
(1981) 07 CAL CK 0033
In the Calcutta High Court
Case No : F.M.A. No. 16 of 1980

Bihar Staff Electricity Board

APPELLANT

Vs

Patna Electric Supply Co. and Another

RESPONDENT

Date of Decision : 22-07-1981

Acts Referred:

Constitution of India, 1950 — Article 13(2), 19(1), 19(1)(f), 226, 31
Electricity Act, 1910 — Section 3, 5, 6, 6(1), 7

Citation : 86 CWN 43

Hon'ble Judges : M.M. Dutt, J;A.K. Sarkar, J

Bench : Division Bench

Advocate : S.K. Acharya, A.G. and Bhaskar Gupta, for the Appellant;R.M. Bajoria, S.K. Bagaria, A.N. Mukherjee and Soumitra pal for Respondent No. 1
B.S. Bagchi and S.C. Niyogi for Respondent No. 3, Soumen Bose and Shyamal Sen, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Dutt, J.—The appellant, the Bihar State Electricity Board has, in this appeal,. challenged the propriety of the judgment of Sabyasachi Mukharji whereby the learned Judge made the Rule Nisi issued on the application under Article 226 of the Constitution of the respondents nos. 1 and 2, the Patna Electric Supply Company and one of its directors, absolute. On February 6,1924 a licence was granted by the Government, of Bihar to Octavius Steel & Co, Ltd, for the supply of electrical energy. The said licence was transferred in favour the respondent no. 1 the Patna Electric Supply Co. On January 5,1973 the Bihar State Electricity Board served a notice upon the company under subsection (1) of section 6 of the Indian Electricity Act, 1910 (hereinafter referred to as the Act), requiring the company to sell the Undertaking to the Bihar State Electricity Board on the expiry of the period of 50 years from the commencement of the licence that is, at 12 O'clock in the night between the 5th and 6th February, 1974 and further to deliver possession of the undertaking on the expiration of the above period of 50 years pending the determination and payment of the purchase price.

2. At this stage, It Is necessary; to refer to some of the provisions of the Act and the amendments made thereto in order to appreciate the respective views of the parties. Section 6(1) of the Act provides as follows:-

6(1). Where a licence has been granted to any person, not being a local authority, the State Electricity Board shall,-

(a) In the case of a licence granted before the commencement of the Indian Electricity (Amendment) Act, 1959, on the expiration of each such period as is specified in the licence and

(b) in the case of a licence granted on or after the commencement of the said Act, on the expiration of such period not exceeding twenty years and of every such subsequent period not exceeding ten years, as shall be specified to this behalf in the licence

I have the option of purchasing the undertaking and such option shall be exercised by the State Electricity Board serving upon the licensee a notice in writing of not less than one year requiring the licensee to sell the undertaking to it at the expiry of the relevant period referred in (sic) sub-section.

Sub-sections (2), (3), (4) and (5) of section 6 inter alia, provide that the State Electricity Board will be entitled to exercise the option of purchasing the undertaking if the State Government or any local authority constituted for an area within, which the whole of the area of supply is included refuses to elect not to purchase "the undertaking. Sub-sections (6) and (7) provide as follows :

(6). Where a notice exercising the option of purchasing the undertaking has been served upon the licensee under this section, the licensee shall deliver the undertaking to the State Electricity Board, the State Government or the local authority, as the case may be, on the expiration of the relevant period referred to in sub-section (1) pending the "determination and payment of the purchase price

(7). Where an undertaking is purchased under this section, the purchaser shall pay to the licensee the purchase price determined in accordance-with the provisions of sub section (4) of section 7A.

Section 7 of the Act inter alia provides for the vesting of the undertaking in the purchaser upon the completion of the sale or on the date on which the undertaking is delivered to the intending purchaser whichever is earlier. Sub-section (1) of section 7A is as follows:-

7A. Where an undertaking of a licensee, not being a local authority, is sold Under subsection (1) of section 5 the purchase price of the undertaking shall be the market value of the undertaking at the time of purchase or where the undertaking has been delivered before the purchase under sub section (3) of that section at the time of the delivery of the undertaking and if there is any difference or dispute regarding such purchase price., the same shall be determined by arbitration.

