(2004) 02 PAT CK 0068

In the Patna High Court

Case No : LPA No. 91 of 2004

The State of Jharkhand and Others APPELLANT

Vs

Bihar State Forest Development Corporation and Others RESPONDENT

Date of Decision : 10-02-2004

Acts Referred:
Companies Act, 1956 — Section 617

Citation : (2004) 2 BLJR 1362 : (2004) 2 PLJR 271

Hon'ble Judges : Ravi S. Dhavan, C.J;Shashank Kumar Singh, J

Bench : Division Bench

Advocate : Anil Kumar Sinha, A.G. and Shyam Kishore Sharma and S.K. Ghose, A.A.G. 2, for the Appellant; J.P. Shukla and R.K. Shukla, Narendra Pd. and S.C. Mishra, P.K. Shahi, Sr. SC, CG, for the Respondent

Final Decision : Allowed

Judgement

Ravi S. Dhavan, C.J.—This appeal has been filed by the State Jharkhand feeling aggrieved by an order dated 15 January, 2004 delivered in CWJC No. 939 of 2003: The Bihar State Forest Development Corporation v. Union of India and Ors.

2. The Bihar State Forest Development Corporation is incorporated as Government Company, in effect, u/s 617 of the Companies Act, 1956. A State Government Company is virtually seeking in the High Court''s prerogative writ jurisdiction on a certiorari action, in effect a certificate, that the State of Jharkhand and the Jharkhand State Forest Development Corporation cannot, under the law, trade in Kendu leaves and other minor forest produce unless the process of division of the assets and liabilities of the Bihar State Forest Development Corporation has been finalised. In this Letters Patent Appeal, the Court''s attention has been drawn to a restraint order, preventing this Corporation from carrying on its business. Thus, the present Letters Patent Appeal.

3. In the petition filed by the Bihar State Forest Development Corporation the

State of Bihar was not impleaded as a party. This was done subsequently by an order of this Court, that is, the appellate Court. This aspect is important.

4. What this Court would have recorded at the end of its order is being place at the outset. A new counsel who appeared on behalf of the Bihar State Forest Development Corporation, previously represented by Mr. J.P. Shukla, Senior Advocate, instructed by Mr. G.K. Shukla, permitted by this Court to remain at the Bar and address the Court in the interest of public justice, stated that the Bihar State Forest Development Corporation will withdraw the company petition which was filed. Be that as it may, this Court is not about to give any direction on this aspect. On the other hand, when the entire perspective was put to Additional Advocate General he was very fair in his academic comment that two mistakes have happened in this entire episode; firstly, a company petition should not have been filed to seek winding up of the Bihar State Forest Development Corporation and, secondly, the petition should not have been filed by this Corporation, that any other person (a worker or creditor) may have is another matter.

5. In so far as the first aspect is concerned, the learned Additional Advocate General is not alone because such a submission has been made by the erstwhile counsel of this Corporation also. But these aspects will ultimately turn out to be important. Why is a second thought being expressed now? Whether the filing of the company petition to wind up the Corporation or the writ petition out of which this Letters Patent Appeal arises should have been seriously considered before filing either? In so far as the company petition is concerned, it was an overt act, and is accepted as such by both, counsel for State of Bihar and its. Corporation. In so far as the winding up of the Corporation is concerned it straightway permits a legal presumption that it was intended to wipe out the business of the Corporation by rendering it dead after winding it up. Then, why was this Corporation bothered about continuing trading in the successor State if it had already decided that it would not like to trade any more, a fact accomplished after filing a winding up petition at the High Court? The logical legal consequence of winding up a Company is to strike it off the rolls of the Registrar of Companies.

6. The Bihar State Forest Development Corporation was incorporated in 1975. The creation or split of the State was nowhere on the scene at that time. This is the result of politics and its aftermath and is not without complications. It is not for the Court to comment upon why the State was split by the modality of the Bihar Reorganisation Act, 2000.

