

(2009) 01 JH CK 0124
In the Jharkhand High Court

Harihar Yadav and Others

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 12-01-2009

Acts Referred:

Constitution of India, 1950 — Article 32

Citation : (2009) 01 JH CK 0124

Hon'ble Judges : Rakesh Ranjan Prasad, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.R. Prasad, J.—In the year 1975, the State of Bihar established a Corporation, namely, Bihar Hill Area Lift Irrigation Corporation, commonly known as "BHALCO" under the Companies Act, 1956 with a share capital of Rs. 10 crore with a view to provide facilities of irrigation to small and medium cultivators of Hill Areas of Chotonagpur and Santhal Pargana, and also for some of the districts of erstwhile Bihar. All these petitioners were permanent employees of BHALCO. When the State of Bihar came to be divided into existing State of Bihar and State of Jharkhand by Bihar Reorganization Act with effect from 15.11.2000, the State of Jharkhand in exercise of its power u/s 85 of the Bihar Reorganization Act, 2000 adopted all the Rules and sub-rules of the Bihar Hill Area Lift Irrigation Corporation and renamed it as Jharkhand Hill Area Lift Irrigation Corporation, Ranchi known as "JHALCO" with the stipulations that the said Corporation would be developed in to a viable commercial organization with effect from 1.4.2002 so that the Corporation can arrange salaries of its employees from its own resources, the arrear of the salary pertaining to the period prior to 15.11.2000 shall not be paid by JHALCO and that establishment expenditure of JHALCO would be brought down and that no new appointments would be made rather the services of those employees who have been appointed irregularly would be terminated. A notification to this effect was issued by the Department of Water Resources, Government of Jharkhand, vide notification No. 2580 dated 29.12.2001 (Annexure 1) Thereupon, Cabinet in its meeting gave post facto

approval of the decision taken by the Department of Water Resources, Government of Jharkhand regarding adoption of BHALCO as JHALCO and even sanctioned a sum of Rs. 5.25 crore for payment of the employees of JHALCO with effect from 15.11.2000 to 31.3.2002. Subsequently, JHALCO in the year 2003 issued notice in the local newspaper calling for the applications from the employees of BHALCO for absorption of their services in JHALCO, vide Annexures 4 and 5, though according to petitioners it was never required to do so as the services of the employees of BHALCO stood automatically absorbed by JHALCO by virtue of the provision of section 65 of the Bihar Reorganization Act, 2000 (hereinafter referred to as "the Act"). Further case of the petitioners is that in spite of absorption of the services of the employees of BHALCO, when they were not paid their salaries, they made representation before the authority and this matter came for discussion before the Assembly whereby Government was directed to pay arrears and current salary within 15 days. But when nothing was done in the matter, this writ application was filed in the year 2003 wherein prayer has been made to direct the respondent including JHALCO to treat the petitioners as the employees of JHALCO and to pay them current salary and also arrears of salary with effect from 15.11.2000.

2. For opposing the prayer of the petitioners the pleas as have been taken in the respective counter affidavits, supplementary counter affidavits and other affidavits by the JHALCO as well as State of Jharkhand are being enumerated hereunder:

That when the memorandum was put up by the officials of the Water Resources Department before the Council of Ministers, Jharkhand, a decision was taken to take over BHALCO in terms of section 65 of the Act and a copy of the said draft agreement was sent before the Government of Bihar for its acceptance and execution but no decision as yet has been taken by the Government of Bihar and as such, in absence of such agreement as envisaged u/s 65 of the Act, BHALCO cannot be said to have been taken over by the State of Jharkhand.

