

PETITIONER:
BIHAR STATE ELECTRICITY BOARD

Vs.

RESPONDENT:
THE PATNA ELECTRIC SUPPLY CO. LTD. & ORS. INTERVENER

DATE OF JUDGMENT: 12/05/2000

BENCH:
S.N.Variava, Y.K.Sabharwal, S.S.Ahmad

JUDGMENT:

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J U D G M E N T

S. N. Variava, J.

1. This Civil Appeal is against the Judgment dated 22nd July, 1981 delivered by a Division Bench of the Calcutta High Court (since reported in AIR (1982) Calcutta p.74). By this Judgment the Division Bench dismissed the Appeal filed by the Appellant against a Judgment of a learned single Judge of the Calcutta High Court which upheld the challenge of the 1st Respondent to Ordinances and the Amendment Act set out hereinafter.

2. Briefly stated the facts are as follows: On 6th February 1924 the Government of Bihar granted to one M/s Octavices Steel & Co. Ltd. a licence for supply of electric energy. This licence was subsequently transferred to the 1st Respondent. One of the terms of the licence was that at the end of the licence period the Government had a right to purchase the undertaking. The licence was for a period of 50 years. The 50 years period would thus end on 5th February, 1974. On 5th January 1973 the Appellant served a notice on the 1st Respondent, under Section 6(1) of the Indian Electricity Act, 1910 (hereinafter called the said Act). By this the Appellant called upon the 1st Respondent to sell the undertaking to the Appellant on the expiry of the period of 50 years from the commencement of the licence, i.e., at 12 O'clock in the night between the 5th and 6th February, 1974.

3. Respondent No. 5 is an Electric Company whose undertaking is also purchased. They were added by Order dated 31.3.1992. In their case the facts are that they were granted a licence for 50 years on 17th September, 1914. The Notice to take over was given on 9th August, 1963 and the undertaking was taken over on 17th September, 1964.

4. On 2nd February 1974, Indian Electricity (Bihar Amendment) Ordinance No. 50 of 1974 was passed. This Ordinance amended certain provisions of the Indian Electricity Act. This Ordinance was followed by two other Ordinances being Ordinance No. 83 of 1974 and Ordinance No. 123 of 1974. Thereafter, the Indian Electricity (Bihar Amendment) Act, 1974 (Act No. 15 of 1975) was passed. These Ordinances and the Act, amended amongst others Sections 6 and 7-A of the Indian Electricity Act.

[illegible]

"6. Purchase of undertakings. - (1) Where licence has been granted to any person, not being a local authority, the State Electricity Board shall, -

(a) in the case of a licence granted before the commencement of the Indian Electricity (Amendment) Act, 1959 (32 of 1959), on the expiration of each such period as is specified in the licence; and (b) in the case of a licence granted on or after the commencement of the said Act, on the expiration of such period not exceeding thirty years and of every such subsequent period, not exceeding twenty years, as shall be specified in this behalf in the licence;

have the option of purchasing the undertaking and such option shall be exercised by the State Electricity Board serving upon the licensee a notice in writing of not less than one year requiring the licensee to sell the undertaking to it at the expiry of the relevant period referred to in this sub-section.

(2) Where a State Electricity Board has not been constituted, or if constituted, does not elect to purchase the undertaking, the State Government shall have the like option to be exercised in the like manner of purchasing the undertaking.

(3) Where neither the State Electricity Board nor the State Government elects to purchase the undertaking, any local authority constituted for an area within which the whole of the area of supply is included shall have the like option to be exercised in the like manner of purchasing the undertaking.

(4) If the State Electricity Board intends to exercise the option of purchasing the undertaking under this section, it shall send an intimation in writing of such intention to the State Government at least eighteen months before the expiry of the relevant period referred to in sub-section (1) and if no such intimation as aforesaid is received by the State Government the State Electricity Board shall be deemed to have elected not to purchase the undertaking.

(5) If the State Government intends to exercise the option of purchasing the undertaking under this section, it shall send an intimation in writing of such intention to the local authority, if any, referred to in sub-section (3) at least fifteen months before the expiry of the relevant period referred to in sub-section (1) and if no such intimation as aforesaid is received by the local authority, the State Government shall be deemed to have elected not to purchase the undertaking.

