

SUPREME COURT OF INDIA

M.P. State Electricity Board

Vs.

Union of India

Writ Petition (civil) 675 of 2004

(S.B. Sinha and Dalveer Bhandari JJ.)

13.09.2006

JUDGMENT

S.B. SINHA, J :

Interpretation and application of Section 58 of the Madhya Pradesh Reorganisation Act, 2000 (for short "the 2000 Act") arises for consideration in these writ petitions.

Parliament enacted Electricity (Supply) Act, 1948 (for short "the 1948 Act"), in terms whereof the Madhya Pradesh State Electricity Board (for short "MPSEB") was established on 1.4.1957. It was a body corporate in terms of Section 12 thereof. The territorial jurisdiction of the Board was the entire State of Madhya Pradesh as notified and constituted by 'States Reorganisation Act, 1956' (for short "the 1956 Act").

A new State known as State of Chhattisgarh comprising of 16 districts carved out of the State of Madhya Pradesh was formed on 1.11.2000. Distribution of assets and liabilities of the States are indisputably governed by the 2000 Act. Pursuant to or in furtherance of the provisions of Section 58 of the 2000 Act, the State of Chhattisgarh was entitled to constitute its own State Electricity Board. It was constituted with effect from 15.11.2000. It started collecting revenue with effect from the said date but it offered the revenues collected to the MSEB till 30th November, 2000. The State of Madhya Pradesh also constituted a new Board with effect from 1.1.2001. It informed the Government of India about the formation thereof and requested it to issue necessary orders under Section 58(4) of the 2000 Act enabling the successor Boards to take over assets, liabilities of the existing Board.

A meeting of the officers of the both the States was held by the Special Secretary, Ministry of Home on creation of new States on 10.1.2001. On a complaint made by the State of Madhya Pradesh that the revenues were being collected illegally by the Chhattisgarh State Electricity Board (for short "CSEB"), it was recorded:

"The Government of India made clear that no unilateral action is to be taken by any State and revenues realized within the State relating to distribution of power should be remitted without fail to M.P. State Electricity Board till the Board is bifurcated on a date as certified by the competent

authority. It was decided that the new Boards should come into being by 31st March, 2001 positively. The Director, Ministry of Power indicated that steps were being taken by his Ministry to settle disputes of successor States and exercises were underway to complete the bifurcation of the State Electricity Board by end of the current financial year."

Several correspondences also passed between the respective State Governments and the Boards as well by and between them and the Central Government.

It stands admitted that the States could not arrive at a material agreement on the division of assets and liabilities of the MSEB. A notification was issued by the Government of India approving constitution of the successor Boards with effect from 15.4.2001. Guidelines in regard to division of assets, rights, liabilities, contracts and employees as also for arrangement for distribution of power were laid down therein. The State of Madhya Pradesh made a representation to the Secretary, Government of India, Ministry of Personnel requesting for modification and/ or review of the said notification in regard to the basis of the apportionment of assets and liabilities. A writ petition came to be filed by the MPSEB before the High Court of Delhi inter alia against the CSEB for remittance of revenues illegally retained for the period 1.12.2000 to 14.4.2001. Provisionally, apportionment of assets and liabilities was confirmed by the Government of India, Ministry of Personnel by a letter dated 4.12.2001 with effect from 15.4.2001 opining that the revenue collected by the CSEB before the said date should be remitted to MPSEB. The Central Government appointed the Central Electricity Authority (CEA) as an independent agency for ascertaining the total liabilities of the two States and their classification in terms of the purported criteria laid down in the notification dated 12.4.2001.

The State of Chhattisgarh filed a writ petition in the High Court of Chhattisgarh questioning the said orders of the Central Government dated 12.4.2001 and 4.12.2001. A transfer application was filed by the MPSEB for transfer of the said writ petition to the High Court of Delhi which was allowed by an order dated 19.8.2002.

The Central Government issued an order purported to be under Section 58(4) of the 2000 Act on 23.5.2003 provisionally allocating various liabilities of the MPSEB between the MPSEB and the CSEB. The said order was questioned by the CSEB before the High Court of Delhi.

