

**B.P.DAS, J & INDRAJIT MAHANTY, J.**

O.J.C. NOS.11666 OF 2001 & 5215 OF 2002 & W.P.(C) NO.2998 OF 2006

(Decided on 28.7.2010)

**PRADEEP KUMAR SAHOO & ORS.** ..... Petitioners.

.Vrs.

**STATE OF ORISSA & ORS.** ..... Opp.Parties.

For Petitioners - M/s. R.K.Rath & N.R.Rout.

M/s. P.Acharya, S.R.Pati, P.K.Ray &  
M.R.Mohanty.

For Opp.Party No.1 – M/s. S.B.Nanda, (A.G.A)

For Opp.Party No.4 – M/s.S.K.Mishra, D.P.Nanda, U.N.Nayak,  
J.K.Nanda, P.K.Mohapatra & M.K.Pati.

For Intervenor - M/s. A.K.Mishra, J.Sengupta, D.K.Panda,  
P.R.Jibandas & G.Sinha.

For Opp.Party No.43 - Mr. A.Mohanty.

For Opp.Party No.80 - M/s. K.K.Mohanty & P.K.Puhan

For Opp.Party No.96 - M/s.R.K.Pradhan, S.Sahoo, A.Mohanty,  
R.Khatun, & S.Mishra.

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**I.MAHANTY, J.** In this batch of writ applications, the petitioners as well as private opposite parties were serving together as “Engineers”, in the erstwhile Orissa State Electricity Board (O.S.E.B.). With the enactment of Electricity Reforms Act, 1995 and on creation of the Grid Corporation of Orissa Limited (in short “GRIDCO”), the services of the petitioners as well as the private opposite parties were transferred to the cadre of GRIDCO w.e.f. 1.4.1997. Subsequently, on creation of various electricity distribution companies, the petitioners as well as the private opposite parties were “absorbed” by Central Electricity Supply Company of Orissa Limited in short “CESCO”) w.e.f. 26.11.1998 now known as Central Electricity Supply Utility (in short “CESU”).

2. CESCO issued a circular on 21.2.2000 indicating its decision to form a “new cadre”, which would be called as the “Business Cadre” and subsequently re-designated it as “Revenue Improvement Cadre” and invited applications from the existing employees to submit their “options” for being considered for appointment in the newly created cadre.

The petitioners hereinabove are persons who gave their “options” to join in the “Business cadre” and were duly selected, by a selection committee. Upon such selection, the petitioners were given “appointment” in the “Revenue Improvement Cadre” (redesignated) w.e.f. 31.10.2000. Accordingly, pursuant to the aforesaid appointment orders the petitioners joined in their respective services. It appears from the record that on 29.12.2000 the petitioners were directed to submit their “resignation from the posts”, which were earlier held by them. After submitting their resignations as required by the employer, the petitioners continued in the “Revenue Improvement Cadre” till 7.8.2001, on which date, the “Revenue Improvement Cadre” was abolished due to a decision taken by the Board of Directors and the services of the petitioners were “terminated”.

Upon “termination” of their services, in the Revenue Improvement Cadre, the employer, considering the past services of the petitioners, permitted the petitioners to re-join in their services in the old CESCO cadre by way of re-induction into the CESCO cadre, in the grade and scale of pay applicable to the petitioners, at the time when they had resigned from the said post and subject to a further condition that, they were to be placed below the existing employees in the said cadre. All the petitioners after their termination from the Revenue Improvement Cadre submitted their applications to return to the old CESCO cadre and were placed at the bottom of the same grade.

3. In the light of the aforesaid facts, the essence of the present dispute between the petitioners and the private opposite parties is regarding their position in the gradation/seniority list on their return to the CESCO cadre.

4. Learned counsel appearing for the petitioners, inter alia, contended that as a result of the aforesaid change of events, the petitioners have been placed below many of their juniors including, some of the private opposite parties. It is further submitted by the petitioners that the employer, after taking into consideration their “merit” had selected them for appointment in the newly created “Revenue Improvement Cadre”. It is, therefore, submitted that since the petitioners who, were found to be meritorious had been selected to the “Revenue Improvement Cadre”, have now been placed below their juniors in the CESCO cadre. This, according to the petitioners, is opposed to the well recognized principles of service jurisprudence.

