
(2002) 09 JH CK 0008
In the Jharkhand High Court
Case No : Writ Petition (S) No. 5732 of 2001

Smt. Rashmi

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 10-09-2002

Acts Referred:

Bihar Reorganisation Act, 2000 — Section 85, 9(7)

Citation : (2002) 09 JH CK 0008

Hon'ble Judges : V.K. Gupta, C.J; Hari Shankar Prasad, J

Bench : Division Bench

Advocate : A.G., Amareshwar Sahay, for the Appellant; Pradip Modi, GP-I and A. Allam, for the Respondent

Final Decision : Allowed

Judgement

1. At the centre of controversy in this petition is the scope and ambit of the power exercisable by the Government of Jharkhand u/s 85 of the Bihar Re-organization Act, 2000 ("Act for short), in the light of the Constitutional provisions contained in Part XI (Chapter I) of the Constitution of India, particularly Articles 245 and 246.

2. Before we go into the details of the main controversy forming the subject matter of this petition, we consider it advantageous to deal with a preliminary objection raised by Mr. Pradip Modi, learned counsel appearing for the respondents to the effect that the petitioner perhaps cannot be termed as a "person aggrieved" and that in any case, she is not similarly situated as the two teachers who were transferred from Bihar to Jharkhand and, therefore, the petition be dismissed as not maintainable. For the reasons which we indicate hereafter, we do not propose to go into the merits of the aforesaid contention because in our considered opinion, the locus standi of the petitioner by itself, in the peculiar facts and circumstances of this case and in view of the involvement of substantial question of constitutional law, may not be a factor warranting any relevance in so far as the fate of this petition is concerned. As would hereafter be

evident, thus, whether the petitioner is personally aggrieved or not or whether she is similarly situated as others, are issues which ultimately would appear to be not germane to the points involved for consideration in this case.

Let us first have a look at the background leading to the formation of the State of Jharkhand and some applicable and relevant provisions of the law by which this State came into being.

3. Before 15th November, 2000, the State of Bihar was a State appearing at Serial No. 3 of the First Schedule to the Constitution of India. It was by virtue of the provisions contained in Part I of the Constitution that the Parliament enacted Bihar Re-organisation Act, 2000 (Act for Short) whereunder, on and from the appointed day, a new State known as the State of Jharkhand came into being. Section 3 of the Act is the provision by which this new State of Jharkhand comprising some of the territories of the erstwhile State of Bihar came into being. The expression "appointed day" has been defined in Section 2(a) of the Act to mean a day which the Central Government may, by notification in official gazette, appoint and it is the admitted case of all the parties that 15.11.2000 was the day "appointed" by the Central Government. It was on 15th November 2000 that the State of Jharkhand thus came into being. It shall be worthwhile here to take note of two definitions as occurring in Section 2 of the Act. Clauses (e) and (j) define the "existing State of Bihar" and "successor State" as under-

"(e) "existing State of Bihar" means the State of Bihar as existing immediately before the appointed day;

(j) "successor State", in relation to the existing State of Bihar, means the State of Bihar or Jharkhand."

4. Part-X of the Act relates to the subjects of legal and miscellaneous provisions. Section 84 in effect and substance stipulates and lays down that the change in the territories, as in effect and substance has been brought about by virtue of Sections 3 and 4 of the Act, would not affect the operation of laws with respect to such territories (as were in existence immediately before the appointed day) Section 85 (with which we shall deal extensively a little later) lays down that the appropriate Government may either by way of repeal or amendment, by order make such adaptations and modifications in any law as is in existence before the "appointed day" so as to facilitate its application in relation to the State of Bihar or Jharkhand, as the case may be. Undoubtedly, the expression "appropriate Government" includes the Governments of Bihar, Jharkhand as well as the Central Government. Section 86 being in the form of a residuary provisions, an all embracing one, lays down that if despite the permissible stipulations contained in Section 85, no provision or insufficient provision has been made for adaptation of any law, any Court, tribunal or authority required or empowered to enforce such law, may for the purpose of facilitating its application to the successor State construe the law in such a manner, without affecting its substance as it may deem necessary or proper with regard to any matter before

the Court, Tribunal or the Authority. For the facility of ready reference, we reproduce herein below verbatim Sections 84, 85 and 86 of the Act,

"84. Territorial extent of laws.--The provisions of Part II of this Act shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial references in any such law to the State of Bihar shall, until otherwise provided by a competent Legislature or other competent authority be construed as meaning the territories within the existing State of Bihar before the appointed day.

