

Shiv Kumar Vs. State of Bihar and ors.

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Court : Patna

Decided On : Dec-21-1995

Judge : D.P. Wadhwa, C.J., and S.J. Mukhopadhyay, J.

Appeal No. : C.W.J.C. No. 3196 of 1995

Appellant : Shiv Kumar

Respondent : State of Bihar and ors.

Disposition : Application Allowed

Judgement :

D.P. Wadhwa, C.J.

1. The petitioner, an employee of the Bihar State Hydroelectric Power Corporation Limited (for short, the Corporation), a Government of Bihar undertaking, has filed this writ application under Articles 226 and 227 of the Constitution seeking writ, order or direction quashing the notification appointing Mr. Ramkaran Pal, respondent No. 4 as the Chairman of the corporation on various grounds. The Corporation is a company registered under the Companies Act, 1956 and is governed by the Companies Act and its Memorandum and Articles of Association. There are five respondents, namely, (i) the State of Bihar through the Chief Secretary, (ii) Commissioner-cum-Secretary, Department of Power (Electricity), Government of Bihar, (iii) Secretary-incharge, Department of Power (Electricity), Government of Bihar, (iv) Mr. Ramkaran Pal, Chairman of the Corporation and (v)

the Corporation itself through its Managing Directors.

2. The petitioner has challenged the appointment of Mr. Ramkaran Pal on three grounds : (i) that he was not qualified to be appointed as Chairman of the Corporation as he did not possess the qualifications prescribed under Section 15A of the Electricity (Supply) Act, 1948; (ii) that it is against the Articles of Association of the Corporation and (iii) that he has not been appointed by the Governor of the State of Bihar.

3. On orders being issued respondents 1,2 and 3 have filed their counter affidavits through Mr. Bankey Lal Prasad, Registrar, Energy Department of the Government of Bihar and respondent No. 5 through Mr. Uday Kant Thakur, Manager (Personnel & Administration) in the Corporation. Respondent No. 4 though represented by his counsel did not choose to file any counter-affidavit denying the allegations made against him. We have, therefore, to draw in adverse presumption against him that perhaps allegations made against him are true.

4. Sequence of events which led to the filling of this petition may briefly be set out.

5. The Chief Minister, State of Bihar, under his signature issued the following directions on December 9,1993 to the Minister, Department of Energy:

I appoint Shri Ramkaran Pal as Chairman of Bihar State Hydroelectric Power Corporation for a period of three years. Necessary notification be issued immediately and be informed.

On the same day the Minister concerned gave direction to the Secretary In charge in his Department that as per direction of the Chief Minister notification be issued. The notification was issued on the following day, i.e. December 1993 appointing Mr. Ramkaran Pal as the Chairman of the Corporation, English translation of the notification reads as under:

Notification No. 22 Patna dt. 10.12.1993.

While modifying the notification issued earlier in respect of the Board of Directors of Bihar State Hydroelectric Corporation Ltd. Sri Ramakaran Pal is appointed to

the post of Chairman of Bihar State Hydroelectric Power Corporation under Article 49(i)(a) of the Articles of Association of Bihar State Hydroelectric Power Corporation for a period of three years from the date of issue of the notification.

Other members of the Board of Directors of Bihar State Hydroelectric Power Corporation shall remain as before.

By Order of Governor

Sd/-S.N. Dubey

Secretary I/C.