3. That JHALCO has been incorporated under the Companies Act, 1956 on 22.3.2002 itself and as such JHALCO is not under obligation to pay current salary or the arrears of salary to the employees of BHALCO which as per the decision of the Central Government taken on 13.9.2004 continued to be under the control of Government of Bihar in terms of section 65 of the Act and the Government of Bihar has even initiated a proceeding for liquidation. That the Cabinet in its decision taken on 18.3.2002, though had sanctioned the amount for making payment to the employees BHALCO from 15.11.2000 to 31.3.2002 but when it was communicated by the concerned department that JHALCO has come into being only on 22.3.2002, the question of making payment with effect from 15.11.2000 does not arise, the Cabinet took a decision was taken on 22.8.2003 whereby earlier decision for making payment with effect from 15.11.2000 was given go-bye. That after the Jharkhand came into being, it needed experienced hand and, hence it was contemplated to take the services of the experienced

employees of the BHALCO and therefore, an advertisement was issued calling for the applications from those employees of BHALCO who were willing to join the services of the JHALCO and pursuant to that, 398 employees of BHALCO submitted their applications/documents. Out of them, applications/documents of 302 employees were found to be in order by the Screening Committee and they were allowed to join and are being paid salaries from the date of their joining. That when the Central Government in its decision considered BHALCO to be under the control of the Government of Bihar, Government of Jharkhand annulled its earlier decision dated 29.12.2001 whereby BHALCO was taken over by the State of Jharkhand and under this situation, the petitioners, employees of BHALCO, can never be absorbed in the services of JHALCO particularly when JHALCO has got already 152 class IV employees in excess to its sanctioned strength and therefore, the question of making payment to the petitioners being employees of BHALCO never arises.

4. On the other hand, stand of the State of Bihar is that entire assets of the BHALCO is situated within the jurisdiction of State of Jharkhand and as such, all the liabilities incurred by the BHALCO is to be borne by the state of Jharkhand in terms of provision of sections 47(1) and 56(a) of the Act.

5. Before coming to the issues involved in this case certain background which shall have much bearing on this case needs to be taken notice of. When the report appeared in some of the Newspapers regarding non-payment of the salaries since long resulting into starvation of the employees of several Corporation situated in the State of Bihar, a Public Interest Litigation was brought under Article 32 of the Constitution of India before the Hon''ble Supreme Court raising question relating to the liability of the State of Bihar for payment of arrears of salary to the employees of the said Corporations, Public Sector Undertaking and Statutory Bodies. The Court after taking into consideration the stand of the State of Bihar passed an order on 9.5.2003 whereby High Court was requested to constitute three members committee chaired by the retired High Court Judge for scrutinizing the assets and liabilities of the Companies. Meanwhile, the State Government was directed to deposit a sum of Rs. 50 crore before the High Court for disbursement of the salaries to the employees of the Corporations. Pursuant to that, number of development took place and in that process, the Hon''ble Supreme Court passed an order on 13.8.2004 directing the State Government to take a decision regarding division of assets and liabilities of the Government Companies/ Public Sector Undertakings in terms of the provisions of the Act. Thereupon, an interlocutory application bearing No. 7 of 2004 was filed wherein prayer was made to direct the respondent to treat JHALCO as successor of BHALCO. Presumably filing of the said interlocutory application got necessitated on account of the fact that JHALCO by way of advertisement had called upon employees of BHALCO to submit papers so as to they be absorbed in JHALCO if they forego their claim of salary for the period prior to their respective dates of absorption. The prayer made in the said interlocutory application was opposed by the JHALCO and also the state of

Jharkhand on the ground that question of taking over the services of the employees of BHALCO or payment of their salary never arises as JHALCO came into being on 22.3.2002.

6. After hearing, the Hon'ble Court passed an order on 13.1.2005 which reads as follows:

It is true, as has been contended on behalf of the State of Jharkhand that a new corporation named as JHALCO has come into being, but keeping in view of the fact that the State of Jharkhand itself has given option to the employees of BHALCO, the order of absorption of those employees who opt for employment may be passed at an early date and not later than six weeks from date. The concerned employees need not file any undertaking at this state as the question as to whether the State of Jharkhand is liable to pay any salary and other emoluments to the employees of BHALCO is a question which would fall for decision in an appropriate proceeding.