It is asserted that, as a consequence of the aforesaid events, the private opposite parties and others who were originally junior to the petitioners in the CESCO cadre but continued to remain in the old cadre, have become senior to the petitioners and have also been subsequently promoted to higher ranks, such as Assistant Executive Engineer, Executive Engineer, Superintending Engineer, etc.. In making the aforesaid submission, it is contended that the placement of the petitioners below their juniors after their re-induction into the CESCO cadre as well as the subsequent promotions granted to the private opposite parties from time to time forms the subject matter of challenge in this batch of cases.

5. Learned counsel appearing for the private opposite parties, on the other hand, submits that the petitioners being attracted by the offer of more than double salary (than what they were drawing at the relevant time) gave their “options” for being considered for appointment under the newly created “Revenue Improvement Cadre”. The petitioners being fully aware of all the conditions stipulated in the Circular issued by the management, and particularly, the stipulation that the employees of the the existing CESCO cadre, who would join in the new cadre, shall be “under an independent Agreement for service”. It was also stipulated in the said circular that the CESCO management would possess the right to terminate the selected candidates of Revenue Improvement Cadre by giving one month notice or one month’s salary in lieu thereof, after which the services of such employees would stand terminated in CESCO.

It is further submitted that, all the petitioners had submitted their “resignation” from the CESCO cadre, and had been inducted into the “Revenue Improvement Cadre” and were paid substantially higher salary than what they were getting earlier. Therefore since the Board of Management decided to abolish the “Revenue Improvement Cadre”, the petitioners were given one moth notice period at the time of abolition and their Agreement of service” stood terminated.

It is further submitted that, the Management of the CESCO taking the plight of the petitioners into consideration, once again offered them an "option to go back" to the CESCO cadre, subject to, their being placed at the bottom of the said cadre. The Management also ensured that the petitioners would not suffer financially and directed that they would be entitled to their "last pay drawn by them, while they were serving in the CESCO cadre". The petitioners having clearly and categorically, accepted such offer of the Management for "re-induction into the CESCO cadre" and upon acceptance of such offer in writing, have been re-inducted in to the employment of the CESCO and placed at the bottom of the CESCO cadre list. Therefore, the petitioners having accepted the terms and conditions for re-induction into the CESCO cadre, can have no grievance against the same and the writ petition filed by such petitioners ought not to be entertained.

Apart from the above learned counsel for the private opposite parties, asserts that the private opposite parties who had continued to serve in the CESCO cadre, have in the meanwhile been promoted to the superior ranks and any interference by this Court in the present case would result in disrupting the entire administrative structure already existing as on date, thereby possibly seriously hampering the distribution of electricity to all consumers in the State.

6. The Management (O.P.) has also filed a counter affidavit, inter alia, highlighting the circumstances and the objects under which the "Revenue Improvement Cadre", had been conceived. Learned counsel for the Management submits that, the writ application merits no consideration and should be dismissed, since the petitioners had accepted the offer of the Management for being appointed into the "Revenue Improvement Cadre" and consequently had submitted their "resignations" from the erstwhile CESCO cadre. Therefore, the petitioners can have no claim for seniority over the employees who continued in the CESCO cadre. It is stated by the Management that the petitioners' employment in the "Revenue Improvement Cadre", stood terminated with the decision of the Board of Management to abolish the Revenue Improvement Cadre and the petitioners have no other rights or claim apart from being offered and paid one month's salary in lieu of notice period in terms of their respective "Agreements of service".

The learned counsel for the Management further asserts in the counter affidavit that, the offer to the petitioners to re-join in their former cadre in CESCO was with a view to, ensure that the petitioners continue to have a source of livelihood and therefore, a condition was stipulated therein that, in the event the petitioners are re-inducted in the CESCO cadre, they would be placed at the "bottom of the said cadre" as on the date of their re-induction. It is asserted that this offer to the petitioners made by the Management was duly accepted by the petitioners in writing and therefore, after having accepted the offer and the terms thereof, the petitioners are estopped from challenging the same.

