
(2011) 06 JH CK 0027

Jharkhand High Court

Case No: L.P.A. No. 77 of 2009

State of Jharkhand and
The Secretary, Water
Resources Department

APPELLANT

Vs

Harihar Yadav and
Others

RESPONDENT

Date of Decision: June 16, 2011

Acts Referred:

- Bihar Reorganisation Act, 2000 - Section 47, 65, 85
- Companies Act, 1956 - Section 529A
- Constitution of India, 1950 - Article 21

Citation: (2011) 3 JCR 383

Hon'ble Judges: Prakash Tatia, Acting C.J.; Jaya Roy, J

Bench: Division Bench

Judgement

1. By Court Heard learned Counsel for the parties.

2. This is a case where the baby is disowned by the mother because of the reason that a healthy baby subsequently became liability. Had it been a healthy baby, probably the two States might have fought for the baby claiming it to be their own baby. Causality is the labour and the workers suffered in this fight to starvation of the employees of the erstwhile Bihar Hill Area Lift Irrigation Corporation Ltd. (hereinafter referred to as BHALCO) and one of the employee namely, Chandan Bhattacharjee immolated himself and died and then a Public Interest Litigation in the form of Writ Petition (C) No. 488 of 2002 was preferred by a public spirited person wherein the Hon"ble Supreme Court passed interim orders and those orders were passed on humanitarian grounds to save the lives of the employees of the then BHALCO, which fact has been taken note of by the Hon"ble Supreme Court in its order dated 13.01.2005 and the relevant part of that order is as under:

We make it clear that we have not issued aforementioned directions to the States of Bihar and Jharkhand on the premise that they are bound to pay the salaries of the employees of the Public sector undertakings but on the ground that the employees have a human right as also a fundamental right under Article 21 which the States are bound to protect. The directions which have been issued by this Court on 9.5.2003 as also which are being issued herein, are in furtherance of the human and fundamental rights of the employees concerned and not by way of an enforcement of their legal rights to arrears of salaries. The amount of salary payable to the concerned employees or workmen would undoubtedly be adjudicated upon in the proper proceedings. However, these directions are issued which are necessary for their survival. Undoubtedly, any amount paid by Justice Uday Sinha Committee pursuant to these directions shall be duly credited for.

3. Thereafter, the Hon"ble Supreme Court found that the writ petition is pending in the Jharkhand High Court; therefore, instead of deciding some issues referred the issues for decision by this Court, vide order dated 8th July, 2008 passed in W.P. (C) No. 488 of 2002. The followings are the issues referred by the Hon"ble Supreme Court:

In view of the above, we give the following directions:

(A)The High Court of Jharkhand is directed to dispose of the writ petition pending before it at the earliest and, if possible, within six weeks from date. If the High Courts finds it difficult to dispose of the matter within the aforementioned period, it may pass interim order as it may deem fit and proper. It is made clear that in the event the High Court finds that the applicants were entitled to be absorbed in the services of JHALCO from an earlier date it would be open to it to pass such an order as it may deem fit and proper so as to adjust the equities between the parties. It is made clear that the question of final absorption, past salaries and the liability to pay the same may be determined by the High Court in the said writ petition.

(B)Managing Director, BHALCO and Managing Director, JHALCO as also the Secretaries of the Government of Bihar and the Government of Jharkhand Shall meet within one month from the date and decide upon and assess the liability on account of the arrears of the salaries payable to the employees already absorbed and to be absorbed, and make a report thereof within a week of the date of decision, to the High Court for taking final decision regarding the mode of payment etc. to the employees, if any, so that the liability of JHALCO to that extent would stand reduced.

(C)The Central Government shall take immediate steps to see that the directions in the order dated 13.09.2004, passed by it are complied with by the State of Bihar."

4. In brief, the facts of the case are that in the State of Bihar, a Government company was floated by the State of Bihar in the name of Bihar Hill Area Lift Irrigation Corporation Limited and got it registered under the Companies Act, 1956. The object of that company was to explore, execute, install, develop, promote, improve, establish, finance, manage,

administer and maintain water resources for the purposes of ensuring regular irrigation facilities to the cultivators in the hilly areas of Chotanagpur and Santhal Pargana and also for other areas like the districts of Rohtas, Aurangabad, Nawadah, Gaya, Bhagalpur (South of Ganga) and Monghyr (south of Ganga) through the means of bigger diameter wells intake, wells lift irrigation schemes as well as other suitable devices appropriate for such irrigation facilities and to manufacture spare parts, machinery, tools, implements, materials, substances, goods or things of any description which in the opinion of the company are likely to promote or advance the development of irrigation facilities to the cultivators in the aforesaid areas. The object clearly indicates that the company was floated in public interest and to take challenges in the field of irrigation and that too in difficult hilly areas in the State of Bihar.