7. Thereafter an interlocutory application bearing No. 11 of 2007 was filed on behalf of the JHALCO for modification of the order passed on 13.1.2005 wherein it was stated that out of 398 workmen who had been working with BHALCO and had applied for their absorption, only 302 workmen turned up and as such they were absorbed in spite of the fact that 152 employees were in excess. Keeping in view the statement made on behalf of the State of Jharkhand, the interlocutory application was disposed of in the term that those who have not turned up for duty on the appointed date may seek their remedies in the matter as are available to them in law. We need not issue any direction in regard to their absorption.

8. It be further recorded that pursuant to order dated 13.1.2005, as has been referred to above, 216 persons put forth applications before the authority of the JHALCO for their absorption but when nothing was done, an interlocutory application bearing No. 21 of 2007 was filed for directing the respondent-State/JHALCO to comply the order dated 13.1.2005 and pass the order of absorption in JHALCO. Upon which notice was issued to the State of Jharkhand and also JHALCO and after hearing, the Court passed the order on 13.12.2007 which reads as follows:

Having heard the learned Counsel for the parties we are of the opinion that as the situation in which the employees of the erstwhile BHALCO arises out of a statement before us by the counsel for JHALCO, from which the State now seeks to wriggle out, we are of the opinion that the Secretaries of the State of Bihar and the State of Jharkhand as also the Managing Directors of the BHALCO and JHALCO should have a dialogue in regard to the absorption of the concerned employees and a report be submitted to this Court. If necessary, intervention of the appropriate Department of the Central Government may also be taken.

9. Subsequently when the matter again came up for hearing, State of Jharkhand as well as JHALCO also took the stand that BHALCO as well as JHALCO are two

different entities as the Government of India has taken a decision that BHALCO continued to be under the control of the Government of Bihar in terms of section 65 of the Act, 2000 and that JHALCO has already employed 302 employees of BHALCO and thereby 152 class IV employees were employed as surplus and as such if 216 employees are directed to be absorbed, JHALCO would become a sick company. Thereupon, the Hon'ble Court did not deem it fit to decide the issue in view of the fact that a labour dispute had been raised in a Public Interest Litigation and that similar matter was pending before this Court and hence, that interlocutory application was disposed of in the following terms:

The High Court of Jharkhand is requested to dispose of the writ petition pending before it at the earliest and, if possible, within six weeks from date. If the High Court finds it difficult to dispose of the matter within the aforementioned period, it may pass interim order as it may deem fit and proper. It is made clear that in the event the High Court finds that the applicants were entitled to be absorbed in the services of JHALCO from an earlier date it would be open to it to pass such an order as it may deem fit and proper so as to adjust the equities between the parties. It is made clear that the question final absorption, past salaries and the liability to pay the same may be determined by the High Court in the said writ petition. Managing Director, BHALCO and Managing Director, JHALCO as also the Secretaries of the Government of Bihar and the Government of Jharkhand shall meet within one month from the date and decide upon the assess the liability on account of the arrears of the salaries payable to the employees already absorbed and to be absorbed, and make a report thereof within a week of the date of decision, to the High Court for taking final decision regarding the mode of payment etc. to the employees, if any, so that the liability of JHALCO to that extent would stand reduced. The Central Government shall take immediate steps to see that the directions in the order dated 13.9.2004, passed by it are complied with by the State of Bihar.

10. In the background, as stated above, this case which was pending since 2003 was taken up for hearing at the stage of admission. Having heard learned Counsel appearing for the parties and regard being had to the pleading the following issue falls for consideration:

Whether BHALCO in view of the provision as enshrined in section 65 of the Bihar Reorganization Act would be considered to be the same entity only with a change in its name as JHALCO or JHALCO is a separate entity than BHALCO?

