676 was cited, where one of the points taken before the Industrial Tribunal on behalf of Lipton Ltd. was that the Industrial Tribunal had no jurisdiction to make the award in respect of employees of the Delhi Office who were employed outside the State of Delhi. This point of jurisdiction was decided against Lipton Ltd. and the Industrial Tribunal pointed out that all the workers of the Delhi Office, whether they worked in Delhi or not, received their salaries from Delhi Office : they were controlled from the Delhi Office in the matter of leave, transfer, supervision etc. and therefore the Delhi State Government was the appropriate Government within the meaning of Section 2(a) of the [Industrial Disputes Act, 1947](#) relating to the disputes which arose between Lipton Ltd. and

their workers Union and under Section 17 of the Industrial Disputes Act the award of Tribunal was binding on all persons employed in the Delhi office.

The Labour Appellate Tribunal, in appeal, upheld the decision of the Industrial Tribunal on this point. The Supreme Court on these facts took the view that the Industrial Tribunal had jurisdiction to adjudicate the dispute between Lipton Ltd., and their Workers. The primary considerations which presumably weighed with their Lordships of the Supreme Court in expressing the said view Were these: Lipton Ltd., London had an office in New Delhi, The employees of the Delhi Office of the said Lipton Ltd., were represented by the Lip-ton Employees Union.

The Board of Directors of Lipton Ltd., Londor, decided to separate the export side of its business from its internal trade in respect of its branch in India and a separate sterling Company called Lipton (India) Ltd. was incorporated in the United Kingdom and this new company took over the internal side of the business in India but the export side of the business continued to be a branch of the Lipton Ltd., London. Pursuant to the aforesaid arrangement of the employees of the Delhi Office of the Lipton Ltd., were notified of the formation of the new company and from 1958 their services were transferred to Lipton (India) Ltd. on condition that their services would be treated as continuous, uninterrupted and on the same terms as before.

The Lipton Ltd., had factories in Calcutta, Allahabad and Conoor in which teas were blended and packed into retail packets for sale throughout India. Dealers were supplied by the Company's own salesmen each of whom has a sales depot at which he maintains stocks of the Company's products. The sales organisation is controlled through six offices -- one of which is located at Delhi. The Delhi Office controls salesmen and other employees employed in the Punjab, Delhi State, Rajasthan and Uttar Pradesh on its business. The Delhi Office employs peons, sweepers, van-workers, godown worker, village salesmen, drivers, junior clerks, godown keepers, divisional salesmen and other categories of workers. The Union framed a charter of demands and submitted it to the Company.

Ultimately when the Company did not accede to their demands the industrial dispute between the Company and their workmen was referred to the Additional

Industrial Tribunal, Delhi for adjudication. It was in this background that a point was taken that the Industrial Tribunal Delhi had no jurisdiction to make an award in respect of the employees of the Delhi Office who are employed outside, the State of Delhi and their Lordships of the Supreme Court expressed the view that the Industrial Tribunal, Delhi had such jurisdiction.

The judgment read as a whole gives the light in which such dispute of composite character concerning workmen spread over more than one State has to be decided. Section 10(1A) which purports to meet such a situation rather indicates that it was not the intention of the Legislature that two Governments would be the appropriate Government. Section 10(1A) makes it amply clear that the Legislature presumably noticed the lacuna in the Act itself where no joint reference was contemplated and accordingly the new section was introduced where industrial establishments of the same nature, situated in more than one State, were concerned in an industrial dispute and such industrial dispute of national character is to be referred to the National Tribunal.

The expression 'industrial establishment' or 'establishment' has been used in several sections of the Act and to the extent possible the same meaning is to be given to that expression in the absence of any statutory definition. From the scheme of the Act it is clear that it envisages, each as a distinct concept, (1) an industry; (2) an industrial concern, within an industry; (3) an industrial establishment, which may itself be the whole of the industrial concern or which may be part of a larger industrial concern; (4) a section of an industrial establishment and (5) categories of workmen in an industrial establishment or in a section thereof.

In the Madras case of India Tyre and Rubber Co., cited above, AIR 1958 Mad 205, although the establishments were spread over more than one State as aforesaid, the reference by the Madras Government to the Tribunal was not challenged. Thus on the Act, as it stands and so far as it is applicable to the facts and circumstances of this case, the Orissa Government is the appropriate Government. No joint reference was contemplated. The facts that some of the departments of the Project happen to be situated on the other side of the river in Andhra Pradesh

makes no difference to the determination of this question.

11. Mr. A. R. Mukherji, learned counsel for the workmen, on this particular issue as to whether the Orissa Government was the appropriate Government competent to make the reference, supported the contentions of the learned Advocate-General of Orissa. He contended that only in certain exceptional cases expressly provided in the Act, the power of the situs Government was expressly superceded or taken away in the Act itself; and in those cases only, the Central Government was empowered to make reference to the National Tribunal.

Thus the jurisdiction of the situs Government was taken away in the case of Banking Companies and Insurance Companies, Mines, Oil-fields as provided in Section 2(a)(i) of the Act. In these cases the appropriate Government would be the Central Government regardless of the fact that such concerns happen to be situated in a particular State or States. The purpose of this special provision with regard to these concerns, namely, Banking Companies, Insurance Companies, Mines and Oilfields was to establish and maintain uniformity of laws so that there may not be any variation in their conditions of service.

With regard to these concerns, wherever they are situated in the country it is the Central Government alone which is the appropriate Government competent to make the reference. The necessity for amendment of 1956 arose primarily because the Labour Appellate Tribunals were abolished in that year. Until 1956 it was the Labour Appellate Tribunals which were maintaining uniformity in the industrial laws of the country as a whole. The Act is silent on the position, such as the present case, where the employer Government which the Andhra Pradesh Government claims to be, owns, a business in another State -- Orissa.

Mr. Mukherjee ultimately relied on the position that the Andhra Pradesh Government had submitted to the jurisdiction of the Tribunal and that in fact no protest was made at the time of the conciliation. That apart, he also commented on the fact that the Andhra Pradesh Government as, such is not a party to these proceedings. Therefore this Court, according to him, should disregard the contentions purported to have been made on behalf of the Andhra Pradesh Government.

12. These are the rival contentions of the parties on the point. On the facts of this particular case we are satisfied that the industry of the Project is substantially in Orissa. In fact, the main organisations of the industry are entirely in Orissa, namely, the Power House, Flume Channel, Flume Tunnel, Tunnel Pond Dam, Pressure Tunnel, Penstocks, and valves etc., Power Station Buildings & Tail Race etc., Turbines and Generators etc., Transformer Yard -- all in Orissa. It further appears that the Jalaput Dam Works and Diversion Dam are spread over both the States almost half and half.