In the course of hearing before the High Court of Delhi, the Union of India suggested that the dispute between the parties should be resolved by passing a final order by it upon giving an opportunity of hearing on all the issues raised by the parties in the said writ petition. The said suggestion on the part of the Central Government was accepted by the High Court of Delhi by an order dated 10.8.2004. Pursuant to or in furtherance of the said representation before the High Court, admittedly the Government of India convened formal meetings of the parties on 5.6.2004 and 28.9.2004. On or about 2.11.2004, a notification was issued fixing 15.11.2000 as the date of dissolution of the erstwhile MPSEB. It was further provided therein that the erstwhile MPSEB would remain functional within the State of Madhya Pradesh upto 31.12.2000. A notification was thereafter issued by the Government of India on 4.11.2004 in regard to apportionment of assets, rights and liabilities of MPSEB between successor Boards of Madhya Pradesh and Chhattisgarh. In the notification dated 4.11.2004, the basis of the apportionment of the various items were stated to be as under:

Fixed Assets

On the basis of geographical nexus

Current Assets

77.03:22.97 (MP : Chhattisgarh) in the ratio of power consumption Security Deposits from consumers On the basis of location of the consumers Liability on account of ED payable to the State Government 77.03:22.97 (MP:Chhattisgarh) in the ratio of power consumption Liabilities Long term 90:10 (MP:Chhattisgarh) in the ratio of fixed assets
Current 77.03:22.97 (MP:Chhattisgarh) in the ratio of power consumption

Post and Staff

As per recommendations of State

Advisory Committee EB

Staff related liabilities

As per Ministry of Power letter no.

42/8/2000-R&R (Vol. V) dated

6.1.2004

MPEB Power

Right to power

Along with plants

A statement showing principles adopted in orders dated 12.4.2001 and 23.5.2003 and changes made by order dated 4.11.2004 reads as under:

S.No.

Head (assets/

liabilities)

Principle of

allocation as per

order dated

12.4.2001 &

23.5.2003

Principle of
allocation as per
order dated

4.11.2004

1.

Fixed Assets

On geographical

nexus

On geographical

nexus

2.

Movable assets

Population ratio

(73.38:26.62)

Power

consumption ratio

(77.03:22.97)

3.

Liabilities

a. Project/ asset

specific

b. other + current

liability

With asset

Population ratio

(73.38:26.62)

In asset ratio

(90:10)

Power

consumption ratio

(77.03:22.97)

4.

Date of dissolution

15.11.2000

A statement showing the consequences of increasing the liabilities of MPSEB by more than about Rs. 2000 crores is given heretobelow: Rs. in crores

Liabilities

Total

MPSEB

CSEB

Remarks

Liabilities as

on 14.4.2001

16620

12976

3644

Division of liabilities

as per GOI order dt.

23.5.2003

Liabilities as

on

15.11.2000

11851

9946

1905

Division of liabilities

as per GOI order dt.

4.11.2004

Undistributed

liabilities

payable to

NTPC

107.99

107.99

0

Undistributed liabilities payable to NPCIL

12.15

12.15

0

Other

undistributed

liabilities

4646.08

4646.08

0

To be borne by

MPSEB as per GOI

Order dt. 4.11.2004

Addl.

Liabilities as

per order dt.

4.11.2004

16617.22

14712.22

(88.54%)

1905

(11.46%)

Revised liabilities as

on 14.4.2001

1736.22

-1739

Addl. Liabilities on

SEBs

305

-305

Net of surplus

revenue with CSEB

claimed by MPSEB

60

-60

Approx. revenue for the period 15.11.00 to 30.11.00

2101.22-2104

Net loss as on

14.4.2001

The legality and/ or validity of the said two notifications are in question in the writ petition filed before this Court.

The writ petitions filed by the CSEB and pending before the High Court of Delhi questioning the legality of the orders dated 12.4.2001, 4.12.2001 and 23.5.2003 passed by the Central Government, have been transferred to this Court by orders dated 25.4.2005 and 10.5.2005.

We may notice that in this writ petition the writ petitioner has prayed for the following reliefs:

"(a) Call for records of the proceedings of the Central Government relating to the Notifications/ Orders dated 12.04.2001, 26.12.2001, 23.5.2001, 2.11.2004 and 4.11.2004 passed by the Ministry of Power, Govt. of India;

(b) Quash the impugned Notifications/ Orders dated 2.11.2004 and 4.11.2004 being unconstitutional and in violation of Article 14 of the Constitution;

(c) Direct Respondent No. 1 to dissolve MPEB in consonance with orders/ directions dated 12.4.2001, 4.12.2001 and 23.5.2003 passed by the Government of India under Section 58(4) of the MPRA;

(d) Direct Respondent No. 1 to perform its constitutional and the statutory duty to lay down proper criterion for apportionment of assets, rights and liabilities in accordance with law and to ensure equitable, just, fair and reasonable apportionment of assets, rights and liabilities amongst the successor Boards on the basis of revenue potential so as to avoid undue hardship and disadvantage to any of the successor Boards; and

(e) Pass any other order and/ or direction, as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

The main contentions raised in the writ petition as also the transfer petitions are :

(i) Fixation of a date of dissolution as 15.11.2000 is ultra vires Article 14 of the Constitution of India. (ii) Division of assets and liabilities had been made without giving due regard to revenue generation potential which is of paramount importance.