85. Power to adapt laws.--For the purpose of facilitating the application in relation to the State of Bihar or Jharkhand of any law made before the appointed day, the appropriate Government may, before the expiration of two years from that day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon every such law shall have effect subject to the adaptations and modifications so made until altered, repealed or amended by a competent Legislature or other competent authority.

Explanation.--In this section the expression "appropriate Government" means as respects any law relating to matter enumerated in the Union List, the Central Government, and as respects any other law in its application to a State, the State Government.

86. Power to construe laws.--Notwithstanding that no provision or insufficient provision has been made u/s 85 for the adaptation of law made before the appointed day, any court, tribunal or authority, required or empowered to enforce such law may, for the purpose of facilitating its application in relation to the State of Bihar or Jharkhand, construe the law in such manner, without affecting the substance, as may be necessary or proper in regard to the matter before the court tribunal or authority."

5. It is in the light of the aforesaid constitutional and legal background and also in the backdrop of the aforesaid historical event of the formation of the new State of Jharkhand, that we, now make a brief reference to the facts involved in this case.

6. The Bihar State Universities Act, 1976 was on Statute Book of Bihar State, admittedly before the appointed day, i.e. 15th November, 2000. Actually, in so far as the successor State of Bihar is concerned, it continues to be on its statute book even as on this day. There is no dispute on that score. Apparently, feeling that the Government of Jharkhand would need to adopt and apply to the State of Jharkhand the aforesaid Bihar State Universities Act, 1976 (1976 Act for short), in purported exercise of the power vesting in it u/s 85 of the Act, the Government of Jharkhand issued notification No. 001/2000-18 dated 13th December, 2000 whereby it adopted 1976 Act but by incorporating the following amendments thereto.

- (i) The name of 1976 Act was changed to Jharkhand State Universities Act, 2000.
- (ii) Some sections as occurring in 1976 Act underwent either changes or amendments or repeals, such as in Section 3 of the 1976 Act, Clauses (a), (b), (c), (g), (h), (i), (j), (k) and (l) were deleted.
- (iii) In Section 9 of the 1976 Act for the words "Governor of Bihar", the words "Governor of Jharkhand" were substituted.
- (iv) Clauses 15 and 17 of Section 18 of the 1976 Act were deleted Section 27 of 1976 Act was altogether deleted.
- (v) Section 22 of 1976 Act also underwent some modification with respect to Clause (4) thereof.
- (vi) In the end the aforesaid notification provided that wherever in 1976 Act, the words "Bihar State" or "Bihar" occurred! they would stand substituted by the words "Jharkhand State" or "Jharkhand".

At the risk of repetition and reiteration, we wish to observe that this notification was issued on 13th December, 2000 and was made applicable with immediate effect.

7. It appears that because of the Reorganisation of Bihar State and the formation of the separate State of Jharkhand, certain persons working in the Universities of Bihar faced some unexpected difficulties in the sense that whereas there spouses migrated or were transferred to the new State of Jharkhand either by way of official allocation of their cadre or otherwise; they were left behind serving in the Universities of Bihar. The families got separated, the spouses naturally also got separated.

8. In 1976 Act, Section 9(7)(i) gave the Chancellor of Bihar Universities power to transfer the officers and teachers from one university to another, of course, and obviously, within the State of Bihar because 1976 Act before the appointed day was applicable to the existing State of Bihar and this power was exercisable by the Chancellor of the Universities of Bihar in the existing State of Bihar. However, after the appointed day, undoubtedly, this power in so far as 1976 Act was concerned and in so far as the Chancellor of the Universities of Bihar was concerned, stood exercisable by him vis-avis the officers and teachers of the Bihar Universities within the successor State of Bihar only. Undoubtedly, the Chancellor of Bihar University could not exercise the power of transfer of the teachers and officers of the Universities of Bihar from Bihar to any university in Jharkhand. For ready reference, we reproduce herein below Clause (i) of Sub-section (7) of Section 9 of the 1976 Act which read thus :

"(7)(i) The Chancellor shall have power to transfer the officers and teachers of the Universities from the University to another or in the same University on the same post or any other equivalent post; the transferees shall retain their respective seniority."