11. It has already been noticed that BHALCO was established in the year 1975 and was incorporated under the Companies Act with an objective to provide irrigation facilities to small and medium cultivators of Hilly Areas of Chotanagpur and Santhal Parganas mainly and some of the districts of the erstwhile Bihar and its activities were mainly confined to most of the districts of the State of Jharkhand. Subsequently, erstwhile state of Bihar came to be divided into existing state of Bihar and State of Jharkhand by Bihar Reorganization Act with effect from 15.11.2000. Under the aforesaid Act, provision was made regarding

functioning and division of interest and share with respect to companies specified in Ninth Schedule to the said Act. Admittedly, BHALCO does figure in the Ninth Schedule. The said provision as enshrined in section 65 of the Act which reads as follows:

12. Section 65 - "Provisions as to certain companies-Notwithstanding anything contained in the foregoing provisions of this Part, each of the companies specified in the Ninth Schedule to this Act shall, on and from the appointed day and until otherwise provided for in any law, or in any agreement among the successor States, or in any direction issued by the Central Government, continue to function in the areas in which it was functioning immediately before the day; and the Central Government may, from time to time, issue such directions in relation to such functioning as it may deem fit, notwithstanding anything to the contrary contained in the Companies Act, 1956, or in any other law.

(1) Any direction issued under Sub-section (1) in respect of a company referred to in that sub-section, may include directions:

(a) regarding the division of the interests and shares of existing State of Bihar in the company among the successor States;

(b) requiring the reconstitution of the Board of Directors of the company so as to give adequate representation to both the successor States.

13. The aforesaid provision stipulates about the continuance of the activities of the company in the areas in which it was functioning immediately before the appointed day and for regulating the same and also for division of the interests and shares of existing State of Bihar, Central Government has been vested with the power to give some direction to the State Government or other authority even contrary to the provision of the Companies Act or in any other law. Keeping in view the said provision, perhaps the Water Resources Department, Government of Jharkhand came with a notification dated 29.12.2001 (Annexure 1) with a purpose to have the activities of the BHALCO continued in the State of Jharkhand with the changed name of JHALCO by adopting Memorandum of Association and Articles of Association of BHALCO by virtue of the power as enshrined u/s 85 of the Act. The decision taken under Annexure 1 was ratified by the Cabinet which is evident from Annexure 2. While taking such decision, it was stipulated under Annexure 1 as well as Annexure 2 that the persons who were working from before would not be entitled to salary for the period before 15.11.2000 and at the same time it was also resolved that no fresh appointment shall be made and that JHALCO should develop it as a viable commercial institution with effect from 1.4.2002 from which date the State Government would not be giving any financial assistance to JHALCO. However, it does appear that the Government sanctioned a sum of Rs. 5.25 crore for making payment to the employees of BHALCO/JHALCO for the period from 15.11.2000 to 31.3.2002. Thus, all these stipulations made under Annexures 1 and 2 clearly go to show that intention of the Government of Jharkhand was to allow BHALCO to continue

with its activities in the territory of the State of Jharkhand with changed name as JHALCO which was in consonance of the provision of section 65 of the Act but now the State of Jharkhand as also JHALCO have taken a U turn and have come with a plea that the JHALCO is a separate entity which came into being on 23.3.2002 when it was incorporated under the Companies Act and as such Jharkhand is not under obligation to absorb the services of the employees of BHALCO but this assertion is not only contrary to earlier stand of the state of Jharkhand, as has been noticed above, rather contrary to the provision of section 65 of the Act which never contemplates about the extinction of the existing company or the formation of the new company, rather it does contemplate of the continuance of the activities of the existing company in the territory in which it was functioning from before. It be reminded that provision contained in section 65 of the Act starts with non-obstante clause whereby the authority has been empowered to issue direction in respect of certain companies even contrary to the provision of the Companies Act or in any other law. In this view of the matter, JHALCO can never be said to be new entity even if it has been incorporated under the Indian Companies Act, rather BHALCO would be deemed to have been continuing in the name of JHALCO. Further objection taken by the JHALCO as also the state of Jharkhand is that since all the shares invested in the company, BHALCO is in the name of Governor of the State of Bihar which cannot be transferred and as such, BHALCO can never be said to have taken over by JHALCO. This contention seems to be devoid of merit in view of the provision as contained in Section 65 (2)(a) of the Act which speaks about the division of the interest and shares of existing State of Bihar in the companies among the successor states and for making any direction in this respect Central Government has been authorized to do so. It be stated here that in absence of any agreement between the two States contrary to contemplation made u/s 65 of the Act about the continuance of the activities of the company in areas in which it was functioning would continue to function by fiction of law as contemplated u/s 65 of the Act. Consequently, subsequent unilateral decision annulling the decision as has been taken under Annexure 1 will have no adverse bearing on the status of the company.

