
(2016) 07 JH CK 0037
In the Jharkhand High Court
Case No : W.P.(S)No. 6348 of 2010

Hari Bansh Lal

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 22-07-2016

Acts Referred:

Electricity Act, 2003 — Section 172(a)

Citation : (2017) 2 AIRJharR 40 : (2016) 3 JBCJ 470 : (2017) 1 JCR 120 :
(2016) 4 JLJR 511

Hon'ble Judges : D.N. Upadhyay, J.

Bench : Single Bench

Advocate : M/s Pandey Neeraj Rai and Rohit Ranjan Sinha, Advocates, for the
Petitioner; M/s D.K. Dubey and Ruchi Rampuria, Advocates, for the Respondents

Final Decision : Dismissed

Judgement

D.N. Upadhyay, J.—This Writ Application has been filed for quashing the Notification No.18/JUD-08-21/2008/1469 dated 04.09.2010 issued by the Deputy Secretary, Department of Energy, Govt. of Jharkhand by which the State Government reconstituted the Jharkhand Electricity Board by appointing Shri Shiv Basant (I.A.S.) as Chairman, Jharkhand State Electricity Board in addition to his being member (Administration) with the sole object to frustrate the benefit granted to the petitioner by Hon"ble Supreme Court of India in S.L.P. (Civil) No. 11013/2009 by which the petitioner has been permitted to join duty forthwith and continue as Chairman of the Jharkhand State Electricity Board in terms of his appointment order and also for issuance of writ in the nature of mandamus commanding upon the respondents to allow the petitioner to continue as Chairman, Jharkhand State Electricity Board pursuant to his appointment on 17.09.2008 since the Hon"ble Supreme Court of India has been pleased to set aside the order dated 27.04.2009 passed by the Hon"ble Jharkhand High Court in W.P.(P.I.L.) No.5067/2008. The Hon"ble Supreme Court of India in its judgment dated 30.08.2010 has been pleased to make it clear that the

continuance of the petitioner as Chairman shall be in accordance with the Section 5 (5) of the Act and Rule-4 of the Rules.

2. The brief fact behind filing of this writ application is that the petitioner was appointed Chairman of the J.S.E.B. till further order vide notification No.1877 dated 17.09.2008 and resumed charge. The appointment of petitioner was challenged by Sahodar Prasad Mahto in W.P.(PIL) No. 5067/2008. After giving opportunity to the parties concerned, this Hon"ble Court vide order dated 27th April, 2009 quashed the appointment of petitioner as Chairman of the Jharkhand State Electricity Board and instruction was given to the State Government to follow the direction given in letter dated 20th February, 2009 issued by the Ministry of Power Govt. of India by which the time has been extended allowing continuance of the Jharkhand State Electricity Board (for the short the J.S.E.B.) as the State Transmission Utility and licensee till 15.06.2009.

3. The petitioner being aggrieved by and dissatisfied with the aforesaid order dated 27th April, 2009 passed by this Court in W.P.(PIL) No. 5067/2008, preferred Civil Appeal No.7165/2010 (arising out of S.L.P.(C) No. 11013/2009) before the Hon"ble Supreme Court. Their Lordships have been pleased to allow the prayer of the petitioner after setting aside the order dated 27th April, 2009 and the petitioner was permitted to join duty forthwith and continue as Chairman of Jharkhand State Electricity Board in terms of his appointment order. It was also made clear that continuance to the post of Chairman is subject to the ultimate decision of the Govt, however, the same shall be in accordance with Section 5 (5) of the Act (The Electricity (Supply) Act, 1948 and Rule-4 of the Rules (The Bihar Electricity Board Rules, 1960).

Pursuant to the order passed by Hon"ble Supreme Court of India in Civil Appeal No. 7165/2010 the petitioner submitted his joining on 30.08.2010 itself by sending "FAX" message as his joining report to the Principal Secretary to his Excellency the Governor, Advisor (Energy) to his Excellency the Governor the Chief Secretary to the Govt. of Jharkhand and all other concerned. It is contended that during the order passed by this Hon"ble Court in W.P.(PIL) No.5067/2008 i.e. on 27.04.2009 and the order passed by Hon"ble Supreme Court in Civil Appeal No. 7165/2010 there was President rule in the State of Jharkhand.