3. Sub-section (2) of section 7A provides for the computation of the market value of an undertaking. Under sub-section (4). where an undertaking of a licensee is purchased u/s 6, the purchase price shall be the value thereof as determined in accordance with the provisions of sub-sections (1) and (2).

4. Under the notice dated, January 5, 1973 issued by the Bihar State Electricity Board exercising its option to purchase the undertaking of the company, the company was required to deliver possession of the undertaking to the Bihar State Electricity Board at 12 0" clock in the night between the 5th and 6th February, 1974 pending determination and payment of the purchase price. Before the company had delivered the undertaking as required under the said notice, on February 2, 1974, the Governor of Bihar promulgated an Ordinance being Bihar Ordinance No. 50 of 1974 amending certain previsions of the Act in its application to the State of Bihar. By section 3 of the Ordinance, section 6 of the Act was substituted. The material change that was effected by the substituted section 6 of the Act was that contained in sub-section (1) thereof, namely, instead of the service of one year's notice, service of a notice in writing of not less than six months upon the licensee requiring; him to sell the undertaking to it on the expiry of the relevant period referred to in sub-section (1), was provided for.

5. By section 5 of the Ordinance, section 7A of the Act was substituted, Subsection (1) of section 7A as substituted is as follows :

7A(1). Where an undertaking of a licensee is sold under sub-section (1) of section 5 or purchased u/s 6, the amount payable for the undertaking shall be the book value of the undertaking at the time of purchase or where the undertaking has been delivered before the purchase under sub-section (3) of section 5, at the time of delivery of the undertaking.

Sub-section (2) of the substituted section 7A provides for the computation of the book value of the undertaking. Sub-section (3) of the substituted section 7A provides for the payment of a solatium of 10 percent of the book value as determined under. subsection (1) and,"(2) for the purchase of the undertaking.

6. Thus it appears that by virtue of the amendment made by the Bihar Ordinance 50 of 1974 in the provisions of sections 8 and 7A of the Act, the licensee will not be entitled to receive the market value of the undertaking in the event of the undertaking being purchased by the State Government, the local authority or the Bihar State Electricity Board, as the case may be. but the licensee will only be entitled to get the book value of the undertaking to be computed in the manner provided in subsection (2) of the substituted section 7A. After the promulgation of the Bihar Ordinance 50 of 1S74 on February 2, 1974 possession of the undertaking was taken by the Bihar State Electricity Board from the company on February 5/6, 1974 and, in view of the provision of section 7 of the Act, the undertaking vested in the Bihar State Electricity Board.

7. As the Bihar Assembly was not in session two further Ordinances being Bihar

Ordinance Mo. 83 of 1974 and Bihar Ordinance No. 123 of 1974 were promulgated on similar terms as the Bihar Ordinance No. 50 of 1974. Thereafter, on January 15, 1975, Indian Electricity (Bihar Amendment) Act, 1974 (Bihar Act 15, 1975) was passed replacing Bihar Ordinances No. 173 of 1974.

8. The company and its director, the respondents nos. 1 and 2 in this appeal, filed a writ petition before this Court inter alia praying for a writ in the nature of Mandamus commanding the appellants to pay the purchase price of the undertaking in accordance with the provision of section 7A of the Act as it stood before it was amended by the Ordinances and or by the said Amendment Act of 1974. Further, the said respondents prayed for a declaration that the Ordinances and the said Amendment Act of 1974 did not apply to the respondents, and that the Ordinances and the said Amendment Act were unconstitutional, void and of no effect.