5. A part of the land from the State of Bihar was carved out to create a new State, i.e., State of Jharkhand, which was born on 15th November, 2000 by the Bihar Re-organization Act, 2000 (hereinafter referred to as Act of 2000). After creation of State of Jharkhand, the said Government company, BHALCO, running under the administration of its own management, being a Government Company, had some direct connection with the Government of Bihar became the subject matter of dispute which appears to be for obvious reason that at the time of creation of Jharkhand State it was running in hopelessly and badly and had incurred huge losses; initially it appears, State of Jharkhand wanted to own it and therefore, a decision was taken by the Government of Jharkhand to "convert BHALCO into JHALCO (Jharkhand Hill Area Lift Irrigation Corporation Limited)" but subsequently, obviously after realizing that the company in question is a liability rescinded its said decision to convert BHALCO into JHALCO. Now, therefore, neither the State of Bihar nor the State of Jharkhand is willing to own this Company as it is a liability. The employees of BHALCO were only at the mercy of the Governments and they were not at fault, but their employment has been put on stake to such a grave extent that hundreds of the employees of the BHALCO stood jobless because of none of fault of those employees, as their services have not been terminated, nor they have been retrenched even by BHALCO, nor state of Jharkhand or its Government company JHALCO accepted them except a few.

6. Then the State of Jharkhand took a decision on 29th December, 2001 under the powers incorporated u/s 85 of the Act of 2000 and it provided that whatever the Rules and Regulations have been framed by the BHALCO are being adopted by the new company JHALCO and the name of the new company will be Jharkhand Hill Area Lift Irrigation Corporation Ltd. (hereinafter referred to as JHALCO).

7. The issue with respect to the employees of the BHALCO also came up for consideration before the State of Jharkhand and the memorandum of Cabinet drawn on 9.1.2002, wherein it has been specifically provided that:

6. Thus under the circumstances the proposal of acquisition and adoption of BHALCO as JHALCO is proposed with the following conditions:

- A. The establishment expenditure of JHALCO will be brought down. For this the services of those employees who have irregularity been appointed would be terminated as per rules.
- B. JHALCO will be given full autonomy and it shall function on commercial lines and shall arrange for salaries of its employees from its own sources.
- C. Arrear of salary pertaining to period prior to 15.11.2000 shall not be paid
- D. No new appointment under any circumstances will be done in JHALCO.
- E. The memorandum and articles of Association of JHALCO shall be accepted in totality and Bihar state and Bihar, wherever it has been mentioned shall be replaced by Jharkhand State. "and Jharkhand respectively. Accordingly, the memorandum shall be treated as modified.
- F. Govt. Will provide JHALCO a sum of Rs. 5.00(five) Crores as its share capital and also 5.25 Crores for payment of salaries to its employees for the period from 15.11.2000 to 31.3.2000.
7. The proposal under para 6 has the approval of the Law Department.
8. The Proposal under para 6 has the approval of the Chief Secretary.
9. The proposal under para 6 has been the approval of Minister, Water Resources Department.
10. The proposal under para 4 has been the approval of Hon"ble Chief Minister.
11. The post facto approval of the cabinet is solicited on proposals laid in para 4 above.
8. The said decision was duly approved by the Cabinet in its meeting dated 10th March, 2002 is the plea of the Petitioner with the help of Annexure 2 and 3. However, this fact has been disputed by Mr. Sinha, learned Advocate General appearing on behalf of State of Jharkhand, that the memorandum of Cabinet dated 9.01.2002 was not approved by the Cabinet by Annexure 3. According to learned Counsel for the Petitioners, there is another document evidencing cabinet's approval for the above decision.
9. Then the State of Jharkhand came up with a proposal to absorb the employees of JHALCO by issuing a number of public notices in the newspaper inviting applications from the employees of BHALCO who were willing to join the service in JHALCO and the last date was extended by other Public notices, copies of which have been placed on record by the Petitioner and are adopted by all the parties. In pursuance of the above applications, 302 applicants, the employees of BHALCO were absorbed in JHALCO and they are in service of JHALCO.

10. The persons who have not been absorbed are aggrieved and they preferred these writ petitions before this Court. On the basis of the Jharkhand State Government's decision dated 29th December, 2001, the memorandum of minutes for consideration of the State Government, which, according to Petitioners, duly approved by all the departments of the Government of Jharkhand and ultimately by the cabinet and in view of the advertisement referred to above, they claimed that the remaining employees are also entitled to absorption in parity with the other employees who have been absorbed in JHALCO. Then a dispute was also raised because the employees who sought to be absorbed in JHALCO were asked to forgo their past service benefit rendered in the service of BHALCO and it was also contended that such conditions cannot be imposed on poor employees and they cannot be asked to furnish such undertakings.