9. Faced with a situation where Jharkhand State had one spouse allocated into its cadre and the other spouse having been left behind in Bihar (serving in one of the Universities of Bihar) and Section 9 of the 1976 Act not being of any help in so far as bringing such spouse to any University in the State of Jharkhand was concerned, the Government of Jharkhand by adopting an apparently innovative method issued a notification on 9.11.2001, being Notification No. 01/2001-353, apparently, once again in purported exercise of the power vested in it u/s 85 of the Act, this time by amending Section 9(7)(i) of Jharkhand State Universities Act, 2000 by inserting Clause (a) after the aforesaid Clause (i) of Sub-section 7 of Section 9 of the Jharkhand State Universities Act, 2000. We have before us a Hindi text of the amending Act but we, on our attempt reproduce herein below the English translation thereof which reads thus :

"9(7)(i)(a) The Chancellor will also have the power to accept the services of those officers, teachers and non-teaching staff of Universities of Bihar whose wife/husband's services have been transferred to the State of Jharkhand by virtue of Bihar Re- organisation Act, 2000 and they have been relieved by the Chancellor of the Universities of Bihar with the consent of the Chancellor of Universities of Jharkhand. The persons so transferred will retain their respective seniority.

The services so transferred shall be accepted by the university against the sanctioned and vacant post.

This provision will be effective for six months from the final bifurcation of state services cadre or one year from the date of issuance of this notification whichever is later."

10. It is the aforesaid notification which is under challenge in this writ petition. The petitioner's contention is that is ultra vires the Constitution of India as well Section 85 of the Re-organisation Act and beyond the competence of the Government of Jharkhand.

11. It is the undisputed case of the parties that the aforesaid impugned notification has been issued and brought about by the Government of Jharkhand through the medium of an executive order. It is not the case of the respondents that the notification, whereby the Jharkhand State Universities Act, 2000 has been brought about by way of any legislative enactment as provided under Article 246 of the Constitution of India.

12. Part-XI of the Constitution of India relates to the subject of legislative relations and basically deals with the distribution of the legislative powers between the Parliament and the State Legislatures. Whereas Article 245 defines the extent of the limits of the legislative power of the Parliament and the State Legislatures, Article 246 clearly stipulates that in so far as the matters appearing in the Union list are concerned, the Parliament alone has the power to legislate and in so far as the matters appearing in the State list are concerned, the State Legislatures alone have the power to legislate.

13. That the legislative power of the State is distinct from its executive power is a known facet of the constitutional law and is a part of the basic structure of the Constitution. It is a known feature of the constitutional scheme that the Government in exercise of its executive power cannot legislate. Legislative power belongs to the Legislature, it cannot be exercised by the Executive. The Executive, if it exercises the legislative power, would usurp the power of the Legislature and would thus transgress in the field of legislation which is the exclusive domain of the legislature. The limits of the executive power and its exercise are defined and are well known. The legislative power, on the other hand, is plenary in nature and its extent in a way is limitless, except as it is circumscribed by the constitutional provisions. It is in this backdrop that we look at the extent of the power which is exercisable by the Government of Jharkhand u/s 85 of the Act.

14. Section 85 of the Act opens (in substance) with the expression "For facilitating the application". The expression "facilitating the application" clearly means that in so far as the new State of Jharkhand is concerned, or for that matter, after carving out the State of Jharkhand the successor State of Bihar may also be concerned, the laws would have to be applied perhaps in such situations and in such contingencies as could not have been conceived by the Legislature when these laws were originally enacted and, therefore, with a view to facilitate their application to the successor State and thus correspondingly to avoid those unforeseen difficulties in their application, and to obviate various other administrative problems, the "appropriate Government" was conferred the power by way of exercise of its executive jurisdiction to make adaptation and modification in the laws, whether by way of repeal or amendment, as may be necessary and expedient and after such adaptation and modification in the law had been made, such law would have effect in the territory of the successor State subject to such adaptation and modification, until such a law is altered, repealed or amended by the competent Legislature. On a reading of Section 85 thus, the following important points can be culled out ;

1. At the core of the intent and purport of Section 85 is the "facilitation" with respect to the application of the laws which obviously and naturally is in relation to such laws as were in force before the "appointed day".
2. The appropriate Government with a view to facilitate the application of all such laws in the successor State was given the power (by way of exercise of the executive jurisdiction) to incorporate adaptations or modifications in such laws, either by way of repeal or amendment,
3. The laws thus adapted or modified would be applicable to the successor State.
4. These laws would remain valid until altered, repealed or amended by a competent Legislature.