7. In the light of the submission made by the learned counsel appearing for various parties, as noted hereinabove, it becomes essential first to take note of the Circular dated 21.2.2000 (Annexure-2 to OJC No. 5215 of 2002) which reads as follows:-

"CENTRAL ELECTRICITY SUPPLY COMPANY OF ORISSA LTD.  
CIRCULAR

No.MD/CESCO/Estt./2697

Date. 21.2.2000

Formation of new cadre in CESCO.

Considering changed environment of electricity business in Orissa and enduring pressure for result oriented performance from all quarters, it has been decided by the management of CESCO to form a new cadre of employees. This cadre shall be called the "Business Cadre" and all appointments to the cadre will be made separately from the existing CESCO cadres as well as by direct recruitment. The appointment to this cadre shall be made purely on the basis of merit and it is expected that these employees in the new cadre will serve the distribution business including the collection of revenue. This cadre will act as a comprehensive service instead of current departmentalization and specialization. In this regard, the new cadre employees shall be given appropriate and necessary training to achieve such overall knowledge.

There shall be three levels of employees in the Business Cadre, viz.: Team Member, Team Leader and Group Leader. The employees who will give their written option to be considered to join in Business Cadre will be interviewed by a Committee comprising of 1) MD of CESCO, 2) Shri D.V.Ramana-Prof. at XIMB and 3) Shri Snigdha Patnaik-Prof. at XIMB to consider their options to join the Business Cadre basing on their understanding, aptitude, previous background and other relevant factors considering their suitability to be placed in any of the three levels. On the basis of the ratings of the assessors and in consultation with such assessors, the MD shall finally decide as to at which level each of the optees shall be placed and communicate the said decision to each of the optees by specific offer of appointment in the Business Cadre. The agreement of employment in the Business Cadre in the specified level shall be final and binding from the date of his/her induction subject to the acceptance of the offer of appointment by the employee.

If an optee gets finally inducted to the Business Cadre, he/she shall be entitled the scale of pay applicable to the level in which he/she is placed along with other appurtenant benefits of the said level. Further the pay of the employees in the existing CESCO cadres shall be protected upon his /her joining the new cadre.

The pay scales for the three levels of the Business Cadre shall be as follows:

Team Member	Rs. 2,500 - 25,000/-
Team Leader	Rs. 5,000 - 50,000/-
Group Leader	Rs. 8,000 - 75,000/-

Annual increment shall be based on performance of the employee concerned.

These pay scales may be revised from time to time as expedient and necessary for the interest of the business as well as the growth of the personnel belonging to the Business Cadre.

Besides Provident Fund & Gratuity benefits as per applicable laws, other service benefits shall be as per service rules to be framed by CESCO taking into consideration the country-wide business of AES, the local laws as applicable and the region-cum-industry principles.

Each employee who joins the Business Cadre shall be under an independent Agreement for service. Either the employee or CESCO shall have the right to terminate the Agreement by giving one-month notice or one month salary in lieu thereof after which the services of the employee shall stand terminated in CESCO.

The joining in the Business Cadre will be a continuous process. However, this opportunity can not be claimed by the employees in the existing CESCO Cadre as a matter of right.

The service period rendered by an employee in the existing CESCO cadre, after being admitted to the Business Cadre shall be counted only for calculating his/her terminal benefits as per the applicable laws.

The option or application should be given in the appended format and should be addressed to the undersigned within one month, i.e., dt.22.1.2000 after which such application shall not be taken into consideration.

Sd/-

Managing Director

Memo No. 2698(27)/Dt.21.2.2000.

Copy forwarded to all functional Directors of CESCO/ DGM(Finance)-cum-Company Secretary/all S.E.s/E.E.s under CESCO for information and necessary action.

The S.E.s & E.E.s are requested to circulate the Circular among their staff in their respective Circles/Divisions.

Sd/-

Managing Director, CESCO."