11. After filing of the writ petition by the Petitioners, the State of Jharkhand re-considered its decision dated 29th December, 2001 and issued another notification dated 26th April, 2005 and by this notification the State Government withdrew their earlier notification dated 29th December, 2001 and it was decided that now a new company will be created in the name of Jharkhand Hill Area Lift Irrigation Corporation Ltd and in pursuance of the said decision this new company, JHALCO, was created and now it is a duly registered company under the Companies Act, 1956 and these facts are not in dispute.

12. Contention of the Petitioners before this Court is that, in fact, BHALCO itself has been converted into JHALCO and they are not two legal entities like BHALCO and JHALCO in view of the Government decision dated 29th December, 2001 and 9th January, 2002 and another submission made was that the State of Jharkhand was under the obligation to absorb all the employees of BHALCO as it was the decision of the State Government as well as of JHALCO to absorb the employee of BHALCO irrespective of their status and number which is apparent from the advertisements referred to above inviting applications from the employees of the BHALCO.

13. Not only above, but a larger issue has been raised by the Petitioners with respect to vesting of BHALCO in the State of Jharkhand with the help of Section 47 of the Act of 2000 and the action of the State of Jharkhand sought to be justified in view of Section 65 and Section 85 of the Act of 2000 by the applicants and it has been submitted that firstly by operation of Section 47 of the Act of 2000 and secondly by the Act of the State of Jharkhand, the BHALCO became assets and liability of the State of Jharkhand and this submission has been seriously contended by Mr. Sinha, learned Advocate General, appearing on behalf of State of Jharkhand and learned Counsel appearing for the State of Bihar supported the argument of the learned Counsel for the employees on this count.

14. In counter, it has been stated that the State Government decision dated 29th December, 2001 was erroneous and also was absolutely illegal as well as beyond the powers of the State Government and the State Government, when realized the mistake, rescinded the decision dated 29th December, 2001 by decision dated 26th April, 2005 and it is also submitted that because of the wrong decision of the State Government,

which cannot be sustained in the eye of law, the employees of the BHALCO cannot get any right. So far as absorption of the employees, in pursuance of the notice inviting applications from the employees of BHALCO are concerned, it has been submitted that JHALCO was running with surplus staff and also had no capacity to pay the salaries of even the existing staff; therefore, JHALCO cannot be asked to absorb the employees of BHALCO. It is also submitted that BHALCO being a company of the State of Bihar, a decision was taken to wind up the company and, therefore, also it is the liability of BHALCO in accordance with law and cannot be fastened upon JHALCO by BHALCO or by the State of Bihar.

15. Therefore, the following major issues arise in this L.P.A because of the reason that learned Single Judge held that BHALCO and JHALCO cannot be said to be two separate entities, rather BHALCO, in terms of Section 65 of the Re-organization Act can be said to have been functioning as JHALCO and therefore, allowing the writ petition of the writ Petitioners, it has been held that the Petitioners are entitled to be absorbed in the services of JHALCO from the date when they have made applications pursuant to directions given by the Hon"ble Supreme Court on 13.1.2005 and they are entitled to get their salaries from the date of their absorption which is to be paid by JHALCO as other employees whose services were accepted by the JHALCO are also paid from the date of joining.

16. The questions for consideration, therefore, before us are:

(1) Whether BHALCO vests in the State of Jharkhand by the operation of the Act of 2000?

(2) Whether BHALCO and JHALCO are two separate entities or one and same?

(3) If not as contended by the Appellant, then whether the Petitioners have any right to seek absorption in JHALCO, being employees of BHALCO?

17. We take up first question for consideration. The Petitioners and the State of Bihar took the stand that BHALCO after coming into force of Bihar Re-organization Act, 2000 automatically vests in the State of Jharkhand by virtue of Section 47 of the Act of 2000. Section 47 of the Act of 2000 is as under:

47. Assets and liabilities of the State Undertakings.

(1) The assets and liabilities relating to any commercial or industrial undertaking of the existing State of Bihar shall pass to the State in which the undertaking is located.

(2) Where a depreciation reserve fund is maintained by the existing State of Bihar for any such commercial or industrial undertaking, the securities held in respect of investments made from that fund shall pass to the State in which the undertaking is located."