9. During the pendency of the writ petition, the Bihar Legislature passed another Act, namely, Indian Electricity (Bihar Amendment) Act, 1975 (Bihar Act 7 of 1976). By this Act, the provisions of sections 6 and 7A as substituted by the said Ordinances and replaced by the Bihar Act 15 of 1975 have been validated and made applicable with retrospective effect. Sections 2(ii) and 3 of Bihar Act 7 of 1976 are set out below :

2. In Section 6 of the Indian Electricity Act, 1910 (Act IX of 1910) as substituted by the Indian Electricity (Bihar Amendment) Act, 1974 (Bihar Act XV of 1975) -

(ii) after sub-section (5), the following sub-section shall be added, namely :-

(6) where a notice exercising option of purchasing the undertaking has been served upon the licensee before the commencement of the Indian Electricity (Bihar Amendment) Act, 1974 (Bihar Act XV of 1975) and the undertaking has been purchased thereafter the amount payable to the licensee on account of the purchase of the undertaking shall be determined in accordance with the provisions of section 7A of the Indian Electricity Act, 1910 as substituted by the Indian Electricity (Bihar Amendment) Act 1974 (Bihar Act XV of 1975) as if the last mentioned Act was then in force and it will be deemed to have been always in force.

3. Validation - Notwithstanding anything contained in any judgment, decree or order of any court, every delivery of an undertaking effected by a licensee to the Bihar State Electricity Board, the Government of Bihar or local authority as the case may be, after the 2nd day of February, 1974 and before the commencement of this Act, shall be deemed to have been exercised or effected, as the case may be, u/s 6 of the Indian Electricity Act, 1910 (Act XV of 1910) as amended by Bihar Act XV of 1975 and this Act, as if the said section 6 so amended was in force at material times when the delivery was effected and accordingly every delivery of the undertaking so effected and all things done or actions taken in consequence of such delivery of the undertaking shall be, and shall be deemed always to have been valid and shall not be called in question in any Court or

tribunal or before any -other authority merely on the ground that section 6 of the Bihar Act XV of 1975 did not provide for payment of any interest-on the amount payable for the period from the date of delivery of the undertaking to the date or dates of its payment.

10. The only question that came up for consideration before the learned Judge at the hearing of the Rule was, whether the respondents nos. 1 and 2 were entitled to compensation on the basis of section 6 read with section 7A of the Act or on the basis as provided by the Bihar Ordinance 123 of 1974 read with the provisions of the Bihar Act 15 of 1975, In that connection, the learned Judge had also to consider whether the provision of section 7A as substituted by the said Bihar Ordinances and the provisions of the Bihar Act 15 of 1975 were constitutionally valid or not.

11. The learned Judge, after considering the facts and circumstances of the case and the submissions made on behalf of either party held that the Bihar Ordinance 50 of 1974 in so far as it altered the basis of compensation to be paid u/s 7A of the Act was void and unenforceable The appellant was directed to pay to the respondent no 1 the purchase price of the said undertaking in accordance with the provision of section 7A of the Act as it stood at the relevant time, ignoring the provision of the Bihar Ordinance 50 of 1974 and the subsequent Ordinances as well as the provisions of the Bihar Act 15 of 1975. Hence this appeal.

12. Mr. S K Acharya, the learned Advocate General assisted by Mr Bhaskar Gupta has appeared before us on behalf of the appellant, the Bihar State E electricity Board It is submitted on behalf of the appellant that the transaction between the appellant and the respondent company was that of sale and purchase. The right of the licensee to get the purchase money did not accrue before the purchase had taken place. The purchase of the undertaking having been effected after the amendment of the Act by the Bihar Ordinance 50 of 1974, the licensee was entitled only to the purchase price to be determined in accordance with the provision of section 7A as substituted by section 5 of the said Ordinance or the subsequent Ordinances including the Bihar Ordinance No 123 of 1974 which was replaced by the Indian Electricity (Bihar Amendment) Act 1974 (Bihar Act 15 of 1975). Our attention has been drawn to subsection (1) of section 7A of the Act which inter alia provides hit the purchase price of the undertaking shall be the market value of the undertaking at the time of purchase or where the undertaking has been delivered before the purchase, at the time of the delivery of the undertaking. It is contended that as both the delivery and purchase of the undertaking had taken place after the Bihar Ordinance 50 of 1974 was promulgated, the respondent company will be entitled to the purchase price to be compelled in the manner laid down in section 7A -as substituted by the said Ordinance. Further, it is submitted on behalf of the appellant that the right of the respondent company to get the price could not arise anterior to the appellant's right to get the property, nor the right to get the purchase price to be computed

