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(2014) 10 P&H CK 0136

In the Punjab And Haryana At Chandigarh

Case No : CWP No. 4059 of 2014 (OandM)

Gurnek Singh Brar APPELLANT

Vs

State of Punjab RESPONDENT

Date of Decision : 09-10-2014

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 311
Electricity Act, 2003 — Section 131

Citation : (2015) 178 PLR 50 : (2014) 4 SCT 718

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Advocate : Rajiv Atma Ram, Senior Advocate and Arjun Pratap Atma Ram, Advocate for the Appellant; Rupam Aggarwal, D.A.G., Ashok Aggarwal, Girish Agnihotri, Senior Advocates, Vinod S. Bhardwaj and G.S. Ghuman, Advocate for the Respondent

Judgement

K. Kannan, J.—The petitioner, who describes himself as a retired Superintending Engineer of the Punjab State Electricity Board, challenges the appointment of the 3rd respondent as legally impermissible and would characterize the position that the 3rd respondent holds as Chairman-cum-Managing Director of the Punjab State Corporation as without authority. He, therefore, seeks for a writ of quo warranto declare the 3rd respondent as usurper of public office and for quashing of the notification issued on 7.2.2014 (Annexure P/7) by the Government of Punjab, Department of Power that has modified the age of superannuation as 65. The order extending the term of appointment of the 3rd respondent from 9.2.2014, the date when he was due for retirement, upto 8.2.2015 is also sought to be quashed as a consequence thereof. The petition was brought on the averments that a notification issued by the Government of Punjab on 16.4.2010 stipulated the qualifications and the experience of CMDs and Directors, except for those to be nominated by the State Government, and the selection process shall be as per the enclosed annexure. The annexure set down the qualifications and the experience for the post of Chairman & Managing Directors (CMDs) and the

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Directors for POWERCOM as under:-

The Article of Association of the POWERCOM that is registered under the Companies Act contained a definition of the various chief functionaries and also ''details the manner of their selection, their tenure, the required qualifications etc. Some other key provisions would require to be reproduced for understanding the controversy that is involved. The definition of the CMD, Company, Controlling shareholder and Directors, as set down in the memorandum are as follows:-

The appointment of CMD/Directors and the manner of filling up vacancies are contained in clauses 44, 45, 46 and 47.

Clause 44 specifies the number of Directors of the Company shall not be less than 3 and not more than 9, as may be determined by the controlling shareholders.

Clause 45 states that the Government of Punjab shall be designated as the "controlling shareholders" as long as it holds majority of shares in the Company, directly or indirectly. As per clause 45, part of the CMD/Directors on the Board shall be nominated by the Controlling shareholders and the remaining CMD/ Directors shall be selected by a Selection Committee constituted for the purpose. Amongst the Directors, there should be non-retiring Director who would holds office for such a duration as specified by the controlling shareholders and shall be eligible for re-appointment. Clause 46 deals with procedure for removal of directors. Clause 47(a) sets down that the CMD and the Directors appointed by the Board of Company through the Selection Committee process, shall have a minimum tenure of 2 years, subject to their attaining the age of retirement as determined by the controlling shareholders. In the notification issued by the Government on 24.5.2011, detailing a tripartite agreement that has been signed amongst the Government of Punjab, Management of two successor companies of erstwhile PSEB, namely, PSPCL and PSTCL and all unions and associations of the two successor companies, an annexure that contains the text of the agreement amongst the parties is given. It contains, inter-alia, provisions for modification in the transfer scheme could be made. To our case would be relevant Clause 5(g); that states as under:-

"(g) Any modification in Transfer Scheme, Memorandum of Association, Article of Association, qualification and experience of CMDs and Directors will be made after consultation and understanding with the signatories to this Agreement. However, Government''s decision will be final in this regard."