15. As the notification dated 13th December, 2000 would itself illustrate, the 1976 Act was adopted in Jharkhand State with modification, both by way of

amendments as well as repeal, in order to facilitate its application to the Jharkhand State. The notification dated 13th December, 2000 can be actually treated as a model to appreciate and understand the extent of power u/s 85 of the Act as also to appreciate the rational, reasoning and the logic behind the exercise of such power. This notification itself clearly reveals that all the modifications, whether by way of amendments or repeal, were basically aimed at, and were relatable to change of nomenclature and within the territories of the new State of Jharkhand. There was no alteration, either by way of amendment or repeal, or otherwise in the substance or the basic text of 1976 Act. The alteration was only by way of change of the nomenclature, change of the names, or the change with respect to the territory. That also was the clear intention of the Legislature when it enacted Section 85. The limited scope of the application of Section 85 was only to facilitate the application of laws, (to the new State); only such laws as were in existence before the appointed day. No other laws; not the law, which came into existence after the appointed day.

16. When we talk of facilitating the application of laws, we clearly mean and understand that the laws in substance would remain the same; only because they have to be applied to a new State, perhaps the nomenclature, the name might require a change and alteration. Reading into Section 85 of the Act, the grant of plenary legislative power to an Executive will be too much. This legislative intent is not discernible at all from the reading of the Section 85 of the Act, because whether Section 85 is read in isolation or it is read in conjunction with Sections 84 and 86 of the Act, the net result is that the legislative intent as would be clearly discernible either from the isolated reading of Section 85 or from a conjunctive reading of these sections is that the Parliament intended that for the limited purpose of facilitating the application of laws, the executive (read the Government) was given an extra-ordinary and exceptional power of adopting laws with modifications, but only to facilitate their application to the new State.

17. Let us now go to another point. Let us for a moment ignore the limited extent of the power u/s 85 of the Act in so far as the "facilitating part" is concerned. Section 85 undoubtedly talks of the laws as were in existence before the appointed day. Undoubtedly, 1976 Act was a law which was in existence before the appointed day. The Government of Jharkhand, therefore, in exercise of its power u/s 85 of the Act was well within its rights to adopt this law with modifications, whether by way of repeal or amendment, with a view to apply the same to the State of Jharkhand. Let us not at this stage go into the question of limited nature of this power. Let us construe this power in its widest amplitude. For the sake of argument, let us not read any limitation in the exercise of this power. Alright! The Government of Jharkhand exercised the power on 13th December, 2000, understandably u/s 85, and adopted 1976 Act by issuing Notification No. 001/2000-18 dated 13th December, 2000. It is by virtue of this notification that 1976 Act was converted into the Jharkhand State Universities Act, 2000. As far as the State of Jharkhand is concerned, as far as the Government of Jharkhand and as far as Section 85 of the Act is concerned, on

and from 13th December, 2000, The Bihar State Universities Act, 1976 stood obliterated. It went out of the statute book of Jharkhand in as much as on and from 13th December, 2000, Jharkhand had its own, its very own, Jharkhand State Universities Act, 2000. Therefore, the expression "law as in existence before the appointed day", surely cannot be applied to Jharkhand State Universities Act, 2000. The Jharkhand State Universities Act, 2000 is a law which came into existence after the appointed day.

18. In the aforesaid backdrop, therefore, when we examine the impugned notification dated 9.11.2001, whereby Section 9(7)(i) was amended and a new clause was inserted, what we find is that this amendment was brought about not in the Bihar State Universities Act, 1976 but in the Jharkhand State Universities Act, 2000. The question is, was the Government of Jharkhand in exercise of its executive power competent to amend a plenary legislation by carrying out an amendment therein or thereto. The answer has to be clearly in the negative. Since Jharkhand State Universities Act, 2000 is a piece of legislation, the addition of a new Clause (a) after Clause (i) in Sub-section (7) of Section 9 of this Act was a clear legislative action and this could have been done only by the Legislature. The Executive had no power to do so.