7. Fortunately for the State of Jharkhand and unfortunately for the State of Bihar, the major part of the forests are in Jharkhand. Kendu leaf is a revenue making product. It was revenue for the State of Bihar when it was undivided. Today, it is an important money earning natural product for the State of Jharkhand, Kendu leaves just cannot be left on the ground to rot as it is a capital asset for sale. It is utilized in the manufacture of bidi and, thus, good business.

8. In fact, it is one of the main business of this Corporation. The filing of winding

up petition lis pendens the writ petition was not fair. It sends a message as an end to the Corporation. If the exercise is taken to its logical conclusion only on the pleading of the Corporation without hearing anybody else, the incompatibility of the stand of the State of Bihar or its Corporation cannot be reconciled.

9. On the one hand Bihar Government feels that its Corporation is the goose which lay the golden eggs and simultaneously it kills its functions and restrains it from doing business by having it wound up. Consequently, what did it expect the State of Jharkhand to do? What message was sent when a winding up petition was filed. The State of Jharkhand did take a rear guard steps as a result of this action in Bihar. The Court did put a question to the Advocate General, Jharkhand that if the Bihar State Forest Development Corporation was an interstate corporate body then why was a state company incorporated by the Government of Jharkhand for the same activities?

10. This aspect was explained by the Advocate General, Jharkhand. He submitted that the State of Jharkhand had done nothing unusual except what the State of Bihar had done when it ceased with the inter state pattern of business and trading of this Corporation. He explained from the record that sovereign powers were utilised in the name of the Governor of Bihar to create an agent of the State of Bihar in establishing, firstly, the Bihar State Forest Development Corporation and, secondly, making this Corporation its "sole agent" for the purpose of trade, collection and marketing of Kendu leaves. He draws the attention of the Court to a notification dated 8 August, 1989 issued under the Bihar Kendu Leaves (Control of Trade) Act, 1973. He desires that the Court to notice that the Governor of Bihar declares the entire geographical area of the State of Bihar as the operational areas for collection and marketing of Kendu leaves. Whereas the State of Bihar became the principal, it had a Government company as its agent (Bihar State Forest Development Corporation Limited). Learned Advocate General, Jharkhand submitted that no one had stopped this Corporation from continuing its activities as an "interstate body corporate" (Section 66 of the Bihar Reorganisation Act, 2000). The geographical areas were defined. Then, the overt act was that while this Corporation, to have itself wound up left hardly any confidence with the State of Jharkhand that this Corporation would yet be keen to do business during the process of its being wound up.

11. On behalf of the State of Jharkhand, its Advocate General continued his submissions that Jharkhand was left with no alternative but to take recourse to Section 85, of the Bihar Reorganisation Act, 2000 to have a Government company of its own.

12. In this theme an aspect not noticed in the judgment challenged nor a submission made on behalf of the State of Jharkhand is an equitable clause. The State of Bihar and State of Jharkhand will be facing many situations to resolve issues as an result of the division of the State. Between the population of the two States, they were of one people. But, the officiation is in juxtaposition. As if on a

battle field between two warring armies. This is very unfortunate. The issues which have been presented in this case could possibly arise in all the Corporations which are mentioned in IX Schedule to the Bihar Re- organisation Act, 2000 and such of these Government companies or Corporations which partake the nature of an interstate corporate body or interstate Corporation. The equity in law, or otherwise, lies in Section 65. It is correct that until otherwise provided in any law that is by legislation or in any agreement, that is by consensus, between the two States or on any direction issued by the Central Government which may amount to a reference the company mentioned in the IX Schedule will continue to function in the areas in which it was functioning immediately on the appointed day. And in this regard if there be difficulty then the Central Government may from time to time issue directions in relation to the functioning as it may deem fit notwithstanding anything contained to the contrary in the Companies Act, 1956 or any other law.