(iii) The Central Government acted arbitrarily in rejecting the contention of the Petitioner Board and in particular in ignoring the provisions contained in the proviso appended to Section 131 of the Electricity Act, 2003. (iv) Apportionment of assets and liabilities pursuant to fixation of cut-off date as 15.11.2000 had caused serious prejudice to the Petitioner Board as would be evident from the following:

(a) as against the consumption of 78%, the capacity allotted was only 68%.

(b) as against 88% of liabilities allocated to Madhya Pradesh, the revenues allocated is 64%.

(c) The order of the Central Government has failed to take into account the adverse consumer mix.

(d) MPSEB has to service large agricultural load with low revenue yield and thus left with lower average realizable tariff as compared to CSEB which is as under:

Description

Unit

MPEB

MPSEB

CSEB

Units sold

Mus

18,958.20

13,560.11

5398.08

Total

Revenue

Rs. Crore

5,234.22

(100%)

3,460.41

(66%)

1773.81

(34%)

Average

Realisable

Tariff

Paise/KWH

276

255

329

(e) The effect of the bifurcation as per the impugned notifications dated 2.11.2004 & 4.11.2004 on the MPSEB finances are as under:

Particulars

MPEB

After Bifurcation

MPSEB

CSEB

Total Income

5,993.02

3,991.27

2,001.75

-Sale of Power

5,318.60

3,543.65

1,774.95

-Subsidy &

Grants

279.46

205.06

74.40

-Other Income

394.96

242.55

152.41

Total

Expenditure

7,466.83

6,007.15

1,459.68

-Power Purchase

2,866.56

2,338.08

528.48

-Power

Generation

1,488.43

1,175.39

313.04

-Repairs &

Maint.

218.03

142.86

75.17

-Employee Cost

1,142.56

899.94

242.62

-Interest & Fin.

Charge (Net)

953.31

785.65

167.66

-Depreciation

564.46

459.59

104.87

-Admin.

Charges

92.27

77.65

14.62

-Other Debits

150.96

125.00

25.96

-Net prior period

Exp.

84.50

78.26

6.24

-Expenses

Capitalised

-94.25

-75.27

-18.98

Net Surplus (+)/

Deficit (-)

(-) 1,473.81

(-)2,015.88

(+)542.07

It is contended that by reason thereof, the petitioner - Board has been saddled with an additional liability of Rs. 2015 crores whereas the CSEB was created with an annual profit and a power surplus. The ratio of population between the States of Chhattisgarh and Madhya Pradesh although is 27:73 but in view of the fact that the State of Madhya Pradesh got lesser proportion of both natural resources and physical assets; yet it was saddled with liabilities which are disproportionate to its revenues. The Central Government having exercised its power under Section 58(4) of the 2000 Act and the parties have acted on the basis thereof, it acted illegally without jurisdiction in fixing a date purported to be under Sub- section (3) of Section 58 of the 2000 Act as 15.11.2000.

The contentions of the CSEB, on the other hand, are:

(i) The writ petition is not maintainable as the Central Government in exercise of its power under Section 58 of the 2000 Act acted in a quasi-judicial capacity and, thus, the impugned order cannot be said to be violative of Article 14 of the Constitution of India. (ii) The impugned notifications having been issued upon compliance of the principles of natural justice and upon due compliance of the mandate contained in Section 58 of the 2000 Act, no exception to the notifications dated 2.11.2004 and 4.11.2004 can be taken. (iii) Power granted to a new State to constitute its Electricity Board is an absolute one and it can be made functional with effect from the date of its constitution and having regard to the fact that the CSEB was constituted on 15.11.2000, the Central Government cannot be said to have acted illegally or without jurisdiction in fixing the said date as the appointed day in terms of Sub-section (3) of the 2000 Act.

The stand of the Central Government was that the provisional order dated 12.4.2001 provided for only an interim arrangement and, thus, it could fix a specific date in terms of sub-section (3) of Section 58 of the 2000 Act. As CSEB came into existence on 15.11.2000, the date suggested by the MPSEB, viz., 15.4.2001 would itself have been arbitrary and unreasonable. Current assets and liabilities of the Board were required to be apportioned and the same having been done on the basis of power consumption ratio of the States, which is roughly 77:23, the same cannot be said to be arbitrary particularly when the current liabilities, mostly on fuel and power purchases, were directly relatable to the power consumption ratio.