It is true that some of the roads and bridges, permanent service lines for telephones and electricity, permanent buildings, some heater-supply equipment, temporary camps etc., are on the side of Andhra Pradesh. As regards stores, they are mostly in Orissa. Only certain items of stores, namely stock in Visakhapatnam and Salur are in Andhra Pradesh. In this context we had the advantage of an affidavit of the Accountant of the Office of the Superintending Engineer, Machkund, filed on 19-10-1959 in which he stated the statistical information and cost particulars in respect of the Machkund Hydro-Electric Scheme, as furnished in Annexures I and II of the said affidavit. The annexure II gives an estimated cost of various works of Machkund Hydro-Electric Scheme as per the latest revised estimate.

We must observe that this is a fair and complete picture of the entire position which supports the view that the industry of the Project is substantially in Orissa, though only some portions are on the other side of the river in Andhra Pradesh. In this contest I should give an analogy. In a jute mill it is the situation of the milling plant, where the jute is milled, which determines the situation of the jute mill industry, although the raw materials, namely, the jute plants might have been brought from other States. In the same way in the present concern Machkund Hydro-Electric Project is a generating industry for production of Hydro-electricity.

The raw materials in this particular case are the waters in the Dam which happen to be partly in Andhra Pradesh. In that context, the Soil Conservation works at Araku in Andhra Pradesh loses its importance as an industry with reference to the Hydro-Electric Project itself. In other words it only supplies a portion of the raw

materials namely, the waters from which the Power House in Orissa generates electricity. Considered from this view, we are of opinion that the industry of Machkund Hydro-Electric Project having been substantially in Orissa the 'appropriate Government' is the Orissa Government which was competent to make the reference and accordingly the Industrial Tribunal, Orissa, had jurisdiction to adjudicate the Industrial Disputes which were referred to him.

This leads us now to the consideration of each of these writ petitions separately.

Re. O. J. C. No. 64 of 1958.

13. With regard to this particular O. J. C, No, 64 of 1958 it appears from the correspondence that after the Machkund Workers Union had given notice of strike on 7-7-1956 the Conciliation Officer (Sub-Divisional Magistrate, Koraput) held conciliation proceedings on 14-7-1956 but failed to bring about a settlement and sent a report to the Orissa Government under Section 12(4) of the Industrial Disputes Act reporting his failure to bring about any settlement. On receipt of the said report the Orissa State Government was satisfied that this was a case for Industrial Tribunal.

On 21-7-1956 a telegram was sent by the Orissa Government to the Government of Andhra Pradesh informing them that a reference was being made to the Industrial Tribunal and asking them to wire concurrence. It further appears that the Secretary to the Government of Orissa, Labour Department, also contacted on phone the Deputy Secretary, Works Department, Andhra Pradesh Government, in the absence of their Secretary on the very same day, namely, July, 1956.

In reply, the Andhra Pradesh Deputy Secretary stated over the phone that they would inform the Labour Department of Orissa by wire on 22-7-1956. On 24-7-1956, the Andhra Pradesh Government was again reminded by wire. The Andhra Pradesh Government by telegram dated 23-7-1956 which was received by the Orissa Government, Labour Department, on 25-7-1956 intimated that their reply would be sent shortly. In the meantime, the Machkund Workers Union in their letter dated E3-7-1956 addressed to the Labour Commissioner, Orissa, threatened that they would go on strike with, effect from 28-7-1956 if no settlement was

reached and the dispute was not referred to the Industrial Tribunal.

The Superintending Engineer, Machkund, sent a telegram on 29-7-1956 which was received by the Labour Department, Orissa on 30-7-1956 to the effect that Machkund Workers Union including Public Utility Services had struck work since 25-7-1956. Thereafter, on 31-7-1956 the Orissa Government referred the dispute to the Industrial Tribunal under Section 10 of the Act. Then, thereafter on 4-8-1956 the Secretary to the Government of Orissa, Labour Department, received a letter dated 28-7-1956 from the Secretary to the Government of Andhra Pradesh, Public Works Department, intimating that they were examining the question of applicability of the provisions of the Industrial Disputes Act and that there was no need to make a reference to the Industrial Tribunal.

It must be noticed that in the meantime having regard to the strike with which the Orissa Government was threatened a reference had already been made to the Industrial Tribunal. The Orissa Government as the 'appropriate Government' had appointed a Conciliation Officer; and the Superintending Engineer, Machkund had been attending such conciliation proceedings. The Government of Andhra Pradesh had not appointed a Conciliation Officer to deal with the disputes regarding the Project. It was the Orissa Government which had to meet the situation as aforesaid.

However, as the Project was being managed by the Orissa Government on behalf of both States, the Orissa Government thought it proper to consult the Andhra Pradesh Government in order to avoid misunderstanding, if any. But as the situation was deteriorating it could not brook any further delay. The Orissa Government had to make a reference in exercise of its powers under the Industrial Disputes Act. In this back-ground we think that the silence and acquiescence on the part of the Andhra Pradesh Government amount to concurrence by the Andhra Pradesh Government to the reference made by the Orissa Government to the Industrial Tribunal.

14. Now as to merits, on the question of retrenchment the issues before the Industrial Tribunal were whether Sections 25-F to 25-H of the [Industrial Disputes Act, 1947](#) are applicable to Machkund Hydro-Electric Project and if so to what

relief the retrenched workers are entitled and whether Project seniority or unit seniority in respect of all kinds of workers should be taken into consideration in matters of retrenchment in the Project. The Industrial Tribunal in his award held that the Project seniority and not the Unit seniority has to be observed for effecting retrenchment of the workmen concerned in the dispute.

It is against this decision of the Tribunal that the Superintending Engineer, Machkund (petitioner in O. J. Case No. 64 of 1958) had filed the said writ petition for quashing the award dated 30-12-1957 in Industrial Dispute No. 2 of 1956. Orissa published in the Orissa Gazette Extra-Ordinary dated 5-2-1958 as aforesaid. Mr. Narasaraju, learned Advocate-General for Andhra Pradesh contended that this Unit seniority and not Project seniority should have been taken into consideration in matters of retrenchment in this particular case. Section 25G of the Act lays down the procedure for retrenchment. It reads as follows:

'Where any workman in industrial establishment who is a citizen of India, is to be retrenched and he belongs to a particular category of workman in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in the category, unless for reasons to be recorded the employer retrenched any other workman.'

The question now is how the retrenchment is to be effected in compliance with the provisions as required by the statute. Seniority of service and rules of social justice are the foundations of the normal rule of 'last come, first go.' When a business is run in various departments and the departments are not treated as water-tight compartments and when workmen from one department are transferred to another department, the staff employed in the business as a whole must be taken as a unit for applying the principle of 'last come, first go' in effecting retrenchment. The departments should not be considered as separate units for this purpose.