4. When the Govt. did not succeed to obtain favourable order from the Hon"ble Supreme Court of India, they have adopted different method indirectly to deprive the petitioner so that he may not continue to the post of Chairman J.S.E.B. Without any previous noting on 31.08.2010 a file was initiated disclosing therein that proposal for reconstitution of Board is pending. It is submitted that the Govt. hurriedly proceeded with the file and within one week issued notification No.18/JUD-08-21/2008/1469 dated 04.09.2010 whereby Shri Shiv Basant has been appointed as Chairman, J.S.E.B. and Shri Shiv Basant immediately took charge on the date of notification itself in the afternoon on 04.09.2010. The aforesaid action was only to eliminate the petitioner from the post of Chairman

J.S.E.B. It is contended, there is no provision for reconstitution of Board. The action of the Govt. was only to replace the Chairman and that is the glaring example of indirectly doing what is directly known as "termination". It was indirect removal of the petitioner from the post of Chairman. There is provision for removal of the Chairman but subject to certain limitations and fulfilment of conditions contained under Section 10 of The Electricity (Supply) Act, 1948. Once the Board is constituted it exists as a body corporate, with perpetual succession [Section 12, Electricity (Supply) Act, 1948]. Re-composition may be made to fill up the vacancy as per Section 5 of the Electricity (Supply) Act, 1948. Hence, the exercise of reconstitution of Board is illegal and unwarranted under the statute. It is well settled, when statute prescribes something to be done in a particular manner, it has to be done in that manner alone, and all other modes of doing it are necessarily forbidden. [Chandra Kishore Jha v. Mahabir Prasad, 2000 (1) PLJR 36 (SC)]. Here the manner of exercise of power is bad because it is designed to defeat the benefit conferred by the judgment of the Hon"ble Supreme Court on 30.08.2010. The manner in which the respondent-officials have acted upon as is reflected in the file notings, speaks for itself. Starting from abrupt initiation of file on the false pretext of pending reconstitution proposal, taking action towards ceasing all the administrative and financial powers of the Board, that too on the very next day of the judgment of the Hon"ble Supreme Court and joining of the petitioner, hastily completing the entire process within four days only, calling back the file from the law department without allowing its opinion to be recorded on the file (even though this opinion had been expressly solicited), erasing some portions by use of whitener and so on and so forth, all pointing out towards improper dealings and that too at the instance of the same person holding the key post of Advisor to the Governor.

5. The petitioner has further referred the provisions of the Electricity (Supply) Act, 1948 and related Sections and provisions and Rule 4 of the Bihar Electricity Board Rules, 1960. The petitioner has also filed I.A.No.5598/2015 with the following averments:-

I. That during the pendency of the writ petition an advertisement was got published in a daily news paper "Dainik Bhaskar" on 13.09.2015 from the office of the Principal Secretary, Energy Department, Government of Jharkhand vide Notification No.1/Board/-01-Urja-26/2013 (khand) 2164 dated 24.08.2015 inviting applications from the eligible candidates for the post of Chairman-cum-Managing Director, Jharkhand Urja Vikash Nigam Limited lying vacant. The last date of submitting applications is 15.10.2015.

II. That it is pertinent to mention that the Energy Department of Government of Jharkhand appointed the Chairman, Jharkhand State Electricity Board, as the Chairman-cum-Managing Director of the holding company-Jharkhand Urja Vikas Nigam Ltd. vide Notification No. 1844 contained in Memo No. 1845 dated 09.07.2013 (as contained in Annexure-10 C series). The said notification was issued in terms with the Jharkhand State Electricity Reforms Transfer Scheme,

2013 formulated under Section 133 of the Electricity Act, 2003 and in view of Regulation 5 of the Bihar State Electricity Board (Conduct of Business) Regulations, 1973 framed under section 79(c) of the Electricity (Supply) Act, 1948.