14. In spite of that Managing Director, JHALCO, Ranchi, respondent No. 4 got a notice published in the Newspaper on 27.3.2003 and 31.7.2003 whereby employees of the BHALCO who were willing to join the service of JHALCO were called upon to submit their joining report with the statement of service tenure. It was further stipulated that from the date of joining, they will be given their salaries. Pursuant to the said advertisement, 398 applications were received and out of them, 302 turned up who were allowed to join. However, now plea is being taken that out of 302 employees who were taken in the services of JHALCO, 152 persons are in surplus and, therefore, if 216 more persons are directed to be taken in service of JHALCO, JHALCO would be ruined financially.

15. In this respect it be stated that when two advertisements were issued, an interlocutory application was filed on behalf of some of the employees of BHALCO

before the Hon''ble Supreme Court, where the Hon''ble Supreme Court after hearing the parties passed an order on 13.1.2005 directing the authorities to pass order of absorption of those employees who have opted for employment on an early date not later than six weeks from the date of making application and that concerned employees need not file any undertaking that they will not be claiming arrears of salary. Pursuant to that, applications by 216 persons including the petitioners were made but when no decision was taken, an interlocutory application bearing No. 21 of 2007 was filed on behalf of the employees of BHALCO wherein same plea was taken by the State of Jharkhand as also by the JHALCO that as per the sanctioned strength, 152 class IV employees are in surplus and, therefore, if 216 persons are directed to be taken in the services of JHALCO, JHALCO would be ruined financially. However, the Hon''ble Supreme Court dealing with the matter expressed its anguish over the contradictory and inconsistent stand taken by them at different occasions which would appear from the extract of the order passed on 8.7.2008 on an interlocutory application bearing No. 21 of 2007 which reads as follows:

We have deliberately referred to the two affidavits on behalf of the State of Jharkhand and JHALCO only to show that JHALCO and the State are changing their stands from time to time. Their stands at times have become contradictory and explicable. It has already been noted that JHALCO came into existence long back on 29.12.2001, because the area of operation of BHALCO fell within the boundaries of Jharkhand after the State of Jharkhand came into existence. The Cabinet note dated 9.1.2002 which was filed by the writ petitioner along with I.A. No. 11 of 2005 clearly suggests that the Jharkhand State Cabinet had sanctioned that BHALCO should be run in the form of JHALCO. In 2003, JHALCO gave two advertisements for absorption of BHALCO employees and even later, it was admitted that JHALCO required the experienced employees of BHALCO. In pursuance of these advertisements, all the BHALCO employees could have applied for being regularized, provided their applications were found to be in order. Accordingly, as many as 302 employees were absorbed. The applications of others were rejected and some others had not applied at all, perhaps because of the condition that such employees had to forego their earlier claims of the unpaid salaries. At the time when the advertisements were issued, there was no compulsion by way of any Court Order to accommodate all the employees and it could have been merely a humanitarian consideration out of which the said advertisement came to be issued. It cannot be forgotten that there was no trained staff available with JHALCO and, therefore, JHALCO required the experienced staff of BHALCO. Therefore, this move was only to replace the nomenclature of BHALCO and to continue the same as JHALCO. It seems that the non-payment of salaries of these employees was a non-factor and, therefore, JHALCO wanted to reap double benefit, viz., firstly, it could get all the experienced employees and secondly, that too without having to face the liability of their salary payments. It must be remembered that all this was in the wake of this Court's Order dated 9.5.2003, wherein, this Court had required the State of