This indeed is the normal procedure in effecting retrenchment. But different considerations, however, arise where the departments are watertight, where a set of employees is tied to a particular department, that is to say, where it is a condition of service, express or implied, that the employer cannot put him to work

in any other department, (East Asiatic Co. (India) Ltd. v. East Asiatic Co. Staff Union, (1954) (2 Lab. LJ 464 (LATI-Mad)), (Wali-ullah and Bind Basni Prasad JJ.).

15. We have now to consider in the present case the facts on which we have to decide whether the retrenchment should be on the basis of seniority Projectwise or Unitwise -- whether horizontally or vertically. The workmen concerned in the present case who are to be retrenched by the Management are what are called the N. M. R. (Nominal Muster Roll) workmen and not the employees belonging to what is called the work-charged establishment.

As I have already stated above, each Division in the Project is a separate Unit -- each having its own muster roll. It is said that there is no common or super muster roll for the entire Project. The Executive Engineer is in charge of each division establishment. The Assistant Engineer is also competent to appoint. The appointments are on daily wages and payment is made once a fortnight. Each workman is given a Check Number and there is no service regulation in respect of such workman. There is no transfer of these workmen from one Division to another.

It appears that the Industrial Tribunal in coming to his decision did not take into consideration the rules, regulations and conditions of service of the workmen. The N. M. R. workmen are broadly classified into three categories, namely, skilled, semi-skilled and unskilled. It is contended on behalf of the Management that to effect retrenchment Projectwise that is to say, in accordance with seniority in the entire Project, it would mean movement of workers from one Division to another which would entail loss of time, dislocation and disorganisation in the work,

It would also mean additional financial burden and there having been no common muster roll it is not possible to determine readily the seniority of these workmen appointed in different Division Units of the Project. In 1955, Project seniority was sought to be adopted in respect of skilled workers. Subsequently, difficulties arose and ultimately in 1956 it was abandoned and the Units came into existence at Machkund and Araku valley which are separated -- one from the other -- by a distance of several miles.

16. In this context, our attention was drawn to the rules in the Madras Electricity Manual which are applicable to the Project. Paragraph 57G of the Manual provides that in the Electricity Department members of the work-charged establishment fall under two categories, viz., --those engaged for construction, works and those engaged for operation and maintenance works. Paragraph 579 provides that the total number or appointments in the different scales of pay is fixed for each division by the Chief Engineer.

The Manual also provides for the method and process for recruitment, dismissal and classification of different classes of workmen. It also appears that there is provision for maintaining Pay Roll for the workmen. One significant provision in the Manual is in paragraph 595 regarding transfers. The rule in the Manual is that transfers may be made by the Divisional Engineers within their jurisdiction. This suggests that transfers are not ordinarily made outside the Divisions.

With regard to payment of wages, the minimum and maximum daily wages of each class of labourers in the different localities in the system are fixed by the Superintending Engineer. Recruitment to daily labour staff shall be made by Assistant Engineers subject to such general conditions as may be prescribed by Superintending Engineers and the Divisional Electrical Engineers for the system and Division respectively. It further provides that every employee shall be provided with a Check Number by the Assistant Engineer out of the list allotted to the distribution from the Division Office.

17. As regards evidence, M. W. (Management) witness) No. 1 (Superintending Engineer, Machkund) said that in 1955 there was a conference with reference to the demands made by the Machkund Workers Union and it was decided to give the skilled workers project seniority and the witness was asked to prepare a list of workers of each category for the whole project. He further said that subsequently there was another conference where it was decided not to follow Project seniority even for skilled labourers.

In 1955 there were different kinds of seniority for skilled, semi-skilled and unskilled. In the conference, all these were altered and it was decided to follow Unit seniority for all kinds of workers, dividing the Project into five Units, these

units being co-extensive with the three Divisions each under one Executive Engineer and two units, that is Machkund and Araku being included in one Division, that is, the C. R. D. Division. A memorandum is stated to have been issued ratifying this decision as per Ext. C dated 31-7-1956.

The Superintending Engineer further deposed that there are four divisions in the Project, that is, C. R. D., Electrical and Mechanical, Jalaput and Division III at Onakdeli. He clearly said in his evidence that his office had nothing to do with the recruitment or discharge of N. M. R. labour in the various Divisions and that with reference to these matters each Division is independent of the other and each is in charge of an Executive Engineer. He further said that there were no appointment orders or transfer orders with regard to N. M. R. workers. In the Project the following works are in progress: Jalaput Dam, Penstock and Power House ---these are the main works and also Soil Conservation works as aforesaid.

As no history of service is maintained for individual N. M. R. workers, so unless the records of each section are waded through which might take years, seniority on Project basis cannot be ascertained for the N. M. R. workers. The evidence of the Superintending Engineer is also corroborated by the Executive Engineer in charge of Jalaput Division (M. W. 2) the Deputy Chief Accountant in the Superintending Engineer's office (M. W. 3) and also by the Executive Engineer in charge Division III of the Project (M. W. 4). M. W. 4 in his evidence said that there is a separate department for Generation manned by an Executive Engineer and supervised by a Superintending Engineer and that the Power House has been registered as a factory under the Factories Act.

Witnesses for the workmen, namely, U. W. (Union Witness) Nos. 1 and 3 in their cross-examination admitted the character of the separate Divisions as forming independent Units. Reading the evidence of the witnesses we are satisfied that the Management had clearly established the unit character of the different divisions in the Project. That apart we also find from the memorandum of the Government dated 31-7-1956 (Ext. C) -- regarding fixation of seniority for issuing notices of termination of service, -- to the effect that no discrimination should be made between skilled and unskilled workers, but the seniority shall be considered within

the respective units stated above for the purpose of retrenchment.

18. It was then contended on behalf of the management of the Project that the Industrial Tribunal, --in adjudicating on reference of the industrial dispute made to him under Section 10(1)(d) of the Act, -- had no unlimited jurisdiction. The Industrial Tribunal was not competent to disregard the conditions of service, terms of employment, rights and obligations of the employer and the employees in relation to the Project. It is only where there is evidence of victimisation or unfair labour practice that the power of the Industrial Tribunal to interfere is invoked. Otherwise, the Industrial Tribunal has no general right to interfere with the Management.

In this particular case, there is no question of victimisation or unfair labour practice as appears from Ext. 44, the minutes of the Conference held on 1-7-1956, where with regard to retrenchment it was decided by the authorities that the necessity of retrenchment was accepted as certain works were coming to a close. It is clear from the minutes that the authorities however took care to forward to many employing concerns of both the States, viz., Nagarjun Sugar Control Board, Tungabhadra, Employment Exchanges, Hirakud and Rourkela -- with a request to absorb the workers served with notices of retrenchment.