in a certain manner did not accrue during the notice period. It is, accordingly contended that the provision of section 7A as substituted by the Bihar Ordinance 50 of 1974 and ultimately enacted in the said Bihar Act 15 of 1975 would apply.

13. On the other hand, it is contended by Mr. Bajoria, learned Counsel appearing on behalf of the respondents that the moment the option is exercised, the contract comes into being under which the market value as on the date the undertaking is taken possession of is to be paid, It is submitted by him that the Bihar Ordinance 50 of 1974 which was promulgated on February 2, 1974 did not apply to" the respondent company, for the said Ordinance was applicable only to cases where option was exercised u/s 6 as substituted by the said Ordinance

14. The question that arises for our consideration is when the right to get the price accrues. The contract of sale and purchase is contained in the licence itself. Under the terms of the licence, an option has been given to the authority concerned to purchase the undertaking of a licensee on the expiration of the term of the licence. In *The Fazilka Electric Supply Co. Ltd. Vs. The Commissioner of Income Tax, Delhi*, , it has been observed by the Supreme Court

There was an undertaking on the part of the applicant for the licence to sell the undertaking to the local authority or Government upon certain terms set out in the licence, and the time at which the option was to be exercised and the price which was to be paid for the property were specified There was consideration, for the contract as the licence was granted on those terms Therefore, all the elements necessary for a contract were present, and the sale in pursuance thereof was not a compulsory purchase or acquisition.

15. It follows from the said observation of the Supreme Court that under the (sic) of the contract as embodied in the (sic) the price which is to be paid in the (sic) of the undertaking being purchased the local authority or Government is fixed. the time the option was exercised by the (sic) u/s 7A of the Act. the respondent company was entitled to the market value of the undertaking to be determined in accordance with the provision of sub section (2) of section 7A. There was, therefore, an implied contract between the respondent company and the appellant that the appellant would pay to the respondent company the market price of the undertaking in the event it purchased the undertaking. The option of purchase was exercised by the appellant before the amendment of section 6 and section. 7A of the Act by the Bihar Ordinance 50 of 1974. The appellant is, therefore, liable to pay to the respondent company the market value of the undertaking in terms of the unamended provision of section 7A. On behalf of the appellant, however, a later decision of the Supreme Court in *The Gujarat Electricity Board Vs. Shantilal R. Desai*, was relied upon. In that case, one of the questions, that came up for consideration before the Supreme Court was whether an election to purchase the undertaking followed up by a notice to the licensee in pursuance of that section within the period mentioned in section 7(4) of the Act before it was amended in 1951 the authority must again exercise its option to purchase on the expiration of the period of licence. In that connection, *hegde J*

observed as follows.

We are not able to find any good reason for reading into S. 7 a require merit that alter a notice under S. 7(4) is issued the authority must again exercise its option to purchase on the expiration of the period of licence. It is no doubt true that the right to purchase the undertaking accrues only at the expiration of the period of licence but for exercising that right, the authority must make its election within the period prescribed in S. 7(4) and issue a notice as required by that sub section