III. That in line with the aforesaid facts the petitioner upon being held and declared to be entitled to be treated/appointed as the Chairman-cum-Managing Director of Jharkhand Urja Vikas Nigam Ltd. the petitioner is also entitled to be made the Chairman-cum-Managing Director of the said company in place of the new incumbent.

IV. That if the appointments are made in pursuance of the said notice/advertisement (Annexure-19) competing equities and complications would be created causing grave prejudice and irreparable loss to the petitioner.

V. That the relief sought for in the writ petition also includes the direction upon the respondents to allow the petitioner to continue as the Chairman, Jharkhand State Electricity Board and this application is in furtherance of the said relief.

VI. That in such facts and circumstances of the case the process of fresh appointment is fit to be proceeded with or, alternatively and without prejudice submitted, shall be subject to final outcome of the present writ petition and the State should be directed to proceed with the process of fresh appointment with this understanding only.

VII. That the petitioner adopts the contents of the pleading and document adduced hereinbefore, including the writ petition and other affidavits.

VIII. That this application is bona fide and in the interest of justice.

IX. That the other and further grounds shall be urged at the time of hearing.

6. The petitioner has further made prayer in the change circumstance that he is entitled to be appointed as Chairman-cum-Managing Director of the holding Company Jharkhand Urja Vikas Nigam Limited in terms with the Jharkhand State Electricity Reforms Transfer Scheme, 2013 formulated under Section 133 of the Electricity Act, 2003 and in view of Regulation 5 of the Bihar State Electricity Board (Conduct of Business) Regulations, 1973 framed under Section 79(c) of the Electricity (Supply) Act, 1948.

7. The respondents took notice and appeared and filed counter-affidavit. It is contended that the Government has complied the order of the Hon"ble Supreme Court passed in Civil Appeal No. 7165 of 2010 in letter and spirit and the petitioner was permitted to join as Chairman, Jharkhand State Electricity Board. By referring the notification by which the petitioner has been appointed as Chairman, it is submitted that the appointment of petitioner to the post of Chairman, Jharkhand State Electricity Board was purely on temporary basis and it was very specific that appointment would be till further order (Annexure-1 of the writ petition). After coming into force of the Electricity Act, 2003 within one

year State Electricity Board has to be dissolved and unbundled practically in three companies i.e. Generation, Transmission and Supply and that was the object of National Electricity Policy. Since the directions of the Energy Department Govt. of India and provision contained under the Electricity Act, 2003 were not complied with within time, extensions to un-bundle the Board were sought for time to time. It is contended that according to Section 172 of the Electricity Act, 2003 a State Electricity Board constituted under the repealed laws shall be deemed to be the State Transmission Utility and licensee under the provision of this Act for a period of one year or the appointed date or such earlier date as State Government may invite and shall perform the duties and function of the State Transmission Utility and a licensee in accordance with the provision of this Act and Rules and Regulation made thereunder.

Provided that the State Government may by notification authorise the State Electricity Board to continue to function as the State Transmission Utility and a licensee for such further period beyond the said period of one year as may be decided by the Central Government and the State Government. The State Electricity Board was not functional on the day of notification i.e. on 04.09.2010 by which Shri Shiv Basant was appointed as Chairman. As a matter of fact, in view of the direction given by the Energy Department, Govt. of India, Jharkhand State Electricity Board was in fact, functioning as State Transmission Utility and a licensee and, therefore, application of the Electricity Supply Act, 1948 or Rules provided under Bihar Electricity Board Rules, 1960 were not liable to be followed. So far reconstitution of Board is concerned, it was in progress in view of the order passed by this Court in W.P.(PIL) No.5067/2008.