Immediately thereafter Mr. Ramkaran Pal, Chairman, wrote a letter to the Chief Minister informing him that he had since taken charge as the Chairman of the Corporation in terms of the notification dated December 10,1993. He, however, said that there was no mention in the notification of the benefits attached to his office with the result that he was feeling difficulty in the discharge of his functions. he, therefore, wanted direction of the Chief Minister in that connection. This letter appears to have been received in the secretariat of the Chief Minister on December, 20, 1993 and on the margin of it the Chief Minister made an endorsement again addressed to the Minister, Department of Energy, to the effect that Mr. Ramkaran Pal be given benefits of a Minister of State. On this letter the Minister wrote on the following day addressed to the Secretary In charge that the order of the Chief Minister be implemented immediately. On December 22/23,1993, Mr. R.U. Singh, Managing Director of the Corporation wrote a letter to the Secretary In charge, Department of Energy, pointing out the anomalies in the appointment of Mr. Ramkaran Pal. He said that there was no provision in the Articles of Association for the appointment of a Chairman separately and that the article provided that appointment could be made only of the Chairman-cum-Managing Director. He also said that by appointment of Mr. Ramkaran Pal as the Chairman of the Corporation the member of Directors of the Corporation would exceed seven which was again impermissible under the Articles of the Corporation. Mr. R.U. Singh pointed out that he had raised this point

in the meeting on December 10,1993 held in the office of the Minister of State of Energy and the Secretary In charge. Mr. Singh complained that in spite of that notification appointing Mr. Ramkaran Pal had been issued as the Chairman of the Corporation. He said that a meeting of the Board of Directors was going to be held on December 31,1993 and a piquant situation had been created by increasing the number of the Board of Directors from seven to eight which was not legal. On December 23,1993, Mr. S. N. Dubey, Secretary In charge, Department of Energy, wrote to Mr. R.U. Singh, Managing Director of the Corporation, referring to his above letter wherein he mentioned about the increase in the strength of the Board of Directors from seven to eight and issued direction that till the State Government took some decision in the matter the meeting of the Board of Directors be not held. On January 7, 1994, another notification was issued whereby Mr. Ramkaran Pal was appointed as Director of the Board, viz Sri Brahmdeo Prasad, Chairman, Bihar State Electricity Board . English translation of his notification is as under:

Notification No. Pra. 3/Ra. Stha.-- 48/93 1 dt. 7.1.94.

While modifying the earlier notification issued with regard to the Board of Directors of Bihar State Hydroelectric Power Corporation Ltd., Sri Ramakaran Pal, Chairman of Bihar State Hydroelectric Corporation is appointed under Article 49(i)(a) of the Articles of Association of the Bihar State Hydroelectric Corporation as the Director of the Board of Directors in place of Sri Brahmedeo Prasad, Chairman, Bihar State Electricity Board from the date of issue of the notification till further orders.

Other Directors of the Board of Directors of Bihar State Hydroelectric Corporation shall remain as before.

By order of Governor,

(S:N. Dubey)

Secretary to Government,

Energy Department.

6. When these two notifications dated December 10, 1993 and January 7, 1994 were being issued the Governor of the State, it would appear, was quite unaware of that. The file does not show that it was ever put up before the Governor. It was not disputed before us even by the respondents that consent of the Governor was never taken at any stage of the appointment of Mr. Ramkaran Pal either as Chairman or as a Director of the Board of Directors of the Corporation. The record which was produced before us did not show that Mr. Ramkaran Pal had any of the qualifications mentioned in Section 15A of the Electricity (Supply) Act which are described in Sub-section (5) thereof and are as under:

(5) A full-time member of the Board of Directors of a Generating company shall be a person who has experience of, and has shown capacity in,-

(a) design, construction, operation and maintenance of generating stations;

(b) transmission and supply of electricity;

(c) applied economics;

(d) organising workers;

(e) industrial, commercial or financial matters; or

(f) administration in a Government Department or other establishment.

7. With his letter dated December 22/23, 1993, Mr. R.U. Singh, Managing Director, also annexed the relevant Articles of Association of the Corporation relating to the appointment of Chairman-cum-Managing Director. The relevant articles would be 47 to 50 are as under:

47. The business of the Company shall be managed by a Board of Directors.

48. The Governor shall from time to time, determine in writing the number of Directors of the Company, which not be less than four and not more than seven and subject to the powers conferred to the Generating companies under the Electricity (Supply) Act, 1948. The Directors shall not be required to hold any qualification shares.