19. During the course of arguments, a question did arise for consideration as to whether power u/s 85, once validly exercised could or can it be exercised second time, third time or even more number of times. The question, in the light of the aforesaid observations now perhaps may not call for an answer. But we do wish to observe that having once exercised power u/s 85 in relation to a law as was in existence before the appointed day, perhaps, in exercise of that power, the State of Jharkhand completely loses its control and jurisdiction in future, because by the very nature of the exercise of that power what it does, on exercising that power, is to obliterate the law as was in existence before the appointed day and as a result of the exercise of this power, a new law is brought into existence. Section 85 in its application to this new law becomes otiose. Even though the expression may not be wholly appropriate (it may not fully fit in the semantics), yet it may be said that the State Government with respect to the exercise of power u/s 85 with respect to such a new law becomes functus officio after the power u/s 85 has once been exercised by it.

20. Mr. Modi, learned counsel appearing for the State referred to a judgment of the Supreme Court in the case of Ramesh Birch v. Union of India reported in 1989 (1) 430 SCC Supp.1 That was the case under the Punjab Re-organisation Act, 1966. We have gone through this judgment and find that even though their Lordships of the Supreme Court while referring to the corresponding provision namely Section 89 of 1966 Act made some observations in paragraph 38 of the judgment, but as per our humble opinion those observations are totally distinguishable and not at all applicable to the facts of the case in hand.

21. Mr. A.K. Sinha, learned Advocate General appearing for the intervener in this case. (The persons who were beneficiaries of the impugned notification inasmuch

as it is by virtue of the impugned notification/amendment that they were transferred from Bihar Universities to the Jharkhand Universities) has submitted that our striking down the impugned notification would jeopardize the interests of the interveners. We understand and appreciate the submission Mr. Sinha and the predicament of his clients. We do realize that our striking down the impugned amendment would naturally put into jeopardy the interests of these persons because it is by virtue of this impugned amendment along and for no other reason or ground that the two Chancellors of Bihar and Jharkhand Universities agreed with each and brought about the transfer of these persons from Bihar to Jharkhand. There was no other power vesting in them under any other law. All that we can say is that Jharkhand Government is to be blamed for putting these persons in jeopardy. Mr. Sinha strongly relied upon a Supreme Court judgment in the case of A.C. Thalwal Vs. High Court of Himachal Pradesh and Others, . Even though our sympathy may be with his clients, but we must say that even this judgment of the Supreme Court cannot be held applicable in the present case inasmuch as all that their Lordships observed and directed in this judgment with respect to the petitioner A.C. Thalwal was that he be allowed to continue functioning on the post held by him and should not be reverted to a lower post. There was no difficulty in issuing or implementing that direction because the person concerned was in the judicial service of just one State i.e. Himachal Pradesh and in the administrative control of just one authority i.e. High Court of Himachal Pradesh. But in the present case, however, the control is dual. These persons belong to Bihar Universities. They have been brought to the Jharkhand Universities by adoption of a method which was impermissible under the Constitution.

22. We, on our part, do not wish to offer any comments. We do not wish to impinge upon the exercise of legitimate executive power of the Government of Jharkhand, nor do we have any intention of impinging upon the exercise of the power by the Legislature of Jharkhand. If in the exercise of any such power, the interests of Mr. Sinha's clients are secured, this judgment should not be construed as coining in their way. If by constitutionally permissible methods and in due exercise of legitimate executive or legislative power, the State of Jharkhand thinks that it needs to secure the interests of Mr. Sinha's clients, this judgment should not be considered as presenting any obstacles in their way. We wish to offer no more comments on the aforesaid submission of Mr. Sinha.

23. In the result, this writ petition is allowed. The impugned notification dated 9.11.2001 amending Section 9(7)(i) of the Jharkhand State Universities Act, 2000 is quashed and set aside with all consequences, the same being held as ultra vires the Constitution and the Act. No order as to costs.