8. Considered the rival submissions. In view of the order dated 30.08.2010 passed by Hon"ble Supreme Court of India in Civil Appeal No. 7165/2010, the petitioner was permitted to join to the post of Chairman, Jharkhand State Electricity Board and that indicates that order of the Apex Court was complied with. It further reveals from Annexure-8 of the writ petition that the petitioner has filed writ petition (civil) No.350/2010 but it was withdrawn by the petitioner seeking liberty to move the High Court to challenge the impugned order under Article 226 of the Constitution of India, therefore, it is clear that the petitioner did not file any petition for initiation of contempt proceeding before Hon"ble Supreme Court of India and he has preferred to challenge the Notification No. 18/JUD- 08-21/2008/1469 dated 04.09.2010 issued by the Deputy Secretary, Department of Energy, Govt. of Jharkhand by which Shri Shiv Basant, I.A.S. was appointed as Chairman, Jharkhand State Electricity Board in addition to his being member (Administration).

9. Since on the date of filing of this writ application, the petitioner was not posted as Chairman, Jharkhand State Electricity Board, writ of mandamus cannot be issued directing the Government to allow him to join to the post of Chairman, State Electricity Board. Now this Court will have to confine to the prayer made by the petitioner for quashing of the aforesaid Notification No.18/JUD-08-

21/2008/1469 dated 04.09.2010.

10. I have gone through the judgment of this Hon"ble Court passed in W.P. (PIL)No.5067/2008 in which content of direction made by the Govt. of India, Ministry of Power vide letter No. 20th February, 2009 has been copied. For appraisal, the same is copied hereunder:-

" No. 25/23/2004-R&R Government of India Ministry of Power Shram Shakti Bhawan, Rafi Marg New Delhi, the 20th February, 2009 The Secretary (Energy),

Government of Jharkhand,

Nepal House,

Ranchi

(Fax No.0651-2491002)

Sub: Continuation of Jharkhand State Electricity Board (JSEB) upto 15.6.2009 beyond 31.10.2008.

Sir,

I am directed to refer to the Government of Jharkhand letter dated 13.12.2008 on the subject mentioned above and to state that, in view of State's request and the prevailing circumstances, in pursuance of Section 172(a) of the Electricity Act, 2003, it has been decided by the Central Government to agree for the continuation of Jharkhand State Electricity Board (JSEB) as the State Transmission Utility and a Licensee upto 15.06.2009 beyond 31.10.2008, to enable to State Government to complete the un-bundling process. This is last extension and the JSEB will become illegal after 15.06.2009, if not unbundled as per the provision of the Electricity Act, 2003.

Yours faithfully,

Sd/- (Malay Shrivastava)

Director

11. I further find reference of this letter in the concluding part of the said judgment (PIL) in para 36 where directions have been given to the Government to strictly comply the direction given by the Government of India, Ministry of Power. Thus, in view of the enactment of the Electricity Act, 2003 and the directions of the Ministry of Power, Govt. of India, Jharkhand State Electricity Board was permitted to function as State Transmission Utility & a Licensee till 15.06.2009 and the State Government was directed to complete the un-bundling process by way of last extension. The concluding line of aforesaid letter dated 20th February, 2009 issued by the Govt. of India, Ministry of Power is very specific "This is last extension and the J.S.E.B. will become illegal after 15.06.2009, if not unbundled as per the provision of the Electricity Act, 2003.

12. With effect from 2 June, 2003 India has adopted a new legislation called the Electricity Act 2003, to replace some age-old existing legislation operating in the country. The new act consolidates the position for existing laws and aims to provide for measures conducive to the development of electricity industry in the country. The act has attempted to address certain issues that have slowed down the reform process in the country and consequently has generated new hopes for the electricity industry.

Before Electricity Act, 2003, the Indian Electricity Sector was guided by The Indian Electricity Act, 1910 and The Electricity (Supply) Act, 1948 and the Electricity Regulatory Commission Act, 1998. The generation, distribution and transmission were carried out mainly by the State Electricity Boards in various States. Due to politico-economic situation, the cross-subsidies reached at an unsustainable level. For the purpose of distancing state governments from tariff determination, The Electricity Regulatory Commissions Act was enacted in 1998. So as to reform electricity sector further by participation of private sector and to bring in competition, Electricity Act was enacted in 2003.