It was noted in the minutes of the Conference that in Nagarjun Sugar Control Board meeting held on 27-6-1956 it was decided to give preference to workers retrenched from Tungabhadra and Machkund Projects and as such lists should be furnished to the Nagarjun Sugar Control Board immediately. Thus there is every genuine sincere attempt by the Management to get employment for the retrenched workers in other sister concerns in the neighbouring States.

19. Then it was further contended on behalf of the Management that award by the Industrial Tribunal, directing retrenchment on Project seniority basis under Section 25G of the Act was without jurisdiction. In dealing with a case of retrenchment under Section 25G, the whole issue was whether such Division or Unit was an Industrial establishment or not. The worker's claim to Project seniority can succeed only if the entire Project can be treated as one Industrial establishment. The Industrial Tribunal obviously over-looked the aspect that Machkund Hydro-Electric

Project was divided into different departments called Divisions which each, by themselves, constitute separate Units to form an industrial establishment within the meaning of Section 25G of the Act.

The learned Industrial Tribunal did not appreciate the evidence adduced on behalf of the Management as discussed above nor did the Industrial Tribunal appreciate the significance of the rules contained in the Madras Electricity Manual nor the conditions of service -- recruitment, appointment, payment of wages etc. In short, the learned Industrial Tribunal did not consider that each division was a separate Unit with an Executive Engineer in charge and an Assistant Engineer under him. The fact that there have been certain casual transfers from one Division to another or that quarters had been allotted to workmen on project seniority basis, in certain cases; as appears from the evidence of the witnesses for the workmen, -- these indeed are wholly irrelevant considerations for the purpose of determining the character of the Divisions. Indeed these are extraneous considerations not relevant to decide the question.

The substance of the entire position is that the Project was divided into different Divisions, obviously for convenience of management and administration. Necessarily they had to be administered separately and independently as distinct units. Viewed in this light, each Unit is an undertaking or separate industrial establishment within the meaning of Section 25G of the Act. The learned Industrial Tribunal did not appreciate the scope of his enquiry under Section 25G of the Act. His decision is not supported by the facts found by him. In fact, some of his observations in the award go to show that while himself noticing the different separate units of works in the Project, he just missed to draw the only natural inference that such Units were separate watertight departments, constituting separate industrial establishments. The learned Industrial Tribunal in his award appears to have observed as follows :

'..... It looks to me that these nominal Muster Roll workers are recruited for various kinds of work at different units of work but nonetheless it is for the project It cannot be denied that though there are various Units still there is only one industrial pool and one concern i. e. the Project but in the various units different

kinds of work are being done and a number of Nominal Muster Roll unskilled workers are appointed from time to time.These observations tend to show that the learned Industrial Tribunal, while appreciating the existence of different units, came to a wrong conclusion in holding that Project seniority but not unit seniority has to be observed for effecting retrenchment of the workers concerned in the dispute. In other words, his conclusion is not supported by his own findings on facts.

20. On the question of retrenchment Mr. A. R. Mukherji, learned Counsel appearing for the workmen, contended that the learned Industrial Tribunal was justified in holding that the Project seniority has to be observed in effecting retrenchment of the workmen. The learned counsel urged that there was no error of law on the face of the record in the finding of the learned Industrial Tribunal. The basis of his argument in this context was the concept of the term 'industrial establishment' as one unit. He argued that in view of the unity of ownership, inter-dependence of the different parts of the Project constituting one organic whole, territorial contiguity of the different parts in the Project, -- the whole Project must be taken as one unit.

This argument overlooks one fact that the different units in the project, namely Power House, Dams, the Transmission lines, the offices etc. are all covered over a range of distance of several miles distributed over both sides of the river Machkund in the States of Orissa and Andhra Pradesh. The learned Counsel further argued that the different Divisions did not constitute watertight compartments. He strongly emphasised the point that the term 'industrial establishment' in Section 25C must be taken as, in its wider general sense, to mean the entire Project taken as a whole.

21. For decisions on the point, in the Madras case of India Tyre and Rubber Co., AIR 1958 Mad 205 cited above it was held that Section 25G makes it Specific that the unit of the industry to which that statutory principle governing retrenchment applied is the industrial establishment; that the definition of an Industrial Establishment, in the Explanation to Section 25A(2) is limited in its scope and cannot apply to the interpretation of 'industrial establishment' as it has been used

in Section 25G; for the purposes of applying Section 25G, the position is that the term 'industrial establishment' has not been defined by the Act itself; before deciding whether the retrenchment ordered by an industrial concern violated the terms of Section 25G, what the Tribunal is to consider is whether the office of the concern at a particular place in which retrenchment is effected, is an 'industrial establishment' within the meaning of Section 25G.

It was further held in that particular case that the petitioner Company was an industrial concern, and the office at Madras where the retrenchment was effected in respect of certain workmen, was an industrial establishment of that industrial concern, each of the sub-depots in the different States was a separate industrial establishment of the same industrial concern for purposes of Section 25G. Recently a Division Bench of the Madras High Court in *Buckingham and Carnatic Company Ltd., Madras v. Industrial Tribunal, Madras*, (1959) 2 Mad LJ (SN) 46: (AIR 1960 Mad 106) held that in establishments which employ several well-defined sections of workmen and have several units, it cannot be said that the entire establishment should be treated as one Unit.

The Supreme Court in *Express News-paper Ltd. v. Union of India*, AIR 1958 SG 578 at p. 637 (paragraph 244) -- on a question whether the Wage Board was not authorised by the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (Act 45 of 1955) to fix the salaries of journalists except in relation to a particular industrial establishment and not on an all India basis of all newspapers taken together, observed that the ground on which the decision of the Wage Board was challenged to be illegal and void, was based on the definition of 'newspaper establishment' found in Section 2(d) of the Act. 'Newspaper establishment' is there defined as 'an establishment' under the control of any person or body of persons, whether incorporated or not, for the production or publication of one or more newspapers or for conducting any news agency or syndicate. So, the contention put forward was that 'an establishment' can only mean 'an establishment' and not a group of them, even, though such an individual establishment may produce or publish one or more newspapers.

The definition may comprise within its scope chains or multiple units, but even so, the establishment should be one individual establishment producing or publishing a chain of newspapers or multiple units of newspapers. If such chains or multiple units were though belonging to some person or body of persons whether incorporated or not, produced or published by separate newspaper establishments, common control would not render the constitution of several newspapers establishments as one establishment for the purpose of this definition; they would nonetheless be separate newspaper establishments though under common control.