18. However, the writ Petitioner-employees of the then BHALCO and the State of Bihar also relied upon the State Government's notification, Annexure-1, dated 29th December, 2001 which was issued u/s 85 of the Act of 2000. Section 85 of the Act of 2000 is read as under:

85. Powers to adapt laws.-For the purpose of facilitating the application in relation to the State of Bihar and 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 competent authority."

19. Learned Advocate General, Mr. Anil Kumar Sinha, appearing for the State of Jharkhand submitted that Section 85 of the Act of 2000 is a provision empowering the State of Jharkhand to adapt the laws which was prevailing in the State of Bihar and has nothing to do with the vesting of the properties of the erstwhile State of Bihar or of any company duly registered under the Companies Act, nor under the purported powers of adapting laws given by Section 85 of the Act of 2000 the properties which lawfully vested in the State of Bihar or in a company could have been taken over by the State of Jharkhand. Learned Advocate General, Mr. Sinha, appearing for the State of Jharkhand further submitted that Section 65 deals with the companies and their vesting in either of the States. Section 65 of the Act of 2000 is as under:

65. Provisions as to certain companies.

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

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

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

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

20. It is also submitted that the BHALCO is a company specified in the Ninth Schedule; therefore, the BHALCO is not governed by Section 47 of the Act of 2000 as specific provision has been made for the companies included in the Ninth Schedule of the Act of 2000.

21. We considered the above submissions and relevant provisions of law referred to above.

22. Section 85 of the Act of 2000 very clearly provides that this Section has been enacted for the purpose of facilitating the relation of the State of Bihar and of Jharkhand for the purpose of continuation of laws which was in force before creation of the State of Jharkhand and empowering the appropriate Government to adapt the law with or without modification and by amendment those laws, to make them effective. Therefore, with the help of Section 85 of the Act of 2000, the State of Jharkhand was competent to adapt law framed by the State of Bihar and it appears that under the purported power of adaptation of law, only the notification dated 29th December, 2001 was issued which is clear from operative part of the notification indicating that all the Rules and Regulations framed for the Bihar Hill Area Lift Irrigation Corporation (BHALCO) are being adapted for the Jharkhand Hill Area Lift Irrigation Corporation (JHALCO). Section 85 is not a mode of prescribing appropriate distribution of the companies, nor is a power to acquire any company which was in existence before the enactment of the Act of 2000 before creation of the State of Jharkhand. Admittedly, BHALCO is a company registered under the Companies Act, 1956 and is a legal entity and for that company, as per law under the Companies Act, the company alone could have taken a decision about itself and the competent Government by enactment could have acquired the company itself and could have also transferred it to anybody but in accordance with law and admitted so has not been done, neither the BHALCO has been acquired by the State of Jharkhand or by the JHALCO under the Companies Act or by any enactment. Rather, it is an admitted fact that BHALCO and JHALCO both are separate registered companies and are in existence, though may be running in losses, but are very much in existence independently.

23. Section 85 nowhere deals with the transfer, acquisition or merger of the companies situated either in the State of Bihar or in the State of Jharkhand which State was created by the Act of 2000. Therefore, the contention of the State of Bihar and the employee-writ Petitioners that the BHALCO has been converted into JHALCO by notification dated 29th December, 2001 is legally not sustainable. At this juncture, it will be relevant to mention here that the decision dated 29th December, 2001 has been rescinded by the Government of Jharkhand, vide decision dated 26th April, 2005, but even if it would not have been rescinded it would not have resulted into acquisition or conversion of BHALCO in JHALCO.

24. The memorandum for cabinet dated 9th January, 2002, Annexure-2, filed in L.P.A No. 77 of 2009, appears to be a proposal wherein after considering various aspects of the matter, it has been recorded specifically that "Thus under the circumstances the proposal

of acquisition and adoption of BHALCO as JHALCO is proposed with the following conditions:" and in paragraph 11 of the said memorandum, it has been mentioned that the post facto approval of the cabinet is solicited on proposals and it is submitted by Ms. Priya Hingorani, learned Counsel for the writ Petitioner-employees that the said proposal was duly approved by the cabinet. However, Mr. Sinha, learned Advocate General, appearing for the State of Jharkhand submitted that Annexure-3 is not approval of the said memorandum, whereas Ms. Hingorani, learned Counsel appearing for the employees relied upon another document to show that this memorandum was approved by the cabinet. Whether the State of Jharkhand unilaterally was competent to take over a registered company by taking a decision itself is the root question and as we have already indicated that the company could not have been taken over by the State of Jharkhand unilaterally. We are of the view that such taking over or transferring of the company also could not have been completed unless it is completed in accordance with law under the Act of 2000 read with the provisions made in the Companies Act.