13. Two things cannot happen. The State of Jharkhand cannot be asked to lay off and not trade, in the present case, in Kendu leaves. Secondly, if the Bihar State Forest Development Corporation had decided that it will kill itself by a winding up petition presented by itself, then it was sending a broad signal that it was not interested in doing business. Why this Corporation was manufacturing a plea that it has sought winding up the Court would not know. May be, a legal plea was to be used somewhere. There are cases in which it laces demands from its employees for not having paid their retiral dues and arrears of salary. This circumstance of winding up may perhaps be to confront the workers. But the equity lies in Sub-clause (b) of Sub-section (2) of Section 65. If the State of Bihar and its Corporation (Bihar State Forest Development Corporation) were so interested to use to its advantage, the benefit given to a parent state and a status as an interstate corporation then it could have requested the State of Jharkhand and yet again could have applied itself to the Central Government also to permit an adequate representation on the Board of Directors of the Bihar State Forest Development Corporation so that the State of Jharkhand could have been represented in the Bihar State Forest Development Corporation. The State of Bihar, then could have also done business in the geographical area when today is Jharkhand. The State of Jharkhand was not invited to nominate Board of Directors so that the interests of the State of Jharkhand could also be safeguarded.

14. If the State of Bihar could venture into a self advised overt act and tilt the balance to nobody''s advantage and arrange to cease business by winding up the Corporation then it can hardly restrain the State of Jharkhand from protecting its interests and future interests of its forests wealth. For whatever the State of Bihar did likewise the State of Jharkhand did also. It incorporated a company known as Jharkhand State Forest Development Corporation where all the shares were held by the Governor of Jharkhand. A company was incorporated as a Government company u/s 617 of the Companies Act, 1956. There can be no issue in this. If the State of Bihar could incorporate a company likewise the State

of Jharkhand could also incorporate a company.

15. Now the Court''s attention was again drawn by learned Advocate General, Jharkhand to the notification of 8 August, 1989. The expressions "to declare the entire geographical area of the State of Bihar" was an aspect which was emphasised. It was submitted that by no fiction or imagination the geographical areas today could include Jharkhand. In this context, the Court''s attention was taken to Section 3 of the Bihar Re-organisation Act, 2000. It was contended that the geographical areas today stand defined, declared and stipulated by an Act of Parliament. In this regard Section 3 is reproduced :

"Formation of Jharkhand State.--On and from the appointed day, there shall be formed a new State to be known as the State of Jharkhand comprising the following territories of the existing State of Bihar, namely :

Bokaro, Chatra, Deogarh, Dhanbad, Dumka, Garhwa, Giridih, Godda, Gumla, Hazaribagh, Kodarma, Lohardaga, Pakur, Palamau, Ranchi, Sahebganj, Singhbhum (East) and Singhbhum (West) districts;

and thereupon the said territories shall cease to form part of the existing State of Bihar."

16. Learned Advocate General, Jharkhand submitted that at best if the State of Jharkhand be the principal then on the same equity, principle and analogy the Jharkhand State Forest Development Corporation can only trade within the geographical limits as mentioned in Section 3 of the Bihar Re-organisation Act, 2000 because upon coming up of the Act, of splitting of the State of Bihar, "the said territories shall cease to form part of the existing State of Bihar."

17. An intervenor''s application had been filed in this case on behalf of the workers of the Bihar State Forest Development Corporation. It was contended that the workers are concerned and worried, firstly, by the action of Bihar State Forest Development Corporation in filing a winding up petition which lends an element of insecurity to workers. The workers were not consulted. It was contended that while between the two Corporations they vie for the business of Kendu leaves, a very profitable business, the Bihar State Forest Development Corporation desires to unwind itself out of this business. On behalf of the workers it was pleaded where would this leave the workers? Then, it was submitted that it was their concern that whereas Jharkhand has incorporated a Government company known as Jharkhand State Forest Development Corporation it may not be understood that the workers'' interests stand absolved alienated merely because the State of Jharkhand could create another Corporation as a parallel to the Bihar State Forest Development Corporation. On this learned Advocate General did not resist either of the propositions and said whatever be the workers interests they shall stand protected and it was simultaneously contended that in so far as Jharkhand State. Forest Development Corporation is concerned, it is in business as opposed to the Bihar State Forest Development Corporation which is itself seeking its winding up. Thus, it left no choice with the State of