Their Lordships of the Supreme Court held that if a newspaper establishment's activities (like an industrial establishment) of production or publication of more newspapers than one, are carried on in different places e. g. in different towns or cities of different States, the newspaper establishment producing or publishing such newspapers cannot be treated as one individual establishment but should be treated as separate newspaper establishment for the purpose of working out the relations between themselves and their employees ; there would be no justification for including these different newspaper establishments into one chain or multiple unit and treating them as if they were one newspaper establishment. These, decisions indeed are a complete answer to the contentions made on behalf of the workmen claiming Project Seniority.

22. Now it is for us to decide whether we can interfere in this writ petition with the award of the Industrial Tribunal. The discretion which an Industrial Tribunal has, must be exercised in accordance with well recognised principles. Undoubtedly there is a distinction between commercial and industrial arbitration. Industrial arbitration may involve the extension of an existing agreement or the making of a new one or in general the creation of new obligations or modifications of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements. A Court of law proceeds, on the footing, that no power exists in the Courts to make contracts for people and the parties must make their own contracts.

The Courts reach their limit of power when they enforce contracts which the parties have made. An industrial Tribunal is not so fettered and may create new obligations or modify contracts in the interests of industrial peace to protect legitimate trade union activities and to prevent unfair labour practice or victimisation. But an Industrial Tribunal cannot, ignore altogether an existing agreement or existing obligations for no rhyme or reason whatsoever *Rohtas Industries Ltd. v. Brijnandan Pandey*, (S) AIR 1957 SC 1. From an examination of the authorities of the Supreme Court as also of the Courts in England, it is clear that one of the grounds on which the jurisdiction of the High Court on writ petitions may be invoked is an error of law apparent on the face of record; but not every error either of law or fact which can be corrected by Supreme Court in exercise of its statutory powers of appeal or revision.

Indeed, an error of fact even though apparent on the face of record cannot be ground for interference by the Court exercising its writ jurisdiction. Nor is there any support for the proposition that the Court exercising its powers under Article 226 of the Constitution can quash an order of the inferior Tribunal on the ground of mistake of fact apparent on the face of the record. Their Lordships of the Supreme Court have settled the law in this respect by laying down that in order to attract such jurisdiction it is essential that the error should be something more than a mere error of law; it must be one that is manifest on the face of the record (*Nagendra Nath Bora v. Commissioner of Hills Division Assam*, 1958 SCJ 798 at p. 815 : (AIR 1958 SC 398 at p. 412).

In the present case before us on examination of the records and the finding of the learned Industrial Tribunal on facts it is clear to us that the learned Industrial Tribunal has not proceeded in accordance with the essential requirements of the law as contained in Section 25G of the Industrial Disputes Act which it was meant to administer. In fact, as we have shown from the observations of the Tribunal quoted above, his conclusions are on the face of the record contrary to his findings on facts as aforesaid.

23. In this view of the position, we hold that the finding of the learned Industrial Tribunal with regard to the procedure for retrenchment was palpably wrong on the

face of the record. The result, therefore, is that the writ petition being O. J. C. No. 64 of 1958 must be allowed on merits so far as it relates to question of mode of retrenchment. We accordingly set aside the award dated 30-12-1957 in Industrial Dispute No. 2 of 1956 as aforesaid only so far as it relates to the mode of retrenchment. We direct that those workers who were employed in the Project prior to 1-7-1956 may be retrenched in accordance with their seniority in the units in which they were employed prior to that date; those workmen who were employed in the Project after 1-7-1959 may be retrenched in accordance with their seniority in the units in which they were employed on the date of their recruitment; any transfer from one unit to another after 1-7-1956 of those workmen who were employed prior to 1-7-1956 shall be ignored for the purpose of retrenchment. We had already made an interim order to this effect on 16-7-1958 which now is made final. The remaining portion of the learned Industrial Tribunal's said award remains undisturbed.

Re. O. J. C. No. 244 of 1958 O. J. C. No. 245 of 1958.

24. On 24-11-1958 the Superintending Engineer, Machkund Hydro-Electric Project, Machkund filed the writ petition (O. J. C. No. 244 of 1958) praying for issue of an appropriate writ for cancelling the notification dated 25-9-1958 whereby the Government of Orissa made a reference under Section 10 of the Industrial Disputes Act to the Industrial Tribunal, Orissa, for adjudication of the industrial dispute,

'Whether in view of the memorandum of settlement arrived at on 6-3-1955 between the Chief Engineer, Electricity, Andhra and the Machkund Workers Union at Madras, 10 days wages in lieu of casual leave shall be paid to nominal muster roll workers who have put in 4 years service in the Machkund Hydro-Electric Project.'

25. On the same date (24-11-1958), the Superintending Engineer, Machkund Hydro-Electric Project Machkund also filed another writ petition (O. J. C. No. 245 of 1958) praying for issue of an appropriate writ for cancelling the notification dated 25-9-1958 whereby the Government of Orissa made a reference under Section 10 of the Industrial Disputes Act to the Industrial Tribunal, Orissa, for

adjudication of the industrial dispute,

'Whether the strike of the workers employed under the Superintending Engineer, Machkund Hydro-Electric Project from 27-8-58 to 23-9-58 is legal and/or justified and if so, whether the workers are entitled to wages for the strike period.'

26. In both the said writ petitions, the said Superintending Engineer, Machkund, also prayed for issue of a writ of Prohibition directing the Industrial Tribunal, Orissa, (Opposite Party No. 3 in both the petitions) not to proceed with the respective reference in each of the cases in pursuance of the respective notification of the Government of Orissa on the grounds stated in the said respective petition.

27. The question whether the Orissa Government is the 'appropriate Government' competent to make the reference was also raised in both these writ petitions. This point is covered by our findings in O. J. C. No. 64 of 1958. We hold that the Orissa Government is the 'appropriate Government' competent to make both the said references. The said writ petitions O. J. C. No. 244 of 1958 and O. J. C. No. 245 of 1958 are dismissed. The Industrial Tribunal, Orissa, being Opposite Party No. 3 in both the said petitions may proceed with the adjudication of the said industrial disputes referred to him by both the said two references according to law.

Re.-- O. J. C. No. 246 of 1958.

O. J. C. No. 247 of 1958.

28. On 24-11-1958 the Superintending Engineer, Generation Circle, Andhra Pradesh Electricity Department residing at P. S./P. O. Visakhapatnam, Andhra Pradesh filed the writ petition, O. J. C. No. 246 of 1958 praying for issue of an appropriate writ for cancelling the notifications dated 25-9-1958 whereby the Government of Orissa purported to make a reference under Section 10 of the Industrial Disputes Act to the Industrial Tribunal, Orissa for adjudication of the Industrial dispute between the said Superintending Engineer, Generation circle of Machkund Hydro-Electric Project, Vishakhapatna and workmen under him the matter referred for such adjudication being

'Whether the strike of the workers of Machkund Hydro-Electric Project employed under the Superintending Engineer, Generation Circle, Visa-khapalna. from 28-7-1956 to 31-7-1958 is legal and/, or justified If so, whether the workers are entitled to wages for the strike period.'