16. Much reliance has been placed on behalf of the appellant on the observation of the Supreme Court that the right to purchase the undertaking accrues only at the expiration of the period of licence. It is contended that as the right accrues after the expiration of the period of licence which is also the expiration of the period of notice u/s 6 of the Act in the instant case, the licensee has no right to claim the market value of the undertaking on the ground that it is impliedly fixed under the terms of the contract embodied in the licence, that is to say, on the basis of the provision of section 7A before it was substituted by the Bihar Ordinance 50 of 1974. It has already been noticed in what context the said observation has been made by the Supreme Court. Be that as it may, prior to the said observation, there are other observations by the Supreme Court which do not support the contention of the appellant. It is observed that the exercise of option to purchase as well as electing to purchase is one integral process and not two independent steps, and that once the concerned authority exercises its option and communicates the same to the licensee, the same is binding on the authority as well as the licensee. In other words, when the option is exercised the licensee is bound to sell and the concerned authority is bound to purchase the undertaking. It is difficult to accept the contention that this binding effect on either party will be without the fixation of the purchase price or the consideration for the transaction. As soon as this stage is reached after the exercise of option to purchase by the service of a notice as mentioned in section 6 of the Act; the concerned authority has to purchase the undertaking on payment of the market value of the undertaking to be determined in accordance with the provision of section 7A of the Act. The above observation of the Supreme Court on which much reliance has been placed by the learned Counsel of the appellant is of no help.

17. In this connection, we may notice the other contention of Mr Bajoria, learned Counsel for the respondents. His contention is that section 7A as substituted by the Bihar Ordinance 50 of 1974 will apply only to cases where option to purchase has been exercised u/s 6 of the Act as substituted by the said Ordinances. It is submitted by him that section 7A(1) as substituted by the Bihar Ordinance 50 of 1974 and the two other subsequent Ordinances and the replacement of the same by the Indian. Electricity (Bihar Amendment) Act, 1974 (Bihar Act 15 of 1975) inter alia refers to the purchase of the undertaking u/s 6. It is--contended that the reference to section 6 is undoubtedly to section 6 as substituted by the

Ordinance. In other words, it is submitted by him that section 7A as substituted by the said Bihar Ordinances and the Bihar Act 15 of 1974 providing for the payment of book value of the undertaking instead of the market value will apply only where a notice under the substituted section 6, such notice being of not less than six months, is served upon the licensee, in the instant case, however, one year's notice was served upon the respondent company u/s 6 before it was substituted by the said Bihar Ordinances and the Bihar Act 15 of 1974 and, as such, the substituted section 7A will have no application.

18. It has been already stated that during the pendency of the Rule Nisi Indian Electricity (Bihar Amendment) Act 1975 (Bihar Act 7 of 1976) was enacted Sections 2(ii) and 3 of Bihar Act 7 of 1976 purport to validate and apply the provisions of section 6 and section 7A as amended by the Bihar Act 15 of 1975 with retrospective effect. The contention made on behalf of the respondents as to the non applicability Of the provision of section 7A as substituted by the said Bihar Ordinances and the Bihar Act 15 of 1975 without taking into consideration the later Act. namely, the Bihar Act 7 of 1976. seems to have some force. The (sic) (sic) and the Bihar Act 15 of 1975 having substituted section 6 the reference to that section in the substituted section 7A most obviously be to the substituted section 7A was applicable. That was the reason why Bihar Act 7 of 1976 had to be (sic). It is however, (sic) by Mr. (sic) that by virtue o Bihar Act 7 of 1976 the provision of the substituted sections 6 and 7A would apply. The learned Counsel however, submits that sections 2(sic) and 3 of the Bihar Act 7 of 1976 are ultravires Article 31(2) of the constitution. The contention as elaborated by him is that after the exercise of option by the Bihar State Electricity Board the respondent company had acquired a right to get the market value of the undertaking in terms of section 7A of the Act. Sections 2(ii) and 3 of the Bihar Act 7 of 1976 purport to acquire part of the said right of the respondent company, which is property, without making any provision for compensation for such acquisition and, accordingly, they are ultravires the provision of Article 31 (2) read with Article 13(2) of the Constitution.