25. The writ Petitioners and BHALCO failed to show that the company BHALCO itself took a decision to convert itself in the name of JHALCO by taking a decision with the approval under the provisions of the Companies Act and also failed to prove that the BHALCO after the notification dated 29th December, 2001 did not exist rather it admitted that even after the notification dated 29th December, 2001 BHALCO is in existence having its own legal entity with all its Board of Directors, properties and its staff irrespective of the fact that where they are posted and working, may they be in the State of Bihar or in the State of Jharkhand partly or fully.

26. Section 65 of the Act of 2000 is relevant at this juncture as it says that the company specified in the Ninth Schedule of the Act of 2000 shall, on and from the appointed day and until otherwise provided for any law in any agreement among the successor State or in any direction issued by the Central Government, continued to function in the areas in which it was functioning immediately before that day; and the Central Government, from time to time issue such directions in relation to such functioning as it may deem fit, notwithstanding anything to the contrary contained in the Companies Act, 1956 or in any other law. Sub-section (2) further provides that any direction issued under Sub-section (1), in respect of a company referred to in that Sub-section may include directions,-(a)regarding the division of the interest and shares of existing State of Bihar in the Company among the successor States; (b)requiring the re-Constitution of the Board of Directors of the Company so as to give adequate representation to both the successor States. This Section 65 is also not a provision in supersession to provisions of Companies Act to take over any company or transfer of company in any State as such but with the help of this provision, the Board of Directors of any company included in IX Schedule can be reconstituted and interest and share in such company can be divided, obviously to give it, the State of Jharkhand. It is not the case of the writ Petitioners that the State of Bihar and the State of Jharkhand arrived at one agreement to transfer the Company as a whole to the State of Jharkhand. Had it been so, it could have been taken

over for consideration irrespective of the provisions of the Companies Act, 1956 and of Sub-section (1) of Section 65 of the Act of 2000. But admittedly, there was no agreement between the States i.e. the State of Bihar and the State of Jharkhand, to transfer the company to the State of Jharkhand; therefore, the company BHALCO has not stood transferred to the State of Jharkhand.

27. Another most important point is that the the Union of India, which is competent to take decisions and issue direction u/s 65 of the Act of 2000, declared on 13th September, 2004 in its decision that BHALCO shall remain in the State of Bihar and we quote from the decision of the Government of India dated 13th September, 2004, which is as under:

And whereas the Central Government considers that as on date BHALCO continues to be under the control of the Government of Bihar in terms of Section 65 of the Bihar Re-organization Act, 2000....

Therefore, the State of Bihar and the company BHALCO both were and are bound by this decision. Not only this, this was a decision given by the Government of India under the power given by Section 65(1) but this issue is no more res integra in view of the ultimate decision given by the Hon"ble Supreme Court after considering the order of the Government of Indian dated 13th September, 2004 in W.P. (C) No. 488 of 2002, which has been delivered after considering the order dated 13th September, 2004 and the Hon"ble Supreme Court rejected the contention of the State of Bihar that BHALCO is the property of the State of Jharkhand and shown its surprise that "we express our surprise how such a bald stand was taken by the State of Bihar. Seen from any angle, this liability could not be altogether shaken off by the State of Bihar to avoid the same on specious plea that BHALCO has now become JHALCO." Therefore, the Hon"ble Supreme Court rejected both the contentions that BHALCO belongs to the State of Jharkhand as well as rejected the stand that BHALCO has now become JHALCO. The judgment delivered by the learned Single Judge contrary to this finding declaring that BHALCO and JHALCO cannot be said to two separate entities rather BHALCO in terms of Section 65 of Bihar Re-organization Act can be said to have been functioning as JHALCO cannot be sustained being contrary to the decision given by the Hon"ble Supreme Court on this very specific issue.

28. We have considered the above legal provisions in view of the fact that according to the learned Counsel for the State of Bihar as well as the learned Counsel appearing for BHALCO, they still hold, that the BHALCO employees are the liability of JHALCO and consequently of the State of Jharkhand but that issue as we have observed is no more res integra in view of the decision given by the Hon"ble Supreme Court in the case of Kopila Hingorani & Anr, Writ Petition (Civil) No. 488 of 2002, as referred to above as well as legally has no foundation.

29. In answer to the specific question as to whether the BHALCO and JHALCO are two separate entities or one and same, the stand taken by the employees-writ Petitioners,

BHALCO and the State of Bihar is rejected and it is held that BHALCO and JHALCO, both are separate and independent, are in existence today also.

30. Now the most important question still survives that whether the writ Petitioners have any right to seek absorption in JHALCO being the employees of BHALCO in view of the advertisement issued by the State of Jharkhand and JHALCO.