29. On the same date (24-11-1958) the Superintending Engineer, Generation Circle, Andhra Pradesh Electricity Department residing at P. S./P. O. Visakhapatna, Andhra Pradesh also filed another writ petition (O. J. C. No. 247 of 1958) praying for issue Of an appropriate writ for cancelling the notification dated 12-9-1958 whereby the Government of Orissa purported to make a reference under S 10 of the Industrial Disputes Act to the Industrial Tribunal, Orissa, for adjudication of the industrial dispute between the said Superintending Engineer, Generation Circle of Machkund Hydro-Electric Project, Visakhapatna and his workmen, the matters referred for such adjudication being :

'Whether the workers of Machkund Hydro-Electric Project employed under the Generation Circle in Anantagiri and also in the power house at Anakadeli are entitled to Class I special pay and go home concession as per Govt. Order No. 587 dated 20th February, 1948.'

30. In both the said petitions also, the said Superintending Engineer at Visakhapatna further prayed for issue of a writ of Prohibition directing the Industrial Tribunal, Orissa (Opposite Party No. 3 in both the said petitions) not to proceed with the respective reference in each of the cases in pursuance of the respective notification of the Government of Orissa on the grounds stated in the respective petitions.

31. The Superintending Engineer, Generation Circle, at Vishakhapatna in Andhra Pradesh, in both the said writ petitions challenged the validity of the said two orders of reference respectively dated September 25, 1958 and September 12, 1958, purported to have been passed by the Government of Orissa, on the grounds stated in the said petitions. In both the said petitions, the State of Orissa and the Secretary to the Government of Orissa, Labour Department are, among others, the Opposite Parties. It appears that the Government of Orissa has not filed any counter affidavit to either of the said petitions and thus we find no denial

of the facts stated in the said petitions, which stand uncontradicted. These petitions did not appear to be seriously contested. It is manifestly apparent on the face of the record that the parties to the alleged industrial dispute are in Vishakhapatnam, (Andhra Pradesh) outside the State of Orissa. Besides the industrial disputes in these two cases also appear to have arisen in Vishakhapatnam, where the Superintending Engineer appears to have been residing. In any event, having regard to the frame and form of the said two references, as they stand, we cannot hold that these two references, purported to have been made by the Government of Orissa, -- can be acted upon. We accordingly direct the Industrial Tribunal, Orissa (Opposite party No. 3 in both the petitions) not to proceed with the said two references in pursuance of the said two notifications of the Government of Orissa, as prayed for. The said two writ petitions (O. J. C. No. 246 of 1958 and O. J. C. No. 247 of 1958) are therefore allowed.

Re.-- O.J.C. No. 132 of 1958.

O.J.C. No. 133 of 1958.

O.J.C. NO. 134 of 1958.

O. J. C. No. 135 of 1958.

32. These writ petitions were filed by individual workmen against the Management. They did not, however, appear to have been seriously pressed at the hearing. However, all these writ petitions involve questions of disputed facts and we take the view that they are all outside the scope of Article 226 of the Constitution. These writ petitions are accordingly dismissed.

33. In the result, these nine several O. J. Cs, are disposed of in the manner as aforesaid. In the circumstances of the case, each party to bear his own costs in all these petitions.

Narasimham, C.J.

34. I agree with the order proposed by my learned brother Barman J. in these nine O. J. Cs. The questions involved in these cases have attained some importance

because here the dispute is not between a private employer and his employees, but between two Governments on the one hand and their employees on the other; and moreover differences have arisen between the Government of Orissa and Andhra as to which Government is the 'appropriate Government' for taking action under the [Industrial Disputes Act, 1947](#). Hence I wish to give my own views on certain aspects of the whole case.

35. Machkund Hydro-Electric Project was intended mainly to utilise the waters of the river Machkund for the purpose of generating electric power, taking advantage of the water-falls at a place known as Duduma Falls where the river suddenly drops down to a height of more than 500 feet. For several miles both below and above the Falls, the mid-stream of the river is the boundary line between the States of Orissa and Andhra. Any project for the exploitation of this valuable natural resource must necessarily require agreement between the two State Governments.

In January 1946 the then Government of Madras (within which were included the territories which subsequently became Andhra State), and the then Government of Orissa entered into an agreement by which the Government of Madras (now Andhra) agreed to be in sole charge of the construction work, in connection with the project.

The capital cost of the project was contributed in the ratio of 70 per cent and 30 per cent between the two States and the power generated was also divided between the two Govts. in the same ratio. There were several other terms for safeguarding the interests of Orissa, but it is unnecessary to refer to them here. In pursuance of this agreement the construction works in connection with the project were taken up. by the Government of Andhra in due course and are nearing completion.

36. The project consists of :

(i) the construction of a main storage reservoir known as Jalput dam, across the river several miles above the Falls for the purpose of securing a stable flow of water throughout the year.

(ii) the construction of a diversion dam just above the falls for the purpose of storing about one week's supply of water.

(iii) the construction of a power house below the Falls, the installation of turbines and generators therein and the construction of appurtenant works for the purpose of taking the water from the diversion dam to the turbines. These consist of a flume tunnel, flume channel, tunnel pond dam, pressure tunnel and penstocks and valves.

37. In addition to these, quarters for the operational staff have been constructed on either side of the river but the Office of the Superintending Engineer in charge of the Project, the Inspection Bungalow and other permanent buildings are all located on the Orissa side of the river. Another important item in the scheme which is part of the Project is the Soil Conservation Scheme which has, for its main purpose the afforestation of the catchment area with a view to prevent rapid silting of the reservoir.

The catchment area lies in both the States and one of the Soil Conservation Schemes known as the Araku Valley Pilot Scheme is located at Araku which is wholly in Andhra State. The diversion and the Jalaput dams extend from the Orissa side to the Andhra side. The power house (including turbines and generators), the flume channel, the flume tunnel, the tunnel pond, the pressure tunnel, penstocks and valves and transformer yard are all located exclusively on the Orissa side.

The total costs of the various works connected with the said project has been given in annexure II signed by the Superintending Engineer in charge of the Project (copy attached to this judgment) from which it appears that out of a total estimate of about 15/- crores the capital sunk on the Orissa side amounts to about 12 crores whereas the capital sunk on the Andhra side amounts to about 3 crores. The workmen are distributed throughout the project and there are labour colonies on both sides of the river but most of the permanent employees reside on the Orissa side.