Bihar to deposit a sum of 50 crores of rupees for disbursement of the salaries to the employees of the corporations and also had directed the disbursement of the funds to the needy employees on ad-hoc basis. The Court had also directed creation of a committee for scrutinizing the assets and liabilities of the companies. Therefore, when the advertisements were issued with the cut-off date of 7.8.2003, JHALCO had a distinct advantage. However, thereafter, came the order of this Court dated 13.1.2005, whereby, this Court took the notice of coming into being of JHALCO and further directed that the concerned employees who were to be absorbed, need not give an undertaking of foregoing their claims for the past unpaid salaries. Till then, it seems from the language of the Order dated 13.1.2005 that no formal Order was passed for absorption. Probably, therefore, this Court gave six weeks' time to such employees. Again as in the earlier advertisements, only the employees foregoing their claims over salaries could apply, all the employees probably did not apply restricting the number only to 302. Now, in pursuance of the order dated 13.1.2005, 216 more employees had applied for and that too without foregoing their claims over salaries. It is probably because of this that a decision was taken in a meeting dated 8.8.2005 to review the financial position of JHALCO, to curtail the number of employees and to limit the total number of employees to 214. In fact, if paragraph A(f) of the Additional affidavit is seen, it will be clear that though there were 152 excess Class IV employees, there was still requirement of 64 Officers, as only 14 Officers were engaged as against the total sanctioned strength of 78 Officers. This exercise of curtailing the employees and limiting the total number of employees to 214 appears to be a deliberate exercise in the wake of the Order dated 13.1.2005 of this Court, and incidentally, even that Order was not followed in its true spirit which ultimately required the petitioners to file I.A. No. 11. Even the figures given in the Additional affidavit's paragraph A(f) are misleading. If properly calculated as against the total sanctioned strength of 214, 302 employees were engaged. Thus, only 88 excess employees could be said to have been engaged and that too prior to the decision dated 8.8.2005. The figure of 152 as the excess employees is, therefore, clearly misleading. There does not appear any explanation, nor any statistics to justify the curtailing of the employees by JHALCO. After all, there was no curtailment of area or the activities at least none pleaded before us, in which case the decision to curtail the number of employees of JHALCO itself appears to be neither sound, reasonable, nor justifiable and only appears to get out of rigor of this Court's Order dated 13.1.2005. Be that as it may, we are, in view of the discussions made thereafter, not in a position to pass any order in favour of the applicants even if their contentions with regard to existence of vacancies are accepted.

16. It be noticed that right from the beginning when decision was taken to allow the activities of BHALCO to continue in the territory of State of Bihar by the changed name of JHALCO, no such indication was ever given about the staffs being surplus. Moreover, even the advertisements issued by the JHALCO do indicate that applications were called upon from all the willing employees who

want to join the services of JHALCO. At that time also no restriction was imposed over the number of employees to be absorbed. In this view of the matter, I do also subscribe the same view as has been expressed by the Hon"ble Supreme Court by observing " figure of 152 as the excess employees is, therefore, clearly misleading. There does not appear any explanation, nor any statistics to justify the curtailing of the employees of JHALCO and such plea seems to have been taken to get out of the rigor of the court's order dated 13.1.2005".

17. Thus, for the reasons discussed hereinabove BHALCO and JHALCO can not be said to be two separate entities rather BHALCO in terms of section 65 of Bihar Reorganization Act can be said to have been functioning as JHALCO.

18. Therefore, I do find that the petitioners are entitled to be absorbed in the services of JHALCO from the date when they have made applications for their absorption, pursuant to direction given by the Hon"ble Supreme Court on 13.1.2005 and they are entitled to get their salaries from the date of their absorption which is to be paid by the JHALCO as other employees whose services were accepted by the JHALCO are also paid from the date of joining. In the result, this writ application is allowed.