31. For this issue, the brief facts are required to be recapitulated, that the BHALCO was a running company before the State of Jharkhand was created by the Act of 2000 and was a Government company of the State of Bihar; the employees in question of BHALCO who were duly appointed and were serving they had no role nor they had any option in the matter of either creation of BHALCO or JHALCO or even in creation of the State of Jharkhand - they were the poor employees only. How their services could have come to an end by the operation of the Act of 2000 is not known, nor explained by anybody, like the State of Bihar or BHALCO. There is no provision in the Act of 2000 which provides that employee of the company covered under Schedule IX of the Act of 2000 will be rendered jobless if at the relevant point of time the office and the working of a registered company having the status of the Government company, in view of the share holding of the company by the State Government, working in the area falling within the territory of the State of Jharkhand, such employees will be jobless if not accepted by other company or by the successor State. The Act of 2000 gave only the power to distribute the share of the company to the newly created State or to keep it with the State of Bihar with its assets and liability including the employees making any arrangement suitable for the purpose of distribution of assets of the company but without giving any power to any of the authorities referred to above to render the employees jobless simply because of the fact that the State of Jharkhand has been created. We are constrained to observe and painfully also that in such a dispute, BHALCO and the State of Bihar should have immediately made arrangement for timely payment of salaries to the employees instead of fighting to disown the legitimate baby given birth by themselves in healthy conditions which was made disabled because of company's own mismanagement resulting into self-immolation of one person and death of several persons. Hon"ble Supreme Court, at this juncture, in public interest at the instance of a public spirited person like Kapila Hingarani and others took cognizance of the matter in W.P.(C) No. 488 of 2002 and without waiting for further damage immediately passed the orders providing the salary to the employees as early as possible on 9th May, 2003 making provision for disbursement of salary of the employees of the corporation and directed the States at that time to deposit a sum of Rs. 50 crores before the High Court for disbursement of salary to the employees of the company and in making the arrangements of the sum of Rs. 50 crores, it was directed that the High Court shall see that the same may be deposited from any source including by way of sale of assets of the Government companies/public sector undertakings be paid proportionately to the employees concerned. The Hon"ble Supreme Court also made it clear that the rights of the workman shall be considered in terms of Section 529-A of the Companies Act and directed the Central Government to take a

decision as regards division of assets and liabilities of the Government Companies/Public Section Undertakings in terms of the provisions of Act of 2000. However, in respect of the BHALCO, the Government of India took a decision on 13th September, 2004 which was in consonance with the directions which was subsequently issued by the Hon"ble Supreme Court dated 9th May, 2003 passed in Kapila Hingarani's case (supra). The Hon"ble Supreme Court in the case of Kapila Hingarani (supra) in the order dated 8th July, 2008 clearly observed that order to pay salary to the employees of the public sector undertakings of the State of Bihar and Jharkhand has been passed on the ground that the employees have a human right as also the fundamental right under Article 21 which the States are bound to protect and it has been made clear that the directions, which has been issued by the Hon"ble Supreme Court on 9th May, 2003 and the directions which were passed subsequent to that date, were passed in furtherance of the human and fundamental rights of the employees concerned and not by way of an enforcement of their legal right of arrears of salaries. The Hon"ble Supreme Court also observed that the above directions were issued which were necessary for the survival of the employees.

32. In spite of the orders passed by the Hon"ble Supreme Court indicating and drawing the attention of the two State Governments towards the inhumane treatment given to the employees of the Government companies, the employees who were in three digit figure are not getting any salary obviously since last 11 years and some of the employees died and they died in harness and this fact has been taken note of by the Hon"ble Supreme Court specifically in this matter referred to above. Today also, none of the counsel appearing for the State of Jharkhand, State of Bihar, BHALCO and JHALCO could specify any provision before this Court as to under what circumstances they could be treated to be employees removed, retrenched or dismissed from the service. The employees have been punished for non of their faults by the sovereign States by not taking any decision in time and not following the decision given by the Union of India and even by the Hon"ble Supreme Court. We may recapitulate, at this juncture, that the Hon"ble Supreme Court clearly held that BHALCO and JHALCO cannot be treated as one entity and decision given by the Union of India dated 13th September, 2004 is binding and this Court is of the view that this is not controverted that the employees services have not been terminated and till date the employees remained in employment then it could certainly be under the employment of the employer and the BHALCO has not removed any employee from the service. Admitted case is that these employees may not have been assigned any work on absolutely frivolous and illegal grounds, then also they continued to be the employees of BHALCO for all purposes and BHALCO is liable to pay all the arrears of salary and other benefits of service to all employees and to the heirs of deceased employees who died during this period.