2. We have set forth all the relevant provisions to immediately embark on the objections taken by the petitioner and the tenability or otherwise of such objections to assess whether the 3rd respondent''s appointment was erroneous and his continuation constitutes any serious impropriety since the quo warranto itself stems from the assumption that he is the holder of the public office. The preliminary objection taken by the learned Senior Counsel appearing for the 2nd respondent, before the arguments got underway, was that the post of Chairman-

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cum-Managing Director was not a public office and that the writ petition itself was not maintainable.

3. I had directed, under the circumstances, the Senior Counsel, Mr. Rajiv Atma Ram to meet the objection and to him the answer consists of the fact that the Power Corporation is established under the Electricity Act, 2003 and being a statutory Corporation which is a successor to the Punjab State Electricity Board vests all the assets of the Electricity Board with the State and transfer in turn to the Corporation. The Senior Counsel would refers me to Section 131 of the Electricity Act that provides for procedure for re-organization of the Board. That section reads as under:-

"Section 131. Vesting of property of Board in State Government. (1) With effect from the date on which a transfer scheme, prepared by the State Government to give effect to the objects and purposes of this Act, is published or such further date as may be stipulated by the State Government (hereafter in this Part referred to as the effective date), any property, interest in property, rights and liabilities which immediately before the effective date belonged to the State Electricity Board (hereinafter referred to as the Board) shall vest in the State Government on such terms as may be agreed between the State Government and the Board.

(2) Any property, interest in property, rights and liabilities vested in the State Government under sub-section (1) shall be re-vested by the State Government in a Government company or in a company or companies, in accordance with the transfer scheme so published along with such other property, interest in property, rights and liabilities of the State Government as may be stipulated in such scheme, on such terms and conditions as may be agreed between the State Government and such company or companies being State Transmission Utility or generating company or transmission licensee or distribution licensee, as the cased may be.

Provided xx xx xx

(3) to (6) xx xx xx"

The scheme of the Act, therefore, provides that from the date of the transfer scheme prepared by the government all the rights and liabilities of the Punjab Electricity Board became vested with the State Government and become revested by the State Government in favour of the Company or the Companies. The Power Corporation being a Company so registered, obtained a transfer from the State Government all the rights and liabilities and the memorandum itself recognized the State Government to be the controlling shareholder. The counsel would, therefore, argue that it is the State which is the owner and the office of the Chairman would also be taken, therefore, to be only a public office. The counsel would point out to the fact that as per the notification issued on 16.4.2010, the Government of Punjab made a transfer scheme for providing and giving effect to the transfer of functions undertaken, assets and liabilities as well

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as the personnel of the State Electricity Board. The control over the personnel was so overwhelming that there was a specific provision for transfer of personnel in clause (6) of the Notification. The notification, which we have extracted above, is the result of the statutory power that the Corporation derives and the management is duly managed by the State. All this is to say that the appointment is, therefore, to a public office and any issue relating to lack of qualification ought to be understood as a person who holds such office as an usurper that could be brought to challenge through a writ of quo warranto.

4. The learned Senior counsel would refer me to a Division Bench ruling of the Calcutta High Court in Manishi Maity Vs. West Bengal State Electricity Distribution Comp. Ltd. and Others, , that examined the rights of the electricity as falling within the ambit of Article 21 and right to shelter seen through the prism of Article 21, would include electricity amongst others as part of that right. It is the duty of the State to protect life and the Corporation that is engaged in power generation and distribution performs an activity of the State. The Chairman, according to the Senior counsel, therefore, holds public office and hence amenable for exercise of jurisdiction under Article 226 of the Constitution.

5. The learned Senior Counsel appearing on behalf of the 2nd respondent would argue that quo warranto could be issued only against a person who holds a public office that carries out the sovereign function of a State. The Power Corporation is a company registered under the Companies Act and it is literally engaged in the business of generation of power. This cannot be taken to be a sovereign function at all and though the Government is controlling interest presently, it shall be perfectly possible for the State to lose such interest at any time when the share holding pattern undergoes a change. The learned Senior counsel refers to precedents on what is public office and our attention would be to turn to the decisions cited by him, to examine whether the office of Chairman in the Power Corporation would amount to public office.