49. (i)(a) The Chairman-cum-Managing Director shall be appointed by the Governor. All other members of the Board of Directors shall be appointed by the Governor in consultation with the Chairman-cum-Managing Director of the Company. No such consultation will be necessary in case of appointment of Directors representing the Government.

(b) The Directors may be either whole time functional Directors or part-time Directors provided that the number of part-time Directors other than those from Govt. and subsidiary Companies, if any, shall not exceed one-fifth of the total number of Directors.

(c) A Director appointed as aforesaid shall fulfil the provisions of the Electricity (Supply) Act, 1948, particularly Sections 9 and 15A(5).

(d) The Directors shall be paid such salary and allowances as the Governor may, from time to time determine.

(ii) The Chairman will be appointed subject to such terms and conditions as may be determined by the Governor.

(iii) At every third Annual General Meeting of the Company every Director appointed by the Governor, other than the whole-time Director and Directors representing the Government shall retire from office. A retiring Director shall be eligible for re appointment.

(iv) A Director representing a Ministry of the Government of Bihar shall retire on his ceasing to be an official of that Ministry.

(v) The Government may from time to time or any time remove any part-time Director, from office at his absolute discretion Chairman and whole-time Directors may be removed from office in accordance with the terms of appointment.

(vi) The Governor shall have the right to fill any vacancy in the office of the Directors caused by removal, resignation death or otherwise.

50. Subject to the provisions of Sections 292 and 293 of the Act, the Board may, from time to time, entrust and confer upon the Chairman-cum-Managing Director,

Director for the time being such of the powers as they may think fit and may confer such powers for such time and to be exercised for such subjects and purposes and upon such terms and conditions and with such restrictions as they may think expedient and may, from time to time, revoke, withdraw, alter or vary all or any such powers.

8. It would appear that after the anomaly was pointed out by Mr. Singh, Article 49 was amended and now it reads as under as mentioned in the counter-affidavit of respondents 1 to 3:

Article 49(i)(a):-The company shall have a Chairman and a Managing Director.

The Chairman and the Managing Director shall be appointed by the Governor. The Governor may at his discretion appoint one person as the Chairman and Managing Director or appoint separately any person as the Chairman and any other as the Managing Director. All other members of the Board of Directors shall be appointed by the Governor in consultation with the Chairman and also the Managing Director of the company. No such consultation will be necessary in case of appointment of Director representing the Government.

It is rather strange that when the articles were starting at the face of the respondents that the appointment of the Chairman or of the Director had to be made by the Director had to be made by the Governor, the appointment has been made by the Minister in the Department of Energy on the directions of the Chief Minister. If we examine the Rules of Executive Business, Bihar, 1979 framed under Clause (3) of Article 166 of the Constitution, the appointment of Mr. Ramkaran Pal would also be illegal.

9. Under Clause (1) of Article 163 of the Constitution there shall be a council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under the constitution required to exercise his function or any of them in his discretion. Article 164 the Chief Minister is to be appointed by the Governor and other Ministers are appointed by the Governor on the advice of the Chief Minister.

10. Under Clause (3) of Article 166, the Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under the Constitution required to act in his discretion.

11. Rules have been framed under Clause (3) of Article 166 and these are called Rules of Executive Business, Bihar, 1979. First Schedule to these Rules specifies various departments of which the business of the Government is to be transacted. The Governor on the advice of the Chief Minister is to allot among the Ministers the business of the Government by assigning one or more departments to the charge of a Minister. In the First Schedule one of the departments is the Department of Energy dealing with generation transmission and supply of electrical energy. It is not disputed before us that the Bihar State Hydroelectric Power Corporation is a Government of Bihar undertaking under the charge of the Department of Energy. Under Rule 10 of these Rules of Executive business all cases referred to in the Third Schedule are to be brought before the Council of Ministers in accordance with the provisions of the rules contained in Part II but subject to the orders of the Chief Minister under Rule 15 of the Rules. It is also not disputed that there is a Minister holding independent charge of the Department of Energy. As per the Third Schedule one of the items is all cases where approval of the Governor is necessary in creation of posts and appointments thereto in public undertakings. Part II of the Rules is not quite relevant for our purpose as it prescribes procedure of the Council of Ministers and how the matter is to be dealt with.