(6) Where a notice exercising the option of purchasing the undertaking has been served upon the licensee under this section, the licensee shall deliver the undertaking to the State Electricity Board, the State Government or the local authority, as the case may be, on the expiration of the relevant period referred to in sub-section (1) pending the

determination and payment of the purchase price.

(7) Where an undertaking is purchased under this section, the purchaser shall pay to the licensee the purchase price determined in accordance with the provisions of sub-section (4) of Section 7-A."

6. Thus, under Section 6(1) a notice in writing of not less than one year was to be given and the purchase price was to be determined in accordance with the provisions of sub-section (4) of Section 7-A.

7. Section 7-A, as it originally stood, read as follows: "7-A Determination of purchase price.- (1) Where an undertaking of a licensee, not being a local authority, is sold under sub-section (1) of Section 5, the purchase price of the undertaking shall be the market value of the undertaking at the time of purchase or where the undertaking has been delivered before the purchase under sub-section (3) of that section, at the time of the delivery of the undertaking and if there is any difference or dispute regarding such purchase price, the same shall be determined by arbitration.

(2) The market value of an undertaking for the purpose of sub-section (1) shall be deemed to be the value of all lands, buildings, works, materials and plant of the licensee suitable to, and used by him, for the purpose of the undertaking, other than; (i) a generating station declared by the licence not to form part of the undertaking for the purpose of purchase, and (ii) service lines or other capital works or any part thereof which have been constructed at the expense of consumers, due regard being had to be nature and condition for the time being of such land, buildings, works, materials and plant and the state of repair thereof and to the circumstance that they are in such position as to be ready for immediate working and to the suitability of the same for the purpose of the undertaking, but without any addition in respect of compulsory purchase or of goodwill or of any profits which may be or might have been made from the undertaking or of any similar consideration.

(3) Where an undertaking of a licensee, being a local authority, is sold under sub-section (1) of Section 5, purchase price of the undertaking shall be such as the State Government, having regard to the market value of the undertaking at the date of delivery of the undertaking, may determine.

(4) Where an undertaking of a licensee is purchased under Section 6, the purchase price shall be the value thereof as determined in accordance with the provisions of sub-sections (1) and (2): Provided that there shall be added to such value percentage, if any not exceeding twenty per centum of that value as may be specified in the licence on account of compulsory purchase."

8. Section 7 is also relevant. It reads as follows:

"7. Vesting of the undertaking in the purchaser.- Where an undertaking is sold under Section 5 or Section 6, then upon the completion of the sale or on the date on which the undertaking is delivered to the intending purchaser

under sub-section (3) of Section 5 or under sub-section (6) of Section 6, as the case may be, whichever is earlier -

(i) the undertaking shall vest in the purchaser or the intending purchaser, as the case may be, free from any debt, mortgage or similar obligation of the licensee or attaching to the undertaking: Provided that any such debt, mortgage or similar obligation shall attach to the purchase money in substitution for the undertaking;

(ii) the rights, powers, authorities, duties and obligations of the licensee under his licence shall stand transferred to the purchaser and such purchaser shall be deemed to be the licensee: Provided that where the undertaking is sold or delivered to a State Electricity Board or the State Government, the licence shall cease to have further operation."

9. The change brought about by the above mentioned Ordinances and the Act was that instead of one year's notice, it was provided that the notice should not be less than 6 months. In Section 7-A instead of purchase price being the market value, it was now provided that the amount payable for the undertaking would be the book value of the undertaking. Thus, instead of computing the market value, there had to be computation of the book value. Section 7-A (3) now provided for the payment of a solatium of 10 per cent of the book value.