Jharkhand to mitigate the damaging situation and not let Kendu leaves go to waste and rot and make use of this forest produce to trade and do business as the Bihar State Forest Development Corporation which had declared to close itself. The Court is not giving any finding on this aspect abut the concern of the workers because this is an entirely different issue. Suffice it to say that it is settled law that the equity of workers in a incorporate company cannot just disappear in thin air.

18. But, now the State of Bihar or the Bihar State Forest Development Corporation seems to be getting wiser by the event or as it is said locking the stable after the horse has bolted out of it. Counsel for the Bihar State Forest Development Corporation who appears in the writ proceedings re. J.P. Shukla, Senior Advocate submits that two mistakes have occurred. First, the winding up petition should not have been filed. Second, the character of this Corporation as an inter-state corporation should have been recognised and the business of the Corporation in Jharkhand should have been accounted or separately. It was contended that the Corporation has instructed counsel to state the winding up petition will be withdrawn. It is accepted that the winding up company petition was filed without counselling the workers. Learned Additional Advocate General II, adopted the submissions made by counsel for the Bihar State Forest Corporation. Whether the Bihar State Forest Development Corporation withdraws the petition or does not is an entirely different matter and is not subject to the present proceedings.

19. Counsel appearing for the Corporation Mr. J.P. Shukla, Sr. Advocate, explained that the notification which was issued by the State of Bihar dated 23 October 2003 (a legible copy was placed on record today) may be treated as best as a declaration of intention that the Government proposed to hand over the activity of the minor forest produce except the Kendu leaves to Panchayats. He submitted that the formality has not been executed as the gazette has not been published. This makes no difference to the issues. Firstly, taking out a Government order for a publication in the gazette and not publishing it for three months is actually the bane of the administration of Bihar. Gazette publications are made at the will and the pleasure of the bureaucracy. This cannot be so. Once an order has been signed by the Governor of State, Article 166 of the Constitution of India takes over. The formality has been done. Secondly, whatever may be the reason, the State of Bihar has declared its intention not to deal with this forest produce, that is, Kendu leaves. Whether the gazette is published or not is another matter, this reflects badly on the style and functioning of the State Government. But in so far as the State of Bihar is concerned, it has declared its intention not to trade in this business and hand over the matter to Panchayats.

On this Advocate General of Jharkhand interjected to say that this is, otherwise, not relevant and. he would simply repeat his submission that when this Corporation has filed a winding up petition then it declared its intention to kill the

Corporation, and in the circumstances what did this Corporation or the State of Bihar expect from the State of Jharkhand? Further, it was submitted that the business of collecting Kendu leaves could not be put into the deep freeze. Somebody has to make a protilable business out of this forest produce available to the State of Jharkhand. The submission was that while the State of Bihar showed no interest in the development of the business in Kendu leaves it could prevent others to carry on this business. More so, in the case of Jharkhand within its territory and geographical limits. A request was made to the Court to see the record of the company petition. The Court has seen it and has no hesitation in re-producing its contents :

"1. That the address of the petitioner above named for the service of all notices, processes etc. is that of his advocate Prakash Sahay C/O B-402 Prachi Ashirwad, Behind Hai Complex, Exhibition Road, Patna.

2. That the petitioner company, Bihar State Forest Development Corporation Limited (hereinafter referred to as "the Company") was incorporated on 10.2.75 under the Companies Act, 1956 as a Public Company Limited by shares and granted the certificate for the commencement of business.