38. The Chief Administrative Officer in charge of the entire project is the Superintending Engineer, Machkund Hydro-Electric Scheme. His office and residence are both located on the Orissa side. Under him there are 4 Executive Engineers, in charge of four Divisions, into which the Project has been divided, namely; (i) C. R. D. Division, (ii) Electrical and Mechanical Division, (iii) Jalaput Dam Division and (iv) Division No. III at Onakadeli. The Executive Engineer in charge of each of these Divisions though working under the general supervision and control of the Superintending Engineer, is in independent charge of his Division. The workers of the project are divided into two categories namely (i) N. M. R. workers (Nominal Muster Roll workers) and (ii) workers of the work charged establishment.

The appointment and dismissal of the N. M. R. workers is exclusively vested in the Executive Engineers in charge of the Division. There is no regular transfer of these workers from one Division to another, though some of them, especially skilled workers, may, after being discharged from one Division, be absorbed in some other Division if there is work for them.

No history of the services of any of these N. M. R. workers is maintained in any of these Divisions as their appointment is purely temporary. The present dispute is in respect of the N. M. R. workers only. The dispute is mainly as to whether in retrenching the N. M. R. workers seniority in the Project as a whole should be considered or seniority within the particular Division in which they are employed should be considered.

39. The question that arises for consideration on these facts is :

'Who is the 'appropriate Government' to make a reference under Section 10(1) of the Industrial Disputes Act, if an industrial dispute exists or is apprehended between the workmen and the management of the said Project? '

Is it the Orissa Government or is it the Andhra Government? Or else should the reference be made jointly by both the Governments? The extreme contention originally put forward by the learned Advocate General of Andhra to the effect that as the Andhra Government has contributed 70 per cent of the capital for the

Project and as that State is in sole charge of the construction works by virtue of the agreement of 1946 and as that State, through its officers, disburses the wages of its employees, wherever that may be, that State alone was competent to make reference, was rightly not pressed before us. He limited his argument to saying that the reference should have been made with the concurrence of both the Governments, especially as the implementing of the ultimate decision of the Labour Court or the Industrial Tribunal and the financial liability arising out of that decision, would fall mainly on the Andhra Government.

40. It was further contended both before the lower Court and before us that the Project which is a Government undertaking is not an 'industry' within the meaning of clause (j) of Section 2 of the Industrial Disputes Act. But a complete answer to this argument is found in the decision of the Bombay High Court reported in *Hospital Mazdoor Sabha v. State of Bombay*, 1957-1 Lab LJ 55 (Bom) where it was pointed out that the correct test to determine whether a particular activity undertaken by Government is an industry or not would be to ascertain whether, if that activity had been undertaken by a private agency it would have been an 'industry' to which the Act would apply.

The correct approach would be to decide what activities are essential to the authority of Government as such and what are the functions which only the Government could discharge and which it would not have been competent for any private individual to discharge. If there is any activity which can be undertaken by a private agency and the same activity is carried on by a Government, then such activity must be held to be an 'industry' within the meaning of the Industrial Disputes Act.

Generation of electricity by harnessing the water resources of a river can be undertaken by private agencies also, and the mere fact that in view of the large expenditure involved and the necessity of obtaining the concurrence of the two Governments concerned this project was undertaken at Governmental level, would not suffice to show that it is one of the functions 'essential' to the authority of Government as such. There can be therefore no doubt that Machkund Hydro-Electric Project is an 'industry' within the meaning of the Industrial Disputes Act.

41. The construction of the expression 'appropriate Government' presents some difficulty. Here a peculiarly difficult position arises because the Government of Orissa and Andhra are joint employers, though the actual management of the project is entirely with the Andhra Government. The situs of the industry is however located in both the States though a major portion of the capital has been sunk On the Orissa side.

42. It is now settled by authority that the 'Government' referred to in the definition of the expression 'appropriate Government' is the Government exercising administrative or executive authority and not the Government exercising its powers as an employer in an industry. Thus in *State of Madras v. C. P. Sarathy*, AIR 1953 SC 53 it was held that the Government making a reference under Section 19(1) of the Industrial Disputes Act was acting administratively. This view was reiterated in a later decision of the Supreme Court reported in *State of Bihar versus D. N. Ganguly*, AIR 1958 SC 1018.

In a recent decision of the Bombay High Court reported in AIR 1959 Bom 390 it was further pointed out that when the Government was functioning under Section 12(5) of the Act it was not functioning in the interests of the employers or employees but in the interests of industrial peace. Under Article 162 of the Constitution the executive power of a State is co-terminous with its Legislative power.

Under Article 245 a State has no extra-territorial legislative power and consequently the Executive power of the State of Orissa, for the purpose of making a reference in connection with the industrial dispute, cannot extend beyond the boundaries of Orissa to the Andhra side and vice versa.

43. If a particular industry is located partly in one State and partly in the adjacent State and a dispute arises within that industry, it is sometimes difficult to decide which is the 'appropriate Government' for taking executive action to maintain industrial peace. One view is that the State where a 'substantial' or 'essential' portion of the industry is located should be deemed to be the 'appropriate Government', and the mere fact that ancillary portions of the industry are located in the adjacent State should not make any difference.

But it may not always be easy to determine what is the 'substantial' or 'essential' portion of an Industry. Does it depend on the proportion of the capital of the industry sunk in the two States, or does it depend on the place where the office of the Chief Administrator in charge of the Industry is located? Will the place, where the power house which generates the electricity required for running the industry, is located, be the decisive factor? Then again where a Project like the present one is spread over a period of several years, it may so happen that at a particular stage in the construction period most of the works may be located in one State, but that as soon as the construction work is completed a substantial portion of the Works may fall in, the other State.

Thus if the proposed power house below the Jalaput Dam referred to by the Superintending Engineer, Machkund Hydro Electric Scheme is completed a further capital of about one crore of rupees, would be sunk on the Andhra side. The construction of the expression 'appropriate Government', occurring in the Industrial Disputes Act, cannot be made to vary with the proportionate increase or decrease in the amount of capital sunk in either of the two States. Moreover, it may be difficult, in some instances, to decide as to what is a 'substantial' or 'essential' portion of an Industry. Suppose the main factory in a sugar mill is located in one State whereas the power house, the quarters for the staff and the quarters and office of the Manager in charge of the factory, are in the other State.

It will then be difficult to say where the situs of the mill is established. These problems are not hypothetical because though many industries in the border areas have been located years ago, the boundary line between the State of Orissa and Andhra State may shift from time to time. The agitation for re-fixing the boundary between the State of Andhra and Orissa and between Bihar and Orissa is still going on.

44. When the [Industrial Disputes Act, 1947](#), was first enacted, apparently this contingency of an inter-state dispute arising where an industry is situated in two contiguous States, was not thought of. There is considerable force in the contention of the learned Advocate-General for Orissa that the expression 'appropriate Government' in Clause (a) of Section 2 of the Act must mean only one

Government and not two Governments acting in agreement.