8. Admittedly, the petitioners joined in the "Revenue Improvement Cadre" of CESCO on or before 31.10.2000 after having submitted their "resignations" from the CESCO cadre. After working in the Revenue Improvement Cadre till 7.8.2001, the services of the petitioners were terminated by letter dated 7.8.2001 (Annexure-6 to OJC No. 5215 of 2002) which is quoted below:-

"CENTRAL ELECTRICITY SUPPLY COMPANY OF ORISSA LIMITED

Regd. Office: 2<sup>nd</sup> Floor, IDCO Towers, Janapath, Bhubaneswar-

751 022, Telephone -541 727, Fax-543 125

No.MD/CESCO-10823

Dt. 7.8.2001

To

Sri Rajat Kumar Das,  
Team Leader.

Sub: **Abolition of Revenue Improvement Cadre and  
Option for employment in CESCO Limited.**

Sir

In view of abolition of the "Revenue Improvement Cadre", your further continuance in employment under the said cadre stands automatically ceased. In terms of the contract of your appointment, Dt.22.12.2000 in the Revenue Improvement Cadre, you are hereby offered one month's salary in lieu of one month's notice. However, in view of your willingness and undertaking to accept payment of one month's salary in lieu of one month notice by way of deferred payment to you, your services in the Revenue Improvement Cadre stand ceased with immediate effect.

However, in order to give you an opportunity to serve in CESCO Limited, if you so desire, you are hereby given the following options, one of which you

should elect and communicate to us within the time stipulated below for necessary action from our end.

1. You will be allowed re-induction in the CESCO Cadre as Deputy Manager (Mech.), in the grade and pay scale applicable to you at the time of your resignation from the said Cadre and you shall be placed below the existing employees in the said Grade. However, on sympathetic consideration you will be placed at the stage in the pay scale where you were at the time of your relinquishment of the CESCO Cadre. This means that, the emoluments which you were drawing then shall be protected. Further, your period of service in the Revenue Improvement Cadre will be counted for your terminal benefits under CESCO Limited.
2. OR, you can sign the Fixed Term Service Agreement as enclosed and on receipt there of your salary shall be fixed on negotiation. In such event, all your terminal benefits in CESCO Limited inclusive of your service in the Revenue Improvement Cadre will be settled within a period of three months from the date of signing of the said Agreement.

Please note that, in the event you do not opt any one of the above alternative offers and intimate us your option within seven days of receipt of this letter by you, your final settlement dues will be calculated and paid to you within one month of receipt of this letter by you.

Yours faithfully,  
Sd/-

MANAGING DIRECTOR.

Encl: Draft copy of Fixed Term Contract service Agreement.”

9. After the letter at Annexure-6 was issued, the petitioners have admittedly submitted their “options” to be re-inducted in the CESCO cadre “in the grade and pay scale applicable to them at the time of their resignation from the said cadre and they shall be placed below the existing employees in the said cadre.....”. Therefore, clearly it is only after the petitioners were re-inducted in the CESCO Cadre, that they have filed the present writ application, seeking to challenge, the very terms and conditions under which they had been re-inducted.

10. The main thrust of the argument made by Mr. R.K.Rath, learned Senior Counsel appearing on behalf of the petitioners was that, a bare look at Annexure-2 would show that, it was issued as a circular of the CESCO under the signature and seal of the Managing Director, who is the head of the organization. It is further submitted that after action was taken to select Officers/Petitioners for the “Revenue Improvement Cadre”, in pursuance of Annexure-2 and since they were subsequently promoted under Annexure-4 and since the private opposite parties resented against the same, the Board of Directors of CESCO, while assessing the disturbance and widespread resentment by a section of employees of the Company at its meeting held on 18.8. 2001 decided to discontinue the said newly created cadre, i.e. the “Revenue Improvement Cadre”. Therefore, if Annexure-2 was annulled by the Board, then the entire matter had to revert back to the stage, before Annexure-2 was issued. In other words, if Annexure-2 is made inoperative, consequently, the Revenue Improvement Cadre became inoperative, and all the employees who were selected to the said cadre were also to be taken back to the stage at which they had joined the said newly created cadre.