12. Part III of the Rules describes the procedure for departmental disposal of business and gives the classes of cases which are to be submitted to the Chief Minister by the Minister In charge. This Part also describes the classes of cases which are to be submitted by the Chief Minister to the Governor before the issue of orders. Finance Department under the Rules is an important department which is almost invariably to be consulted in matters having repercussions on the finances of the State. All this will show utter violation of the rules.

13. In the record pertaining to the appointment of Mr. Ramkaran Pal as Chairman and Director there is a letter addressed by Sri Rajesh Kumar, Advocate, dated August 9, 1994, addressed to the Governor of Bihar. In this he brought to the notice of the Governor about filing of a writ petition against the appointment of Mr. Ramkaran Pal and complained that in spite of that various facilities had been granted to Mr. Ramkaran Pal causing a drain on the finances of the Corporation. He also complained about misuse of power by Mr. Ramkaran Pal and one of the instances which he gave was the appointment of Mr. Shilendra Kumar Pal as Private Secretary of Mr. Ramkaran Pal concealing the fact that Mr. Shailendra Kumar Pal is the son of Mr. Ramkaran Pal. reference has been made to the office order dated April 12, 1994 issued by the Corporation appointing. Mr. Shailendra Kumar Pal as Private Secretary where instead of mentioning his father's name which is the usual practice, his address has been given as C/O Baleshwar Prasad Sinha and the appointment has been made on a consolidated pay of Rs. 2,000/- with special pay of Rs. 250/- power month with effect from December 13, 1993. This letter of Sri Rajesh kumar, Advocate, ultimately came to be marked to the Secretary, Energy Department and from him to the Managing Director of the Corporation on August 16, 1994. There is no response from the Corporation to this letter of the Secretary, Energy Department, which is the last communication on the file/record.

14. There has not been any denial to the facts stated by the petitioner and in fact these are on the basis of the official record which was produced before us by the State Government. Not much has been said in the affidavit filed on behalf of the Corporation and as a matter of fact it is not for the Corporation to justify the appointment of Mr. Ramkaran Pal as the Chairman and also as a Member of the Board of Directors of the Corporation.

15. The counter-affidavit filed on behalf of respondents 1, 2 and 3 by Mr. Bankey Lal Prasad, Registrar, Energy Department, has been sworn in a peculiar fashion. He has said that paras 2 and 4 are true to his knowledge and the statements in para 5 are true to his information derived from the records of the case and 'the rest are by way of submissions and annexures are photo copies of their respective originals. In para 1 of the counter affidavit. Mr. Prasad describes his position in the