33. So far as employees' right to get absorption in JHALCO is concerned, we are of firm view that it was a State Government decision as well as of the JHALCO to absorb the employees of BHALCO in JHALCO which at the relevant point of time was not illegal, not unjust, nor it can be said to be unreasonable or discriminatory rather at the time of taking

the decision, it was just proper and most needed decision taken by the State of Jharkhand and because of the fact situation that at the relevant point of time creation of JHALCO the working area of BHALCO was substantially, if not wholly, in the territory of the State of Jharkhand. It is thought fit by the State that the activities which were undertaken by the BHALCO in relation to irrigation in hilly areas of State of Jharkhand are required to be continued in the State of Jharkhand and when working persons were already available from BHALCO to work under JHALCO in the newly created State of Jharkhand, then there was no justification to remove those employees from BHALCO and to recruit new employees for the same purpose. At this juncture, we may also repeat that the aims and objects of the companies, BHALCO or JHALCO, are not to earn profit but these companies were constituted only to do and discharge state functioning of exploring and providing irrigation facilities in tough hilly areas in the country of India and particularly in the State of Bihar and subsequently within the state of Jharkhand and the profit was not the motive. In running these companies, in the aforesaid conditions, if losses are incurred, then these losses are, in fact, only for accounting purposes of the companies and such work if would have been in the hands of the State Governments, it would not have been termed as losses in commercial terms as sought to be projected to avoid the liabilities of the employees by the BHALCO and JHALCO and ultimately by the two States. In public welfare, it is the State's duty to put funds and putting these funds for public purpose cannot be termed to be the loss to the State but it is a gain to the State as the State is a welfare State under the Constitution of India and the State cannot shirk from the responsibility to do public work under their own scheme which they themselves framed for providing irrigation facilities to the poor public in the then State of Bihar and in the State of Jharkhand. Therefore, we are of the view that merely assigning work by the State Government of public utility by creating a company, the loss to the company is a secondary thing and the aim and object of public importance is the primary thing and because it is being done by a Government company, it cannot be termed to be a loss in any manner to the company or to the Government. The department of the Government, which is doing the work of irrigation facilities, is not supposed to earn profit when such work is undertaken in difficult area where no other entrepreneur will enter for its business, nor public will be in a position to pay the cost of that facility to the commercial organization, who may earn profit. We are addressing this because of the reason that much have been argued by the learned Counsel for the State of Jharkhand and BHALCO that the companies are running in losses and, therefore, initially BHALCO cannot bear the liability of these employees and the JHALCO is now running in huge losses and cannot pay the salaries of even the existing employees of JHALCO. This situation was created by the States and the companies themselves and not by these employees from whom work was not taken by the companies and ultimately by the State Governments. This is not a case of an ordinary magnitude but it is a case which is an example of inhumane attitude of the Government companies through the Governments, because of one reason that the salaries of large number of employees have not been paid by the Government companies for more than a decade to the employees without any reason. Therefore, it may be a departure from the well known principle like "no work no pay" on the basis of

which plea some time salary may be denied to the workmen under the provisions of the Industrial Disputes Act, 1947 for the period for which the workmen did not work or part payment may be made to them even after holding that the order of termination was illegal and back wages may be denied even after holding that the action of the employer to terminate the service of employee was wholly unjust and illegal. In this case, admittedly neither there is an order of retrenchment nor an order of termination of services of any of the employees and nor the employees have been dismissed and the employees of the BHALCO have not been absorbed in JHALCO so as to terminate services of employees in BHALCO then how salary of these employees can be denied to put these employees in worst position than the position to a person against whom a disciplinary action has been taken and removed and whose order of termination set aside, has been ordered to be re-instated with full or half back wages. Certainly, these employees' case is entirely different and during continuation of the service of these employees, the employer had no right nor has right to deny the salary on any count like they did not work. Therefore, taking this equitable ground also in consideration with the legal basis in the claim of the employees, we are of the view that BHALCO is liable to pay all the arrears of salary to the employees who have not been absorbed by the JHALCO till date and also to the heirs of the deceased employees who died during this period.