According to Mr. Rath, the CESCO authorities cannot resort to double standard, as they are not entitled to act upon the document (Annexure-2) as well as, reject the same. If Annexure-2 was annulled, the petitioners, who were selected against the newly created cadre ought to be taken back to their original place of postings. The selection and the appointment of the petitioners to a higher cadre has become the reason for penalizing them. The petitioners for no fault on their part, accepted the appointment and joined the newly cadre being selected by the CESCO authorities. Those who were not selected and remained in the original cadre are today rewarded by being made senior to the petitioners.

Mr. Rath, further submitted that since the decision in Annexure-2 was annulled, then the entire actions taken under the same were to be nullified and if the creation of the Revenue Improvement Cadre under Annexure-2 was made inoperative, then all subsequent actions, should have been made inoperative and the petitioners should have been brought back to their original position in the CESCO cadre. It is further alleged that the authorities have resorted to double standard by not restoring status quo ante.

The petitioners submitted that if, on the agitation made by certain employees, the Board of Directors decided to cancel the creation of the new cadre, then in that case, the petitioners were not at fault. If the Managing Director had no authority to create the new cadre i.e. "Revenue Improvement Cadre", it was an internal matter of the company and the company cannot hide behind the plea that the Managing Director did not have the necessary authority. The petitioners have walked into the present state of affairs on account of the actions of the Managing Director and as such the management cannot run away from the same and has to accept its liability to restore the status quo.

**11.** Mr. Rath, learned counsel for the petitioners placed reliance on the judgment of the Hon'ble Supreme Court in the case of **R.N.Gosain v. Yashpal Dhir**, AIR 1993 SC 352 as well as the judgment of the Apex Court in the case of **Jail Narain Parasrampur (dead) and others v. Pushpa Devi Saraf and others**, (2006) 7 SCC 756.

In so far as the case of **R.N. Gosain** (supra) is concerned, the Hon'ble Supreme Court was dealing with the case of a "tenant" who had submitted an undertaking to vacate the premises, subject to his right to move to the Supreme Court given in pursuance of order of High Court to avail protection from eviction. It is in this context the Hon'ble Supreme Court came to hold that, the tenant cannot be permitted to assail the said order of High Court since it is impermissible to approbate or reprobate at the same time.

We are of the considered view that the facts of the present case are clearly distinct and of no point as the Management of CESCO or any of its action can be considered to an amount of approbate or reprobate at the same time. The Management of CESCO took a decision to create a Revenue Improvement Cadre and after the said Cadre remained in operation for some time, they took a subsequent decision to discontinue the said Cadre and terminate the employees. The principles of approbate or reprobate are not attracted to the facts of the present case.

In so far as the judgment of the Hon'ble Supreme Court in the case of **Jail Narain Parasrampur (dead) and others** (supra) is concerned, the Hon'ble Supreme Court was considering the issue as to, whether a contract entered into by promoters of company prior to its incorporation for the purpose of the company, could be enforced by the company after its incorporation. The Hon'ble Supreme Court came to hold that since at the time of acquisition of property by the promoters, the Company was not

incorporated the same would not mean that no title would have passed in favour of the Company.

We are of the view that the said judgment is of no assistance to the petitioners since the same circumstances do not arise for consideration in the present case.

**12.** In response to the aforesaid contentions, Mr. Nanda, learned counsel appearing for the Management, submitted that the assumption by the petitioners, that the decision vide Annexure-2 to the writ petition creating the "Business Cadre" later on re-named "Revenue Improvement Cadre" was annulled because the Managing Director had no authority to issue Annexure-

2, is a clear and manifest error of fact. Mr. Nanda stated that the authority and powers of the Managing Director vis-à-vis the Chairman of the Board of Directors have been amply addressed in the "share holder agreement" and for convenience, the relevant portion of the said agreement relating to the status of the joint venture company which had purchased, a majority share holding in CESCO Ltd., the purpose of such sale and purchase of share holding, the Board representation and the terms of management are quoted here-in-below for ready reference:

" xxxxx AES Orissa Disitribution Pvt. Ltd., whose registered office is at A-5, Forest Park, Bhubaneswar, Orissa ("JVCo.");

" xxxxx The consortium comprising the investors have incorporated JVCo as their investment vehicle."

" Gridco will transfer to the Trustees 72,72,000 shares of Rs.10. each in the capital of CESCO constituting 10% of the Shares."