6. The counsel relied on a decision of the Gujarat High Court in Pardeep v. Principal decided (LPA No. 2485 of 2014 decided on 11.4.2014) that examined the definition of public office and the circumstances where quo warranto could be issued. The Bench held that a writ of quo warranto must satisfy that the office in question is a public office and the same is of a public nature. Referring to the law of Lexicon Major 4th edition 2010, the Bench re-produced that "public office is a position whose occupant has legal authority to exercise a government''s sovereign power for a fixed period." Halsbury''s Law of England defines it illustratively as "The duties of the office must be of a public nature. Thus, an information lay against a Privy Councilor, because, membership of the Privy Council constitutes the holding of an office of a public nature." The Bench made its own inference after citing several decisions and held that "public office", as explained by various authors and the authoritative pronouncements, is that a public office is the right, authority and duty created and conferred by law by which an individual is vested with some portion of the sovereign functions of the

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Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power." The Bench was considering the nature of the office held by a Chief Account Officer of the Gujarat University and held that he does not perform any of the sovereign function of the Government. Responding to the argument that the office of the Chief Account Officer is a statutory creation, the Bench held that Section 8 of the Gujarat University Act, which described who could be officer of the Society did not set out the Chief Account Officer as one of the officers, though there was a Clause 6 which stated that it could appoint such other officer in the service of the university as declared by the statute. The Court found that there was no declaration under the clause assimilating the position of the Chief Account Officer as statutory authority. It also found that the Chief Account Officer was not described in the same manner like a Chancellor, Vice Chancellor or a Registrar and, therefore, he exercised no government function or invested with the power to do any of the function of the State.

7. To me, it seem that sovereign function does not necessarily stay confined to administration of foreign affairs or security of State. The State engages itself in diverse activities and it will be difficult to restrict the application of doctrine only to an activity which only a State can perform. Indeed, education itself cannot be taken to be the exclusive preserve of the State activity nor can electricity be. The test shall be whether it an office created under the Constitution or under a statute that delineates the function of such office. Illustratively, the office that qualifies for a civil post and subject to control of Article 311 or an office that is spelt out as specifically created under a statute could alone come within the definition. If the Electricity Act created an office of a Chairman-cum-Managing Director and prescribe his tenure and qualifications, I would go as far as to state that such office would be a public office. It shall be possible to trace every top description to some statute or the Constitution but that cannot make it different a public office. It should relates to function of a State which undertakes in public interest and that appointee''s position must be expressly governed under the statute. If it fails this test, then the holder of such office cannot be taken to be a holder of public office. The Chairman in a Power Corporation is not a named officer in the statute that enable setting up a Corporation and I would, therefore, hold that it is not a public office which will be amenable for issue of writ of quo warranto. The petitioner would failed for this reason only.

8. Even as I hold that the writ petition is not maintainable, for the sake of completion of arguments made before me regarding the validity of the appointment, it becomes my duty to examine the same as well so that in the event of reversal of holding that the post of the Chairman-cum-Managing Director in a Power Corporation is a public office, it could be probed whether grounds exist for challenging such appointment.

9. We have extracted the portion of the regulations relating to the office of a Chairman. The Senior Counsel, Mr. Ashok Aggarwal, points out that the

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notification dated 16.4.2010 merely refers to the qualification and the experience of CMD and Directors and in this case, the challenge is as regards the age of the 2nd respondent as beyond the prescribed limit mentioned in the notification. According to him, the qualification and the experience are distinguished from the requirement of age for they are spelt out distinctively. If the notification spells out only qualification and experience, any modification regarding age ought not to be understood as being governed by the notification issued on 16.4.2010. We have extracted already the three distinct terms and the requirements mentioned respectively. It would be seen that the age is not a specification which is brought out under the notification at all. I would also accede to the argument made by the learned Senior Counsel for the 2nd respondent that even the Articles of Association spelt out the definition of CMD and the Directors, as for distinct posts and the appointment of the Director and the tenure spelt out under Clause 45 cannot be applied for the CMD. Whenever there is a reference to Director, it cannot at all times be taken as reference to the CMD as well, for, it is governed by different clause. Reference to Director alone has never been treated as sufficient, for, whenever CMD is to be governed by such a clause there is specific reference to inclusion of CMD by the use of description such as "Director including the CMD or the CMD and the Director etc." I will not, therefore, take the reference to the age of retirement and the extension given to him, after the initial tenure of two years that expired on 7.2.2014 could be treated as re-appointment. Clause 47-A states that the CMD and the Director appointed would have a minimum tenure of two years subject to their attaining the age of retirement determined by the controlling shareholder.