34. Now we consider the rights of the employees of BHALCO to be absorbed in JHALCO. As we have already taken notice that it is a decision of the JHALCO and the State of Jharkhand themselves to offer job to the employees of the BHALCO and that decision at that relevant point of time was just, legal, reasonable and passed as per the need of the time. Neither the State of Jharkhand nor JHALCO had any right to discriminatorily give appointment to the employees of BHALCO, when they had declared that they will take the employees of BHALCO without specifying any particular number and invited all the employees of BHALCO to take absorption in JHALCO. Otherwise also, the fact which is not in dispute is the area of working of JHALCO was in the entire State of Jharkhand as it is apparent from the memorandum of articles of JHALCO but at the time of creation of the State of Jharkhand these employees were in BHALCO, and it is not the case of State of Jharkhand or JHALCO that there is no need of continuation of the programme as undertaken by the JHALCO and just contrary to it, it was a conscious decision of the State of Jharkhand to continue the work and for this very purpose only the JHALCO was constituted under the Companies Act, 1956. The need of the employees was, therefore, imminent and urgent and the employees at that time were in service of BHALCO and there was no employee in the JHALCO and BHALCO employees were most suitable for the job in JHALCO and, therefore, the decision to absorb the employees of BHALCO in JHALCO was taken, which cannot be disowned by JHALCO and State of Jharkhand even on the ground of losses to the JHALCO accrued subsequently due to its own mismanagement. The contention of learned Counsel for the State of Jharkhand and JHALCO is that the Government decision dated 29th December, 2001 has been validly withdrawn by the State Government and that withdrawal has not been challenged is of no consequence in view of the fact that the decision dated 29th December, 2001 was with

respect to adaptation of laws and bye-laws of BHALCO and the memorandum prepared for the cabinet referred to above was only an illegal decision to convert the BHALCO into JHALCO. If it was not approved by the Cabinet as approved even then the fact remains is that BHALCO is a separate legal entity and JHALCO is separate entity and both BHALCO and JHALCO are the Government companies, one of the State of Bihar and another of the State of Jharkhand respectively and JHALCO under the supervision and guidance of its administration could have taken a decision to absorb the employees of BHALCO and that decision found to be just. Thus the employees have right to enforce the undertakings and offer given by the JHALCO to the employees of BHALCO and no reason has been given by the State of Jharkhand and JHALCO that how the employees who have been given appointment were given appointment discriminating the employees to whom appointments were not given at the relevant point of time by JHALCO and running into losses is a subsequent event happened after obviously a few years and that cannot justify non-absorption of the employees of BHALCO.

35. We are also conscious that while passing such type of order the Court must take into account the financial implications and cannot fasten the employee upon the employer merely because it may be lawful to do so. At the same time, in peculiar and exceptional circumstances, discussed above, we cannot ignore the equitable balance between financial implication upon the poor, mostly Class IV employees. In fact situation, we may observe that the companies may survive losses but man cannot survive without bread. The work undertaken is a work of importance and of public benefit and when the work is in respect of irrigation facilities of tough hilly areas like the State of Jharkhand financial losses to State is liable to be ignored. Without commenting in the manner in which, the decision has been taken by the management of the JHALCO denying the absorption we may feel it appropriate that some burden if created in terms of the monetary losses to the Government, a welfare State should have come forward to resettle these poor persons who are not in more than a 300 (three hundred) in total and who substantially are Class IV employees, if not all.

36. We are also of the considered opinion in view of the fact that these employees continued in service in BHALCO the salaries be paid to the employees by the BHALCO till they are absorbed or stand absorbed in the JHALCO and thereafter JHALCO shall pay the salaries of those employees. However, JHALCO can take a policy decision to deal with the employees stand absorbed by virtue of this order passed by this Court whether they are to be retrenched. If retrenched, then it can be done by paying adequate compensation and that decision is to be taken by the management by application of mind judiciously and keeping in mind the humanitarian approach and our observation may not be treated to be the direction or licence to the JHALCO to remove those employees without there being any just reasons.

37. Since it was the offer of the JHALCO to absorb the employees then as we have already discussed that the JHALCO shall absorb the employees now from the date of order of this Court i.e. today 16th June, 2011 and they shall be deemed to have been

absorbed in JHALCO with the employees entitled to the benefits of past service rendered by the employees in the BHALCO. But the State of Bihar and BHALCO are directed to pay the arrears of salary and other service benefits to the employees of erstwhile BHALCO upto order of this date within a period of three months from today and the liability to pay the salary of the employees who stand absorbed in JHALCO, shall be of JHALCO, however, from the date of joining of these Petitioners and other employees, if they approach JHALCO within a period of two months form the date of this order.

38. Learned Counsel appearing for the employees submitted that the employees may also be awarded interest for the salary which have been illegally not been paid without any rhyme and reason and during the continuation of the employment, the employee has been denied work by the BHALCO.

39. Looking into the facts of the case and period which has already been lost in this litigation and taking note of the condition of BHALCO and JHALCO we are not awarding any interest over the salary which have not been paid to the employees. We are not also not imposing exemplary cost on both the States i.e. the State of Bihar and State of Jharkhand so as to reduce their financial burden to help those poor persons who will get the benefit of not imposing the cost upon these four bodies.

40. The L.P. As are decided accordingly.