10. It must be mentioned that the above mentioned Ordinances and Amendment Act were part of the policy of nationalisation of electric companies by the Union of India. Similar amendments were made by many States. Electric companies, all over India, were sought to be so purchased. Like the 1st Respondent, a number of other Electric Companies challenged the constitutional validity of the amending Act/Ordinance. The challenge was, inter alia, on the ground that the rights under Article 19(1)(f) and Article 31(2) were being violated. It was also claimed that the Amending Act/Ordinance was invalid as it had no reasonable or direct nexus to the principles under Article 39(b) of the Constitution. It was also claimed that, in effect and substance, the law was not one for acquisition of electrical undertakings but was one to acquire a chose in action and to extinguish rights, which had accrued in the Electric Companies, to get the market price. It was contended that the right to get compensation accrued on the day the notice was given. It was contended that what was being acquired was the difference between the market price which the State was obliged to pay and the book value to which the liability was now sought to be limited. It was claimed that as the Act was merely a clock which the law was made to wear to undo the obligations arising out of intended statutory rule Article 31(c) was not attracted. It was also claimed that in any case, every provision of a statute was not entitled to protection of Article 31(c) but only those which are necessary for giving effect to the principles in Article 39(b) and accordingly the provision in the impugned law in relation to the determination of the amount do not attract Article 31(c). In all the matters it was claimed that the purchase price should be the market value.

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reported in (1989) 3 SCC 709, upheld the validity of the Act/Ordinance. This Court held that the Act had nexus with the principles in Article 39(b) and was therefore protected by Article 31(c). It was held that the Act was not a piece of colourable legislation. It was held that electric energy generated and distributed was a "material source of the community" for the purpose and within the meaning of Article 39(b). It was held that the idea of distribution of natural resources in Article 39(b) envisages nationalisation. It was held that on an examination of the scheme of the impugned law the inescapable conclusion was that the legislature measure was one of nationalisation of the undertaking and this law was eligible for and entitled to protection of Article 31(c). It was held that it was not possible to divorce the economic consideration or component from the scheme of nationalisation with which the former are inextricably integrated. It was held that the financial costs of a scheme lies at its very heart and cannot be isolated. It was held that with the provisions relating to vestiture of the undertaking in the State and those pertaining to the quantification of the amount are integral and unseparable parts of the integral scheme of nationalisation and do not admit of being considered as distinct provisions independent of each other. It was held that the provisions for payment of amount to the undertaking, by reducing the market value to book value, formed an integral part of the nationalisation scheme and that economic consideration for nationalisation was not justiciable. It was held that what was being acquired was the material resources of the community. The contention that immediately upon giving of the notice the rights got crystallised was negatived. It was held that the exercise of the option did not affect licensee's right to carry on business. It was held that the licensee's rights would be affected only when the undertaking was actually taken over. Similar view was taken in the cases of Maharashtra State Electricity Board v. Thana Electric Supply Co. & Ors., reported in (1989) 3 SCC 616, and Vellore Electric Corporation Ltd. v. State of Tamil Nadu, reported in (1989) 4 SCC 138.

12. It must be mentioned that in all the above mentioned cases the undertakings were taken over, i.e. they vested in the Government either prior to or on the same date as the Ordinance. As seen from facts set out above in the case of the 1st Respondent the Ordinance is prior to the undertaking being taken over. Thus the principles laid down in above mentioned case would apply to this case also. However, in case of the 5th Respondent the undertaking was taken over on 17th September, 1964, whereas the Ordinance is in February 1975.

13. Mr. S. K. Jain however submitted that the principles laid down in the above Judgments do not apply to this case. Mr. Jain submitted that in all the above mentioned decisions the Ordinances/Amending Act were either prior to or on the same day as the takeover of the undertaking. He submitted that in this case the takeover is much earlier to the Amending Act. He submitted that the Ordinances, i.e. Ordinance No. 15 of 1974 and 123 of 1974 did not apply and, therefore, the takeover was not under those Ordinances. Mr. Jain took the Court through the provisions of the aforementioned Ordinances and submitted that the provisions of these Ordinances are completely different from those of the Ordinances/Act in the cases

decided by the Court. He submitted that the takeover was under the unamended Sections 6 and 7-A. He submitted that on February 6, 1974, as the takeover was under the unamended Sections 6 and 7-A of the Indian Electricity Act, the 1st Respondent became entitled to receive market value. In support of his submission he took this Court through the Ordinance No. 50 of 1974 and Ordinance No. 123 of 1974. He submitted that amended Section 6 in Ordinance No. 50 of 1974 provided that a notice in writing of not less than 6 months was to be given. He submitted that in this case a notice of one year had been given on January 5, 1973. He submitted that it was thus clear that this notice was under unamended Section 6. He submitted that after the Ordinance no fresh notice had been given. He submitted that the acquisition was under the unamended Sections 6 and 7-A and by the Amending Act 15 of 1975 there could be no retrospective amendment taking away vested rights.