3. That the registered office of the company is situated at 13, Patliputra, Patna.

4. That the objects inter alia for which the company was established are as follows :

To promote, develop, establish, execute, operate and. otherwise carry on projects, schemes, industries, Business and activities which in the opinion of the company are likely to

(i) accelerate and increase forest production and productivity;

(ii) contribute to better utilisation of forestry products including timber, fuel wood, pulp wood, climbers, herbs, fruits and seeds, leaves and any product of the forest;

(iii) contribute to the development of industries based on forest products;

(iv) increase the availability of supplies of forest products whether major or minor in the State of Bihar.

5. That the company is a Government company within the meaning of Section 617 of the Companies Act, 1956 and its entire shares are held by the Government of Bihar and his nominees and the Central Government through its nominee.

6. That the share holders have no personal stake in the company except that they hold shares either in the name of the Governor of Bihar or His nominees and Central Government and their nominees.

7. That the following persons were present during extra- ordinary General meeting held on 17.10.2003 :

-- SI. Name & Address Designation No. -- 1. Sri M.N. Prasad, Development Commissioner Director Bihar, Patna. 2. Sri U.N. Panjiyar, Finance Commissioner, Shareholder Bihar, Patna. 3. Sri Ashok Kumar, Secretary, Industries Director Department, Bihar, Patna. 4. Sri S.S. Verma, Secretary, Environment & Shareholder Forest Department, Bihar, Patna. 5. Dr. M.K. Sharma, Principal Chief Conservator of Forests, Bihar, Patna. Shareholder 6. Sri Mithilesh Kumar, Managing Director, Director Bihar State Forest Development Corporation Ltd, Patna. -- 8. That in view of heavy loans incurred by the Company in its extra ordinary General Meeting held on 17.10.2003 decided to winding up its activities through this Court. The company has neither funds of its own nor other business activities.

9. That the Board of Director already in its meeting held On 16.10.03, decided to call on Extra-ordinary General Meeting to the shareholders on 17.10.2003 to pass a Special Resolution in terms of Section 433 (a) / 43991) (a) of the Companies Act, 1956 to wind-up its affairs. Accordingly, the company in its Extra- ordinary General Meeting held on 17.10.2003, passed special resolution to wind up its affairs in terms of Section 433(a) /439(i)(a) of the Companies Act, 1956 and accordingly Managing Director is filing the winding up petition in the Hon''ble Court through lawyer.

10. That thus the company in furtherance is not able to carry on the objects as stated above, as the forest kendu leaf and other minor forest products allotted by the Government of Bihar has been withdrawn through Notification dated 12.4.94 and 23.10... vide notification No. 26/93/KHAND-5/96 and 8670. The State has been taken the lease lands from the corporation.

11. That petitioner has moved Hon''ble High Court and the writ petition regarding bifurcation of the State on 15.11.2000 and the major part of the forestry leased to the company now falls under the State of Jharkhand, bringing the company into defunct stage.

12. That the petitioner is not in a position to file a return before the Registrar of Companies as the Account could not be completed because the bifurcation of State and the debtors and creditors have also not been able to ascertain as the Jharkhand State has already incorporated as other company. The petitioner, therefore, prays as follows :

1. That Bihar State Forest Development Corporation Ltd. Be wound up by this Hon''ble Court under the provisions of Section 433(a) read with Section 439(I)(a) of the companies Act, 1956; and

2. Such other order or orders may be made in the premises as shall be just.

And for this, the petitioner shall ever pray."

21. For whatever this company petition may be worth it shows nothing on what may be the reason, why this Corporation its winding up when it is accepted that there is enrichment in business for this interstate corporate body.

22. Counsel for the Bihar State Forest Development Corporation admitted that the company petition is sketchy. No wonder that the workers have been excited when they apprehend unemployment. A complication is created by the Bihar State Forest Development Corporation to tease the workers that it will go into winding up if they demand salary. This gives a plea to the workers to protest on the misplaced legal pleas of its Corporation.