" xxxxx JVCo has acquired 3,70,87,200 Shares from Gridco pursuant to the Acquisition Agreement."

" xxxxx As a result of the acquisition of Shares by JVCo pursuant to the Acquisition Agreement and following the transfer of Shares to the Trustees the Shares will be held as to 51% by JVCo, as to 39% by Gridco and as to 10% by the Trustees, all such Shares being fully paid."

" xxxxx CESCO is a public company Ltd. by shares and was incorporated under the Companies Act, 1956 on 19<sup>th</sup> November, 1997."

" xxxxx JVCo recognizes that Gridco's principal objectives in selling a majority stake in CESCO to JVCo are to,"

" xxxxx improve operational efficiencies and reduce losses;"

" xxxxx create opportunities for secure and increasingly mere rewarding employment for technically qualifies personnel in the electricity industry in Orissa, and

" xxxxx provided a stable environment for employees which will offer them better opportunities for career development."

" xxxxx The Chairman shall have no second or casting vote."

" xxxxx The Directors appointed by JVCo including any Managing Director if considered necessary by JVCo, shall be responsible for the day-to-day management of the Business."

" xxxxx No director ( including the Chairman) appointed by Gridco shall have any executive responsibility relating to CESCO unless specifically agreed



otherwise by JVCo. No director appointed by the Trustees shall have any executive responsibility.”

“5.3: JVCo shall ensure that none of the matters set out below shall be undertaken by CESCO without the prior written consent of a director appointed by Gridco for so long as Gridco is the registered holder of 26% or more of the Shares.”

“5.3.1) the sale or disposal in any manner of land or buildings (or any interest in such) having a value of Rs.50 lakhs( subject to escalation at annual inflation rate) or more;

5.3.2) material changes in the nature of the Business including the closure of the Business or any material part thereof or the sale or transfer of any material part of the undertaking of CESCO;

5.3.3) the acquisition of any undertaking or any part thereof or any interest therein;

5.3.4) the establishment of any new business or diversification from the Business;

5.3.5) the merger or amalgamation of the Business with the business of any other entity;

5.3.6) the subscription for or acquisition of any shares, debentures or securities or interest in any other entity;

5.3.7) the incurring of borrowings which would breach covenants in World Bank or other loan documentation to which CESCO is a party unless appropriate waivers have been obtained from the World Bank or other lenders; and

5.3.8) an issue of shares in the capital of CESCO to the public or to a person who is not a Share holder (other than in accordance with the provisions of this Agreement).

It is clarified that the above restrictions shall not apply in regard to disputes which may arise between CESCO and GRIDCO under the terms of any other agreement”.

It is submitted that due to some confusion which arose relating to the scope and authority of exercise of power of the Managing Director, the same was formally clarified and restated vide the Board of Director’s meeting dated 29.3.2001, which merely ratified the earlier authority, without adding any new restriction or terms to the same. Even though, such delegation or redefining of the power of Managing Director was done on said date, as can be seen no new item or authority was added or subtracted which are covered under Clause (5.3) of the share holders’ agreement.

Accordingly, the action taken by the Managing Director in creating the new cadre, i.e. “Revenue Improvement Cadre” can not be said to be without authority or sanction of law as alleged by the petitioners.

On a composite reading of the share holders agreement, the Director/Managing Director appointed by the JVCo., had the liberty to “reorganize the business structure”, which also includes the right of creation of posts/cadres in order to improve the operational efficiencies.

It is also submitted by the Management that in none of the writ applications it has been alleged that the cadre creation was mala fide or to favour or discriminate any employee vis-à-vis the other existing employees. It is the settled principle of law that the