14. We see no substance in these submissions. As mentioned above the undertaking was taken over on February 6, 1974. On that day unamended Section 6 no longer stood on the Statute book. It has been replaced by new Section 6 which was incorporated by Ordinance No. 50 of 1974. Undoubtedly Ordinance No. 50 of 1974 provides for a notice of not less than 6 months. It was not necessary to give a fresh notice. The 1st Respondent had been given a notice of one year on 5th January 1973. A notice of one year is a notice of not less than 6 months. Therefore, the takeover was under the amended Sections. On the date of takeover what was payable was book value and not market value. Therefore, the principles laid down in Tinsukhia's case, Thana Electric Supply Company's case and Vellore Electric Corporation's case would apply.

15. Mr. Jain next submitted that in this case the vesting took place on 5th/6th February, 1974. He submitted that there was no provision for vesting in the Amendment Act 7 of 1976. He submitted that in the present case as the vesting was earlier, a retrospective provision of method of determination of compensation cannot apply. He submitted that the method prevailing on date of vesting i.e. market value must continue to apply. He submitted that the change in the method of determination of compensation from market value to book value could not be justified by taking recourse to Articles 39 (b) and 39(c) read with Article 31(c). We see no substance in this contention. This is the very argument, which amongst others, is negated in Tinsukhia's case.

16. Mr. Jain next submitted that this case was specifically referred to by the 5 Judge Bench in Tinsukhia's case. He relied upon para 11 and 76 of that judgment and submitted that it is held therein that this case is distinguishable. He further submitted that even in Thana Electric Supply Company case this case was specifically referred to. He pointed out paras 31 & 32 of this judgment. Mr. Jain submitted that the five Judge Bench of this Court has held that this case was distinguishable. He submitted that this Bench (comprising three Judges) could not overrule the decision of the five Judge Benches and hold that this case was not distinguishable. He submitted that this Bench thus could not hold that this case was covered by those judgments. We see no substance in this submission also.

The impugned Judgment proceeds on the footing that the right to get compensation accrued when the Notice dated 5th January, 1973 was given i.e. when the option to purchase was exercised. The impugned Judgment also proceeds on the footing that what was being acquired was a chose-in-action. In para 76 of the judgment in Tinsukhia's case, the correctness of the findings that the acquisition was of a chose-in-action were not gone into because it was held that the acquisition was of material resources viz. the electric energy. On that basis it is held that the principles laid down in the impugned judgment do not apply. In Tinsukhia's case it is held that the rights accrued when option to purchase was exercised. In Thana Electric Supply Co.'s case the principles laid down in the impugned judgment were not accepted. It was held that no rights accrued in favour of the Electric Co. at time that the option to purchase was executed. Thus far from laying down that this case is different both the Courts (in Tinsukhia as well Thana Electric Supply Company's case), specifically negative the principles on which impugned judgment is based.

17. For all the above reasons the submission that the principle laid down in Tinsukhia's case, Thana Electric Supply Company's case and Vellore Electric Corporation's case do not apply is unacceptable.

18. So far as the case of the 5th Respondent is concerned, we have today delivered Judgment in Civil Appeal No. 3658 of 1993, wherein also the taking over of the undertaking was much prior to the Ordinance and much prior to the 25th Constitutional Amendment Act by which Articles 31(c) was incorporated. For reasons set out in that Judgment, the case of the 5th Respondent is also covered by the Judgments in Tinsukhia's case, Thana Electric Supply Company's case and Vellore Electric Corporation's case.

19. In this view of the matter, the Appeal is allowed. The Judgments of the Division Bench as well as the learned single Judge are set aside. The Writ Petition filed by the 1st Respondent and the 5th Respondent stands dismissed. There shall be no order as to costs.