23. Actually, the issue which came before the Court on a writ petition which was filed by the Bihar State Forest Development Corporation, in effect, against the State of Jharkhand and the Corporation it created (Jharkhand State Forest Development Corporation) should have remained an issue between them whatever be the academics. But after the manner in which the pleas have been manufactured this Court can hardly inject or oust the workers when they say that our interests are getting jeopardized. Under the law, if there be dues to them they are secured creditors. Their equity is inside the Corporation. This is not to ignore the side issue that on behalf of the workers it has been submitted that the Managing Director is an absconder. When another Counsel who now (not a counsel who appeared in the writ petition) appear on behalf of the Corporation resists the proposition that is not so, the workers on the other hand plead before the Court that when they go to the Labour Commissioner to seek reconciliation the Bihar State Forest Development Corporation takes the name of the High Court to say that a winding up petition is pending. These aspects are not actual aspects which are noticed are not actual the lis in the present proceeding either the writ petition or the present Letters Patent Appeal. Therefore, the Court is not giving any finding on quantifying the amount which the workers may have to receive, that is to say, the number of workers identified and the amount which may be due to them. This may be an aspect for another forum. But the Court cannot help observing that if the workers partake the nature of secured creditors it is not that they are a category which are not sufficiently interested in the affairs of the Corporation that they do not have a say specially when they come down to winding up a Corporation.

24. Afterthought apparently seems to have been taken in defence before this Court, an aspect which has already been noticed. The Corporation indicated to the Letters Patent Appeal Bench that they will withdraw the company petition, or for that matter, the indication of reservation of filing the petition without making the State of Bihar a party itself or that Company Petition should never have been filed. On this the stand has been apparently there for their protection on the submission of the Advocate General of Jharkhand that if the State of Bihar and its Corporation decided between themselves without reference to the successor State or such of the interests as has been left within the geographical limits of

Jharkhand to the benefit of the Successor State then the filing of the winding up petition to wind up Bihar State Forest Development Corporation was an indiscreet act. On the company petition being filed, any prudent man would get the impression that the State of Bihar and/or its Corporation had no intention or serious programme to do any further business. Thus, any other plea which the State of Bihar or this Corporation may take, they are now estopped from pleading that doing business was the intention.

25. All these aspects have not been noticed by learned Judge in the writ petition. The totality of the circumstances could have been taken into account but if the petition itself was defective when the Corporation filed it without making the State of Bihar a party perhaps for no fault of the Court it could have been dismissed for non-joinder of a necessary party. That a Corporation which has itself announced that it was going into liquidation and yet simultaneously seeking an injunction against the State of Jharkhand and/or the Corporation it created that it be restrained from carrying on business within the territory of this State" is an inequitable, unfair plea barred by the equitable rule of estoppel.

26. If between the State of Bihar and its Bihar State Forest Development Corporation both are really bona fide in their pleadings that they would like to withdraw the petition they may do so in the forum where it has been filed. Before this Court only their submission has been noticed. In that case learned Advocate General of Jharkhand submitted that should that happen then all the factors will be taken into account. It goes without saying that in that case, the company which has been incorporated in Jharkhand would need be amalgamated with the Bihar State Forest Development Corporation, a pattern compatible to make the latter an inter State Corporation as intended by the Bihar Reorganization Act, 2000. Thereafter, by virtue of this Act Jharkhand would be entitled to have its interest protected by being called upon to nominates its Directors on the Board of the Corporation. In that case the memoranda and the articles of association will need be amended so that the interests of the successor State are sufficiently taken into account and watched by the inducted Directors, should an occasion so arise.

27. The record is certified as noticed in this order. The order dated 15 January, 2004 is set aside.

28. The appeal is allowed with costs.