Sub-section 58 of Section 2 of the Electricity Act, 2003 identifies the law repealed and it reads as follows:

Section 2

(58) "repealed laws" means the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 repealed by Section 185;

Section 131 deals with the vesting of property of Board in the State Government and the provisions relating to officer and employee.

Section 172 deals with transitional provision which is as under:

Section 172. (Transitional Provisions):

Notwithstanding anything to the contrary contained in this Act,

(a) a State Electricity Board constituted under the repealed laws shall be deemed to be the State Transmission Utility and a licensee under the provisions of this Act for a period of one year from the appointed date or such earlier date as the State Government may notify, and shall perform the duties and functions of the State Transmission Utility and a licensee in accordance with the provisions of this Act and rules and regulations made thereunder: Provided that the State Government may, by notification, authorise the State Electricity Board to continue to function as the State Transmission Utility or a licensee for such further period beyond the said period of one year as may be mutually decided by the Central Government and the State Government;

(b) all licences, authorisations approvals, clearances and permissions granted under the provisions of the repealed laws may, for a period not exceeding one year from the appointed date or such earlier period, as may be notified by the

Appropriate Government, continue to operate as if the repealed laws were in force with respect to such licences, authorisations, approvals, clearances and permissions, as the case may be, and thereafter such licences, authorisations, approvals, clearances and permissions shall be deemed to be licences, authorisations, approvals, clearances and permission under this Act and all provisions of this Act shall apply accordingly to such licences, authorizations, approvals, clearances and permissions;

(c) the undertaking of the State Electricity Boards established under Section 5 of the Electricity (Supply) Act, 1948 may after the expiry of the period specified in clause (a) be transferred in accordance with the provisions of Part XIII of this Act;

(d) the State Government may, by notification, declare that any or all the provisions contained in this Act, shall not apply in that State for such period, not exceeding six months from the appointed date, as may be stipulated in the notification.

Section 185(1) speaks as follows:-

Section 185. (Repeal and saving):-

Save as otherwise provided in this Act, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998 are hereby repealed.

The Central Electricity Act of 2003 prohibits state electricity boards (SEBs) from functioning as integrated power utilities. It makes it mandatory to divide them into separate entities for handling transmission, generation, distribution and trading functions.

13. On perusal of Annexure-6 of the writ application, it is clear that said notification was issued in view of the Electricity Act, 2003 Section 172(a) considering JSEB as State Transmission and Utility and licensee.

14. Learned Counsel has vehemently raised that the Government has indirectly deprived the petitioner by reconstituting the Board and no such proposal was pending prior to passing of order by Hon"ble Supreme Court of India in Civil Appeal No.7165/2010 but I find that direction for making fresh appointment of the Chairman of the Board in the light of letter dated 20th February, 2009 issued by the Ministry of Power, Govt. of India was already existing in the order passed by this Court in W.P.(PIL) No.5067/2008, therefore, it could not be considered that the Govt. has acted upon indirectly only to deprive the petitioner from continuing to the post of Chairman, JSEB. To sum up, it is observed that after enactment of the Electricity Act, 2003, Jharkhand State Electricity Board was not required to function in letter and spirit in which it was functioning earlier. Under Section 172 of the Electricity Act, 2003 transitional provisions have been made and it is enumerated that State Electricity Board under the repealed laws shall be deemed to be the State Transmission Utility and a licensee under the provision of this Act for a period of one year from the appointed date or such earlier date as

the State Government may invite and shall perform the duties and functions of the State Transmission Utility and a licensee in accordance with the provision of this Act and Rules and Regulations made thereunder. In view of the new provision appearing in the Electricity Act, 2003 the identity, constitution and function of State Electricity Board stood changed and, therefore, the petitioner cannot seek direction for providing benefit and reinstatement in view of any of the provision of The Electricity (Supply) Act, 1948 and for further reason that aforesaid Electricity (Supply) Act, 1948 has now been repealed.

15. In view of the discussion made above and the provision referred to I find no merit in this writ application and the same stands dismissed.