Energy Department. In the second paragraph he says that he has gone through the writ application. In the third paragraph he says that the petitioner is a mere peon and not a correspondence clerk as stated by him. In para 4 he says that the petitioner has challenged the appointment of 4th respondent, Mr. Ramkaan Pal, who has been appointed as Chairman of the Corporation on misconceived understanding of the existing law. We assume that the words 'misconceived understanding of the existing law' refers to the understanding of the petitioner and not of the appointing authority. In para 5 it has been stated that the appointment of the Chairman of the Corporation is not governed by Section 5 of the Electricity (Supply) Act as contended in the writ application and that Section 5 of the Act relates to the constitution and composition of the State Electricity Board and does not cover the Corporation which is a limited company. That is all what could have been said to have been stated in the counter-affidavit by respondents 1, 2 and 3 on the basis of the records. Mr. Prasad, Registrar, does not stop here and goes on to add further in the counter-affidavit. In paras 6 and 7 he denies the allegation and says that Section 15A(5) of the Electricity (Supply) Act specifies the qualifications of a member of the Board. In para 8 he says that Mr. Ramkaran Pal has the qualification of doing organising worker, administration in Government of any other department as prescribed under Section 15(5) of the Act. In para 9 it is stated that Mr. Ramkaran Pal. was a founder Chairman of the Bihar State Sheep and Wool Weavers Cooperative Unit Limited and besides that he was General Secretary of All India Pal Maha Sabha, a social organisation from 1975 to look after the interest of the worker. In the industrial, commercial and financial matter and that he was also a member of various committees and projects. Mr. Prasad goes on to add that Mr. Ramkaran Pal as member of such Committees, as has been mentioned in the annexure to the counter-affidavit, was involved in organisations doing the administration work, financial matters of various organisations and, therefore, he says that it has been wrongly stated by the petitioner that Mr. Ramkaran Pal did not have the required qualification. In para 11, reference has been made to the Corporation as a company under the Companies Act and is being governed by its memorandum and Articles of Association and it is sought to project that Corporation is different from the Board which is constituted under Section 5 of the Act. Then it is stated in para 12 that the

appointment of Mr. Ramakaran Pal was made under Article 49(i)(a) of the Articles of Association of the Corporation which had been amended, he is silent as to when this article was amended though he quotes both the unamended and amended Article 49(i)(a). If it refer to the annexure filed with the counter-affidavit, it can be seen that Mr. Ramkaran Pal is a member of various committees numbering thirteen. In para 13 it is denied that Mr. Ramkaran Pal had been appointed against the instruction of the Bureau of Public Enterprises as per its circular. It is stated that the Board of Directors is limited to seven in number and only if there is increase in the number of Directors, that concurrence of the Bureau of Public Enterprises is required. It is stated that the number of Directors did not increase the figure seven. In para 14 it is denied that the appointment of Mr. Ramkaran Pal was against certain directions issued by the State of Bihar. In para 5 it is stated with regard to the newspaper reports filed with the writ petition that at present the total number of Directors are only five. These newspaper reports are from the Indian Express and the Hindustan Times, Patna. In the Delhi Indian Express it is titled Homeodoc As Power Board Chief with super heading 'A Right Equation with Powers?' These reports make a scathing criticism on the appointment of Mr. Ramkaran Pal in the Corporation. It has been brought out that Mr. Ramkaran Pal is a mere homeopathic doctor and has no qualifications whatsoever under Section 15(5) of the Electricity (Supply) Act. It is pointed out that the appointment of Mr. Ramkaran Pal is clearly an instance of favoritism and in breach of all rules and regulations. To all these two newspaper reports making allegations in detail about the appointment of Mr. Ramkaran Pal, in the counter-affidavit the Registrar is only content with the statement that the total strength of Directors in the Corporation is only five. With reference to the appointments made by Mr. Ramkaran Pal as Chairman it is stated. that he is authorised to appoint them as per provision made by Government letter No. 83 dated March 7, 1994, a copy of which has been annexed. It is stated that the terms of appointments of these persons are co-terminus with the period of appointment of Mr. Ramkaran Pal as Chairman and that the Corporation issued letters of appointment as per instructions of the Chairman. Then with reference the plea of the petitioner that various expenditure have been incurred in renovating the office of the Chairman, it is stated that no unwarranted expenditure was involved taking into consideration the maintenance

required in the office.