10. The age of retirement which had been original determined as 62 came to be modified by the notification issued on 7.2.2014 that spelt out the age of superannuation in the case of Director to be 62 years and the Chairman-cum-Managing Director to be 65 years through notification issued on 7.2.2014. This modification was challenged by the petitioner as a modification brought under Clause 5(g) under the Tripartite Agreement and the argument was that it was not done in the manner stipulated under Clause 5(g) which required that it should be done after consultation and understanding with the signatories of the agreement. The learned Senior Counsel would take me to the terms of the amendment carried out that had increased the age of superannuation of the Chairman-cum-Managing Director to 65 and would urge that the modification brought about was in violation of Clause 6(g). The learned Senior Counsel for the petitioner would argue that "consultation", as examined by the Supreme Court in Dr. Ram Tawakya Singh Vs. State of Bihar and Others, , defines expression to mean meeting of two minds, to be able to confer and produce mutual impact and that each mind have its own consultation fully. Such a consultation may take place at a conference table or through correspondence. The form is not material but the substance is important. If there is more than one person to be consulted, all the persons to be consulted should know the subject with reference to which they are consulted. The learned Senior Counsel appearing for the 3rd respondent

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would mount two objections for the alleged violation of Clause 5(g). The consultation does not mean concurrence and there is no requirement of securing a concurrence from the representative of the employees union. Indeed, it is not even denied that the amendment came after a consultation and one union did not concur. So long there was no requirement for concurrence, the latter clause in 6(g) itself would legitimize the ultimate decision. The latter clause is that the government decision would be final in that regard. If after putting it through all the three parties and if the government takes a particular decision it ought to prevail. The other objection is that the modification which Clause 5(g) contemplates is a modification regarding qualification and the experience and thus, does not include a reference to age only. We have already seen that the age is seen as distinct even under the caption "qualification and experience". I would accept this objection as well and hold if the amendment in the age has been brought before the actual date of superannuation, the 3rd respondent who is allowed to continue was not getting re-employment but was only securing an extension. There surely does exist difference in the manner pointed out by the learned Senior Counsel appearing on behalf of the 3rd respondent. If the notification had been brought subsequent to the date when the 3rd respondent had superannuated, then his continuation would have meant a re-appointment. However, if the amendment to the age had been brought about before the date of superannuation, such as in this case when the date of superannuation was 8.2.2014, but the amendment had been brought about on 7.2.2014, his continuation meant merely an extension. This is also to address an objection that the re-appointment made of the 2nd respondent did not go through the constitution of a fresh Selection Committee and reappraisal of his candidature. The extension had been granted only for the reason that he had rendered excellent services, which, according to the petitioner, cannot be a ground in terms of the provision contained in Clause 45 of the Bye-laws. This ought to fail also for the reason that the governing consideration cannot be Clause 45 and the consideration could only be Clause 47 and that too, since the amendment had been brought out even before the date of superannuation, this case is not of re-appointment for selection procedure to be put through.

11. I find no error in the decision of the 1st respondent to allow for such an extension and the office of the 3rd respondent post is pursuant to appropriate notification legitimizing his continuation in office and there is no room for a challenge to such office in the manner canvassed in the writ petition. The writ petition is, therefore, dismissed with costs of 3rd respondent assessed at Rs. 25,000/- against the petitioner.

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