19. On the other hand, it is contended on behalf of the appellant that even assuming that there has been acquisition of the right of the respondent company to get the market value of the undertaking, the Ordinances and the Bihar Act 15 of 1975 having provided for the payment of compensation for such acquisition namely, the book value of the undertaking they are quite legal -and Valid In any event, it is submitted by the teamed Counsel, after the deletion of Article 31 of the Constitution by the. Constitution 44th Amendment Act,- the question of payment of compensation does not arise. The learned Counsel for the appellant invokes the (sic) of eclipse and submits that section 7A as substituted by the Bihar Ordinances and the Bihar Act 15 of 1975 remained. in a (sic) or dormant state or eclipsed and, consequently, unenforceable against Citizens so long as Article 31 (2) was there. But after the deletion of that Article, the substituted section 7A became valid and enforceable.

20. The right to receive the market value of the undertaking is a debt or a chose in action and is property within the meaning of Article 19(1)(f) and C1 (2) of Art 31(2) of the Constitution. Reference in this connection may be made to the decision of the Supreme Court in *Madan Mohan Pathak and Another Vs. Union of India (UOI) and Others*, . In that case, it has been observed by Bhagawati J that property within the meaning of Article 19(1)(f) and C1, (2) of Art 31 comprises every town of property, tangible or intangible, including debts and choses in action, such as unpaid accumulation of wages, pension, cash grant and constitutionally protected Privy Purse. In view of the said decision of the Supreme Court, it follows that such property can be acquired by the State but it must conform to the provision of Article 31(2) Of the Constitution. namely, the law acquiring such property must be for a public purpose and must provide for compensation for the property so acquired; such law cannot be called in question in any court on the ground that the compensation provided by that law is not adequate.

21 The contention of the appellant is that the provision for payment of book value in the Ordances and the Bihar Act 15 of 1975 is a provision for payment of compensation for the acquisition of the property of the respondent company that is to say its right to get the market value. We are unable to accept the contention. The respondent company as observed earlier had acquired the right to receive the market value of the undertaking u/s 7A of the Act before it was amended. By section 2(sic) and 3 of the Bihar Act 7 of 1976, the said right of the respondent company to get the market value was taken away with retrospective effect and the respondent company was only entitled to receive the book value of the undertaking. Therefore a portion of the property of the respondent company is sought to be acquired by the Bihar Act 7 of 1976 by providing for payment of book value which is less than the market value. The provision for the payment of book value cannot in our opinion be regarded as the provision for payment of compensation for the purported acquisition of the property of the respondent company.

22. Counsel for the appellant has drawn our attention to another observation of Bhagawati J in Pathak's case (supra) Bhagawati J observes: Where money is given as compensation for taking of money. the theory of forced loan may apply, but it is difficult to see how it can be applicable where chose in action is taken and money representing its value, which in a large majority of cases would be less than the amount recoverable- under it, is given as Compensation." Relying on the said observation, it is contended on behalf of the appellant that in the instant case also a chose in action is taken and the amount of compensation, that is, the book value of the undertaking is given. It is submitted that the amount of compensation in the shape of book value may be less than the market price of the undertaking. but in view of the provision of Article 31 (2) of the constitution, the provisions of sections 2(ii) and 3 validating and applying the substituted section 7A with retrospective effect cannot be called in question on the ground of inadequacy of compensation. we are afraid, the said observation of