16. It is abundantly clear that Mr. Prasad, Registrar, Energy Department, has tried to justify the appointment of Mr. Ramkaran Pal when he does not say that he has any personal knowledge about the same. Who gave him all these facts he has not stated. The affidavit filed by Mr. Prasad conceals more than what it tells. As noted above, he has not stated as to when and in what circumstances amendment to Article 49(i)(a) was made. The affidavit is not based on records maintained in the office of the Energy Department. Mr. Prasad has not stated as to why the consent of the Governor was not taken when it was not required under Articles of Association of the Corporation. He has also not stated as to whether the appointment of Mr. Ramkaran Pal either as Chairman and a Director was in accordance with the Rules of Executive Business when it is clearly in violation of the same. There is no whisper in the Counter-affidavit filed by Mr. Prasad that Mr. Ramkaran Pal was also appointed as Director of the Corporation. As noted above, there is no denial of the allegations made in the petition and supplementary affidavit filed by the petitioner. It stands admitted that Mr. Shailendra Kumar Pal is the son of Dr. Ramkaran Pal but it is not stated why his appointment has been made from a back date. Assuming what Mr. Prasad has to say about the qualifications of Mr. Ramkaran Pal to hold that post of Chairman and Director in the Corporation, it cannot be said that he fulfils any of the qualifications prescribed under Section 15(5) of the Electricity (Supply) Act. It is meaningless to say that a person is member of various organisations without referring to their objects and the rules and regulations for membership.

17. We have given our anxious moments to the case but it is difficult for us to uphold the appointment of Mr. Ramkaran Pal as Chairman and Director of the Corporation. This appointment cannot be justified either in law or on facts of the case. Even the counsel for the respondents were at a loss to understand at least on the point that when it was the Governor who was the appointing authority under the Articles of Association of the Corporation, how appointment came through the Minister. The appointment of Mr. Ramkaran Pal is grossly illegal from whatever angle we may see it. We take a serious view of the affidavit filed by Mr. Bankey Lal Prasad, Registrar, which affidavit has been filed to mislead the record of the

Energy Department in which he holds that position. An officer of the Department swearing affidavit on the basis of the record has to stick to the record. It is a settled law that you cannot add a new ground to sustain an order when that is not a ground mentioned in the records at the time the order was made. The file of the Department relating to appointment of Mr. Ramkaran Pal as Chairman and Director does not at all contain as to his qualification and also as to what other considerations prevailed with the respondents 1, 2 and 3 to appoint him as the Chairman and Director of the Corporation. It is strange that the respondents while appointing Mr. Ramkaran Pal did not even look to the Articles of Association of the Corporation. The letter of Mr. R.U. Singh has been ignored for reasons difficult to decipher. The concerned file relating to the appointing of Mr. Ramkaran Pal has been dealt with at the highest level in the State Government. It is unfortunate that no one has pointed out the illegality committed in the appointment. We do not know if it is on account of ignorance of or otherwise. In any case an officer is not fit to hold the high post if he cannot advise the Government properly even on most elementary matters. It must not be forgotten that this country is governed by rule of law and the governed by rule of law and the Court will come down heavily if there is any infraction of the law and power is exercised arbitrarily. It is beyond our comprehension to think of a case where power has been exercised a flagrant violation of law and most unashamedly . Notifications have been issued in the name of the Governor without any paper having been placed before him.

18. We, therefore, allow this writ application with costs and quash the appointment of Mr. Ramkaran Pal both as Chairman and Director of the Corporation. Consequently all appointments made by him in that capacity in the Corporation also stand quashed forthwith. We quantify the cost of Rs. 15,000/-, out of which Rs. 5000/- shall be payable by respondents 1, 2 and 3 as one set; Rs. 5,000/- by respondent No. 4, Mr. Ramkaran Pal; and Rs. 5,000/- by Mr. Prasad, the Registrar, Energy Department, who shall be personally liable to pay the cost and shall not be entitled to any reimbursement from the State. The costs are payable to the President of the Advocates' Association in the High Court to be utilised for legal aid to the poor under the directions of Hon'ble Mr. Justice N. Pandey, In charge of Legal Aid in the High Court. The costs shall be payable within four weeks from today.