management of the company has a legal and statutory right to reorganize its business so as to minimize the cost and improve the efficiency. In the process of such reorganization, situations may arise when the vision with which such reorganization was planned may fail to achieve its goal and in such a situation, unless it is alleged that such reorganization process was done with malafide intention, no court can or should question such attempt for reorganization and take upon it-self the responsibility of assessing the merit or demerit of such an action. In the present circumstance of the case, the business cadre was created with the motive to improve the Revenue Recovery and profitability of the company (scales of pay and by way of inter changing of the cadre) since some of the junior employees became the controlling authority of the earlier existing senior employees, wide spread resentment was shown by the existing cadre staff and there was wide spread non-cooperation by such existing employees. Since the desired results were not achieved by the creation of such cadre, the Board of Directors proposed to discontinue the newly created cadre and authorized the Managing Director to take the follow-up action in the matter of re-induction of the CESCO Cadre employees who were taken into the new cadre and also to lay out the modalities to such re-induction. In the absence of allegation or substantiation of motive or malafide in the matter of such cadre creation or abolition, this Hon'ble Court will be ill-advised to interfere in such matter and give its own assessment basing on the claims and counter claims of both the sides of employees who are before this Hon'ble Court.

It is further submitted that the entire challenge of the petitioners rests on their argument that the Managing Director was not authorized to issue such circular creating a new cadre which is not supported by any such rule or terms of share holders agreement and unless this Hon'ble Court comes to a finding that, such cadre creation is ab initio void then the natural consequence will be that, at the most the action of the Managing Director may be termed as voidable due to the non-approval of the said cadre creation by the Board of Directors. In such a circumstance, the law is well settled that the ultimate result of a bonafide action does not speak of the legality or illegality of such action unless such action is alleged and proved to be motivated or malafide or discriminatory per se.

**13.** Mr. Nanda, learned counsel for the opposite party Management placed reliance upon a judgment of this Court in the case of **Trilochan Patra V. Grid Corporation of Orissa Ltd. & another**, in OJC Case No. 3367 of 1996 disposed of on 30.10.2000 wherein it was held as follows:-

“In view of the rival contentions, the issue in this writ petition lies within the small compass as to whether the petitioner, who was holding the substantive post of Assistant Engineer on the date of his giving option to join the new cadre and who joined the new cadre after severing his link with the State Government, can be reverted to the former post of Junior Engineer in pursuance of the Government order.

Though the Regulations have been made a part of the service condition of the petitioner, in view of the fact that the Regulations are prospective, i.e., effective from the date of publication in the Gazette(29.8.1984), it cannot be deemed to be the service condition of the petitioner till 29.8. 1984. The petitioner was appointed to the substantive post of Assistant Engineer in the new cadre after severing his link with the State Government. As per the Resolution dated 19.7.1983, any Engineer had the right to give option. The petitioner admittedly being an Engineer had legally exercised his option to join the foreign cadre and had been appointed in the new cadre after severing his link with the

State Government. Therefore, the Government has no right to direct demotion of the petitioner, who is guided by a separate set of rules. Even though his promotion as Assistant Engineer with effect from 28.4.1981 has been found to be not in accordance with law, no material has been placed before us to show that he was not eligible to exercise his option on 19.7.1983 for joining the foreign cadre. After exercising option, the petitioner was recruited in the foreign cadre (not promoted) and he did not hold any lien in the Government Service. In view of all these facts, the order dated 2.3.1996 issued by the OSEB demoting the petitioner to the post of Junior Engineer is unsustainable in law”.

**14.** After having taken note of the various contentions advanced by the learned counsel for the respective parties, it became necessary at this stage to first consider the contention raised by the petitioners, that the Management of the CESCO having come to hold that the Managing Director was “incompetent” to issue Annexure-2 (Notice inviting applications for creation of new Revenue Improvement Cadre) ought to have also similarly directed that all actions subsequent to Annexure-2 ought to have also been declared invalid and the petitioners ought to have been put back to the same position as they worked prior to joining the newly created Revenue Improvement Cadre.

In this connection, the counter affidavit filed by the Management, “share holder agreement” was referred to who have relied upon and in particular, the Managing Director was authorized to take all steps including creation of new Revenue Improvement Cadre with the objection of improving the revenue collection for the purpose of including the revenue for the Company.