It is true that by virtue of Section 13(2) of the General Clauses Act the singular may also include the plural unless there is something repugnant in the subject or context. Hence as a matter of construction it may be said that the expression 'appropriate Government' may mean the two Governments where an industry is located in both the States. But the Act contains no provision as to how the two Governments should come to an agreement, or as to what is to be done in case the two Governments differ as to the action to be taken.

Suppose one Government wants to make a reference under Section 10 of the Act and the other Government does not agree. Moreover the main object of the Act is to ensure industrial peace by taking prompt action either by way of conciliation proceedings (under Section 12) or by a reference to the Labour Court or to the Industrial Tribunal (under Section 10). The Act could not have contemplated a 'joint reference' by both the Governments which would necessarily involve protracted correspondence between the two if there is no agreement.

When the [Industrial Disputes Act, 1947](#) was amended by Act 36 of 1956 this difficulty appears to have been partially solved by the insertion of Sub-section (1A) in Section 10 of the Act. By virtue of this amendment, if an industrial dispute is apprehended or exists and the dispute is such that industrial establishments situated in more than one State are likely to be interested in, or effected by, such dispute, then the Central Government may appoint a National Tribunal for adjudication of that dispute. Perhaps this provision may have to be resorted to if the two Governments do not agree.

But where neither Government approaches the Central Government for appointment of a National Tribunal under Sub-section (1A) of section 10 and each Government thinks that it alone is the appropriate Government, an acute controversy may arise for which there may not be an easy solution unless the Act itself is amended or recourse is had to Article 263 of the Constitution for resolving the conflict.

45. The present case however can be disposed of by another line of approach. As already pointed out the main aim of the Project is the generation of electricity from water-power. Hence the situs of the plant which generates electricity, namely the power house (including turbines and generators) and of its appurtenant works like flume channel, flume tunnel, tunnel pond dam, pressure tunnel, pen stock valves, transformer yards, etc., may be reasonably taken as the essential or 'substantial' part of the project and as these works are admittedly located exclusively in Orissa the industry may be held to be located in Orissa. The capital cost of these works alone amounts to Rs.6.87 crores out of a total of 15 crores.

The remaining works like Jalaput dam, diversion dam, Roads and bridges, are situated nearly equally in Orissa and Andhra Pradesh. The office of the Superintending Engineer in charge of the Hydro-Electric Scheme is also located in Orissa. In this particular instance however I would not say that the location of the Office of the Superintending Engineer is the decisive factor. If such a view be taken it will be easy for the Andhra Government who are in charge of the Project to shift their office to the Andhra side and then claim to be the appropriate Government.

46. Some guidance on the interpretation of the expression 'Appropriate Government' may be had from the decision of the Supreme Court reported in AIR 1959 S.C. 676. In that case there was a dispute between the Delhi branch of the Liptons Ltd. and some of the employees. Some of these employees were working in the neighbouring States such as Punjab, Rajasthan and Uttar Pradesh outside the State of Delhi and there were sales depots of the firm in those States. But all the employees were controlled by the Delhi Office and they received their salary from that office. Taking all this into consideration their Lordships of the Supreme Court held that the Delhi State Government was the appropriate Government. I have already shown the danger of applying this principle too literally in the present case.

In a big project involving the expenditure of more than Rs. 15 crores, the mere location of the Office of the Superintending Engineer in charge of the Project will not determine the situs of the industry, though it may be taken as one of the

relevant factors. I would therefore in agreement with my learned brother hold, that on the facts as disclosed by the State of Andhra, the industry may be reasonably held to be situated in Orissa though some of the works are spread over the adjacent State of Andhra. The Orissa Government is accordingly the appropriate Government for making the reference under the Industrial Disputes Act.

47. On the question as to whether the four divisions into which the administration of the Machkund Hydro-Electric Scheme is divided should be regarded as separate units with distinct establishments I agree with my learned brother that in view of the evidence led by the Superintending Engineer, Mr. Kondiah (in O. J. C. 64/58) each division should be considered as a separate establishment for the purpose of Section 25G of the Industrial Disputes Act.

An industrial concern may consist of only one establishment, or there may be several establishments within one concern; AIR 1958 Mad 205. The question will depend on a detailed investigation of the administrative arrangements made within the industrial concern, Here each division has been placed in charge of a separate Executive Engineer who is the sole authority for appointing and dismissing Nominal Muster Roll Workers, the Superintending Engineer's authority being confined solely to general supervision and control.

48. O. J. Cs. 246 and 247 of 1958. In these two O. J. Cs. the employer is the Superintending Engineer (Generation Circle) Andhra Pradesh Electricity Department residing at Visakhapatnam in Andhra State. He is in charge of the working of the Power house at Machkund, its ancillary equipment and maintenance of sub-stations at various places in Andhra State and also of the power transaction lines. A new Circle under this Superintending Engineer was created since August, 1955, when power was generated for the first time at Machkund. This Superintending Engineer is completely independent of the Superintending Engineer of the Machkund Hydro Electric Supply Scheme. Mr. Kondiah admitted this fact in cross-examination as follows:

'I am the Superintending Engineer in charge of the entire Hydro Electric Project excluding the generation part for which there is a separate Superintending Engineer who took charge of that since August 1955 when power was first

commissioned'.

The head-quarters of this Superintending Engineer is at Vishakhapatnam and except the power house at Machkund all other works in charge of that Superintending Engineer are admittedly in Andhra State. On his behalf it was urged that the Andhra State Government was the 'appropriate Government' if there is an industrial dispute within the industry in charge of this Superintending Engineer.

Though the Orissa Government have challenged this interpretation they have not filed any counter-affidavit or stated the facts necessary for the purpose of deciding whether the industry in charge of this Superintending Engineer can reasonably be held to lie in Orissa and not in Andhra State. It is true that the power house which generates electrical energy is wholly in Orissa but the transmission lines, the office of the controlling authority, the sub-stations and all other works are exclusively in Andhra State.

We have no evidence to show the proportion of the capital sunk in Orissa State and in Andhra State in respect of those items and the ex parte statement of the Superintending Engineer must be taken as unchallenged. It is true that the workers employed in those works are also members of the Machkund Workers' Union, but this circumstance alone would not suffice to confer jurisdiction on the Orissa Government to make a reference under Section 10(1) of the Industrial Disputes Act unless further materials are placed before this Court to enable it to hold that this Industry is substantially or essentially located in Orissa. In the absence of such materials I must hold that the situs of this industry is in Andhra State and that the Andhra State is the 'appropriate Government' for taking action under the Industrial Disputes Act.