Bhaga-wati J relied on by the learned Counsel for the appellant is not applicable to the facts of the instant case. That observation was made in the context of acquisition owing state of debts and choses in action owing by poor people to rich money lenders and not acquisition of such debts or choses in action due and owing by the citizens to the state. It has been pointed out by Bhagawati that in the former case, there is no question of augmenting the revenue of the state but in the later, If the State acquires such debts and choses in action due and owing by people to the State, it would be a case of augmenting the revenue of the State or reducing State expenditure and that would clearly not be a public purpose and the legislation would plainly be violative of the constitutional guarantee embodied in article 31(2) of the constitution. Pathak's case (supra) is an authority for the proposition that the State cannot acquire any debt or chose in action due to it from citizens for that would be only for the purpose of augmenting the State revenue or reducing the State expenditure which which will not be a public purpose and, as such, void under Article 31 (2). The purported acquisition of part of the debt or chose in action by sections 2(H) and 3 or the Bihar Act 7 of 1976 with retrospective effect is, therefore, without any public purpose. Sections 2(ii) and 3 also do not provide for payment of compensation. In the circumstances, it must be held that sections 2(ii) and 3 of the Bihar Act 7 of 1976 are ultra vires Article 31(2) of the Constitution

23. Now we may consider the question of applicability of the doctrine of eclipse to the instant case it is contended on behalf of the appellant that it may be that the substituted section 7A which was made retrospective in operation by section 2(ii) and 3 of the Bihar Act 7 of 1976 remained ineffective and unenforceable against the respondent company so long as Article 31 (2) of the Constitution was there, but after the deletion of Article 31. the bar of constitutional limitations removed and the substituted section 7A read with sections 2(ii) and 3 became valid and enforceable in spite of the fact that sought to acquire a part of the property of the respondent company, namely, its right to get the market value of the undertaking, without providing for payment of compensation. In support of his contention that the doctrine of eclipse is applicable act only to pre-Constitutional laws but also to post Constitutional laws, the learned Counsel for the appellant has placed reliance on the following decisions of the Supreme Court: Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another, M P. V Sundaramian & Co v. The state of Andhra Pradesh, AIR 1968 SC 468; Jagannath Vs. The Authorised Officer, Land Reforms and Ors, and The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another, . On the other hand, Mr.; Bajoria, learned Counsel for the respondent has relied on some other decisions of the Supreme Court in support of his contention that the doctrine of eclipse Is not applicable to post-Constitutional laws. These decisions are Saghir Ahmad Vs. The State of U.P. and Others, ; Behram Khurshed Pesikaka Vs. The State of Bombay, ; Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another, ; Deep Chand Vs. The State of Uttar Pradesh and Others, ; and Mahendra Lal Jaini Vs. The State of Uttar Pradesh and

Others, .

24. it appears from the above decisions of the Supreme Court that there is a divergence of opinion as to the applicability of the doctrine of eclipse to post-Constitutional laws. We do not, however, propose to enter into the conflict, but we may proceed on the assumption that the doctrine is also applicable to post-Constitutional laws. It is true that by section 2(ii) and section 3 of the Bihar Act 7 of 1976 the substituted provisions of sections 6 and 7A have been validated and made applicable with retrospective effect. But there is a serious difficulty in applying the doctrine of eclipse to the instant case with retrospective effect. The constitutional limitations under Article 31 (2) were operative when the Bihar Act 7 of 1976 was enacted. It is quite immaterial that Article 31 has been deleted from Part III of the Constitution by the Constitution (44th Amendment) Act, 1978 with effect from June 20, 1979. The deletion of Article 31 not being retrospective, any law passed before such deletion must stand the test of the provision of Article 31 (2). In this connection, we may refer to the decision of the Supreme Court in *Waman Rao and Others Vs. Union of India (UOI) and Others, .* In that case, Chandrachud C.J observed as follows :

By section 7 of the Constitution (Forty-fourth Amendment) Act, 1978 the reference to Article 31A(1) with effect from June 20, 1979, as a consequence of the deletion by section 2 of the 44th Amendment of Clause (f) of Article 19(1) which gave to the citizens the right to acquire, hold and dispose of property. The deletion of the right to property from the array of fundamental rights will not deprive the petitioners of the arguments which were available to them prior to the coming into force of the 44th Amendment, since, the impugned Acts were passed before June 20, 1979 on which date Article 19(1)(f) was deleted.