**15.** The Management has categorically stated that the decision of the Managing Director under Annexure-2 was not annulled (as claimed by the petitioners) due to lack of competency on the part of the Managing Director. It is stated categorically in the counter affidavit that the Managing director did possess the necessary power to create such Cadre. This averment of the Management clearly nullifies the assertion made on behalf of the petitioner to the extent as noted hereinabove. It further appears from the counter affidavit of the Management that a subsequent Board of Directors Meeting held on 18.8.2001 decided to discontinue the newly created Cadre, not due to want of competence on the part of the Managing Director but as the business decision. It is also relevant to note herein that as stated by the Management in its counter affidavit, the merits and/or reasons as to why the opposite party-company created the “Revenue Improvement Cadre” as well as decided for terminating the same, is not a matter in which the writ Court in exercise of writ jurisdiction ought to enter. This area is completely within the scope of the discretion of the Management and therefore, we desist from giving any finding on the same.

**16.** In so far as other contentions raised by the petitioners are concerned, the following facts clearly emerge.

The CESCO (Opposite Party-Company) decided to create a “Revenue Improvement Cadre” and Circular inviting application was issued on 21.2.2000 (Annexure-2). The petitioners submitted their written options to join the said Cadre and in fact, joined the same w.e.f. 31.10.2000.

The notice inviting application as extracted in Paragraph-7 would clearly indicate the following important terms:-

- (i) This Cadre shall be called the “Business Cadre” (later renamed as Revenue Improvement Cadre) and all appointments to the said Cadre will be separate from the CESCO Cadre as well as by direct recruitment.

- (ii) The agreement of employment in the Business Cadre shall be final and binding from the date of his/her induction subject to the acceptance of the offer of appointment by the employees.
- (iii) Each employee should join the Business Cadre shall be an "independent agreement for service" either the employee or the CESCO shall be right to terminate the agreement by giving one month notice or one month salary in renew thereof after which the service of the employee shall stand terminated in CESCO.
- (iv) All the petitioners have admittedly, after accepting the aforesaid terms and conditions, put their application or auctions for being considered to appointment for the said newly created Cadre and also duly submitted the resignations from the CESCO Cadre.

Further, the "Revenue Improvement Cadre" itself was discontinued and all employees employed therein were terminated by the letter of CESCO dated 7.8.2001 (Annexure-6), extracted in Paragraph-8 hereinabove and the order of termination was passed by complying with the terms of agreement for service entered into between the petitioners and opposite party-Company. Upon termination, the Management offered the petitioners an opportunity to be re-inducted to the CESCO Cadre but on the specific term and conditions that, they would be placed "below existing employees in the said grade".

Once again the petitioners exercised their "option" and having accepted the aforesaid terms and conditions of re-induction and after they have been re-inducted to the CESCO Cadre, have thereafter sought to challenge the same.

**17.** We are of the considered view that the aforesaid facts would clearly indicate that the petitioners had voluntarily "opted out" from their original Cadre, i.e. CESCO Cadre and had of their own volition joined the newly created Cadre i.e. "Revenue Improvement Cadre" and also submitted their resignations from the parent Cadre.

**18.** After having resigned from the earlier post, the petitioners had voluntarily chosen to be appointed in the newly created Cadre, i.e. Revenue Improvement Cadre". Therefore, they were fully conscious of the fact that their appointment in the new Cadre would be on the basis of a new and separate service agreement which contained a term under which termination of service could be effected, the "option" of either employer or employee by giving one month notice or one month salary in lieu thereof. The petitioners having severed their relationship with the CESCO Cadre had joined the "Revenue Improvement Cadre" on the basis of fresh terms and conditions of employment and are bound in law by the said terms. Of course, the Management having taken a decision to close the "Revenue Improvement Cadre", have also complied with the requirement of one month notice or pay in lieu of such notice and the petitioners can have no grievance against the same. Apart from the above, the petitioners thereafter were re-inducted the CESCO Cadre after having accepted the terms and conditions for their re-induction which required that they would be placed, "below the existing employee in the CESCO Cadre. No challenge to the conditions of re-induction was ever made and instead, the petitioners voluntarily accepted such terms and conditions of re-induction and joined back to their services in the CESCO Cadre.

**19.** In the light of the aforesaid findings, we are of the considered view that the writ petition merits no further consideration and the prayer of the petitioners deserves to be rejected.

**20.** Accordingly, the writ petition stands dismissed but in the circumstances no cost.

Writ petitions dismissed.