Reference may also be made to the decision of the Supreme Court in *Bachan Singh and Others Vs. State of Punjab and Others*, where (sic) J who delivered the majority judgment observed.

And now to the off beaten track of legislation being void as being in contravention of Art 31(2) as it stood at the relevant time. The impugned legislation was put on the statute book on August 27 1971. Therefore, art 31(2) as it stood on the relevant date may be noticed. The Article as amended by constitution (twentyfifth Amendment) Act, 1971, will, therefore, not be attracted

In *Tara Prasad Singh and Others Vs. Union of India (UOI) and Others, .* the Supreme Court had to consider the constitutional validity of the Coal Mines (Nationalisation) Amendment Act, 1976. In that connection, Chandrachud C.J speaking for the Court observed "We are not concerned with the amendment introduced by the 44th Amendment Act which deleted the reference to Art. 31, since that Amendment Act came into force prospectively with effect from June 20, 1979.

25. In the instant case, the Bihar Act 7 of 1-976 was passed before June 20, 1979 on which date Article 31 (2) was deleted from the Constitution and,

accordingly, in view of the above decisions of the Supreme Court, the validity of the said Act can be assailed on the ground that it is violative of Article 31(2) of the Constitution, It has been already held by us that section 2(ii) and section 3 of the Bihar Act 7 of 1976 having sought to apply the provisions of section 6 and 7A as substituted by the Bihar Act 15 of 1975 with retrospective effect depriving the respondent company of its right to get the market value of the undertaking, which is property within the mining of Articles 19(1)(f) and 31 (2) of the Constitution, without any public purpose and without any provision for compensation are violative of Article 31 (2) of the Constitution and are void. The doctrine of eclipse has no manner of application in the instant case on the ground of deletion of Article 31 from the Constitution such deletion being prospective and not retrospective.

26. The position, therefore, is that the Bihar State Electricity Board having exercised its option to purchase the undertaking of the respondent company under the unamended section 6 of the Act, section 7A as substituted by the said Bihar Ordinances and ultimately by the Bihar Act 15 of 1975 will not apply. Sections 2(ii) and 3 of the Bihar Act 7 of 1976 which made the substituted provisions of section 6 and 7A applicable to the exercise of option under the Unamended provision of section 6 of the Act being ultra vires. Article 31 (2) of the Constitution and void, and the doctrine of eclipse not being applicable, the right of the respondent company to receive the market value of the undertaking u/s 7A of the Act before it was substituted remains unaffected.

27. It is, however made clear that so far as the prospective applicability of the substituted provision of the said Ordinances as replaced by the Bihar Act 1575 is concerned, they are valid and effective, in other words, after the said provisions were substituted by the Bihar Ordinance 50 of 1974, if any notice is given under the substituted section 6 exercising option by the concerned authority for the purchase of an undertaking the licensee would only be entitled to the book value of the undertaking to be determined in accordance with the provisions of the substituted (sic) 7A. But, as held already where, as (sic) the instant case, the option was exercised u/s 6 before it was amended by the said Bihar Ordinance 50 of 1974, the provisions of the substituted section 7A providing for the payment of book value (sic) not apply. In such a case the (sic) would be entitled to market value of the undertaking u/s 7A of the (sic). Before we part with this appeal, we notice the contention of Mr. Somendra (sic) Bose, learned Counsel appearing behalf of the added respondent the (sic) of India, which claim to be the Creditor of the respondent company. It contended that in view of the provision section 37 (1) of the Electricity (supply) Act 1948 the debt due to the added respondent out of such purchase money. We do not think that in this appeal we are called upon to consider the claim of the added respondent. All that we say is that we have not said anything in this judgment which may overjudice the right if any of the added respondent to realise the debt due to it from the purchase price payable to the respondent company in accordance with law.

In the circumstances and for the reasons aforesaid this appeal is dismissed. In view, however of the case, there will be no order for costs.

A.K. Sarkar, J.

I agree