The 2000 Act was enacted to provide for the reorganization of the existing State of Madhya Pradesh and for matters connected therewith. Section 2 of the said Act provides for the interpretation of the terms mentioned thereto. Section 2(a) defines the "appointed day" to mean the day which the Central Government may, by notification in the Official Gazette, appoint. Indisputably, the appointed day is 1.11.2000.

'Population ratio' in relation to the States of Madhya Pradesh and Chhattisgarh is defined to mean the ratio of 485.7:176.2. 'Successor State' in relation to the existing State of Madhya Pradesh has been defined in Section 2(j) to mean the State of Madhya Pradesh or Chhattisgarh.

The 2000 Act makes various provisions for apportionment of assets and liabilities between the two States. Section 37 of the 2000 Act provides for apportionment of the assets and liabilities of two States. Section 43 provides for the assets and liabilities relating to the undertaking of the existing State of Madhya Pradesh whether directly owned or through a body corporate constituted or incorporated or registered under any Central, State or Provincial Act. Three undertakings of the State, viz., the State Electricity Board, the State Road Transport Corporation and the State Warehousing Corporation have, however, been given a special treatment in terms of Section 58 of the 2000 Act. As interpretation of the said provision would fall for our consideration, we may notice the relevant clauses thereof herein:

"58. Provisions as to Madhya Pradesh State Electricity Board, State Road Transport Corporation and State Warehousing

Corporation .--

(1) The following bodies corporate constituted for the existing State of Madhya Pradesh, namely:--
(a) the State Electricity Board constituted under the Electricity Supply Act, 1948;

(b) the State Road Transport Corporation established under the Road Transport Corporations Act, 1950; and

(c) the State Warehousing Corporation established under the Warehousing Corporations Act, 1962, shall, on and from the appointed day, continue to function in those areas in respect of which they were functioning immediately before that day, subject to the provisions of this section and arrangements for the functioning of such body corporates as may be mutually agreed upon between the successor States failing which to such directions as may, from time to time, be issued by the Central Government.

(2) Any directions issued by the Central Government under sub-section (1) in respect of the Board or the Corporation shall include a direction that the Act under which the Board or the Corporation was constituted shall, in its application to that Board or Corporation, have effect subject to such exceptions and modifications as the Central Government thinks fit. (3) The Board or the Corporation referred to in sub-section (1) shall cease to function as from, and shall be deemed to be dissolved on such date as the Central Government may, by order, appoint; and upon such dissolution, its assets, rights and liabilities shall be apportioned between the successor States of Madhya Pradesh and Chhattisgarh in such manner as may be agreed upon between them within one year of the dissolution of the Board or the Corporation, as the case may be, or if no agreement is reached, in such manner as the Central Government may, by order, determine:

(4) Nothing in the preceding provisions of this section shall be construed as preventing the Government of the State of Madhya Pradesh or, as the case may be, the Government of the State of Chhattisgarh from constituting, at any time on or after the appointed day, a State Electricity Board or a State Road Transport Corporation or a State Warehousing Corporation for the State under the provisions of the Act relating to such Board or Corporation; and if such a Board or Corporation is so constituted in either of the States before the dissolution of the Board or the Corporation referred to in sub-section (1),--

(a) provision may be made by order of the Central Government enabling the new Board or the new Corporation to take over from the existing Board or Corporation all or any of its undertakings, assets, rights and liabilities in that State, and (b) upon the dissolution of existing Board or Corporation,--

(i) any assets, rights and liabilities which would otherwise have passed to that State by or under the provisions of sub-section (3) shall pass to the new Board or the new Corporation instead of to that State;

(ii) any employee who would otherwise have been transferred to or re-employed by that State under sub-section (3), read with clause (i) of sub-section (5), shall be transferred to or re-employed by the new Board or the new Corporation instead of to or by that State."

An electricity board is constituted under the 1948 Act. Constitution and incorporation of a Board, thus, is a function required to be carried under the 1948 Act. After coming into force of the 1948 Act, each State is enjoined with a duty to constitute its own electricity board. On reorganization of the State, the MPSEB was to be dissolved. Both the States were required to constitute their new Boards. Assets and liabilities of the erstwhile Board were, thus, required to be apportioned between

the two new entities. The framers of the Act probably opined that, keeping in view of the fact that the dispute in regard to apportionment of assets and liabilities would be a State function, both the States can resolve the dispute, if any, amicably. However, a provision had to be incorporated in the said Act that in case the parties being not resolving their disputes amicably, the Central Government shall by an order determine a date as also issue requisite directions in regard to apportionment of assets and liabilities.

Sub-section (1) of Section 58 of the 2000 Act is an enabling provision providing for continuation of function of the Board till arrangements for the functioning of such body corporates as may be mutually agreed upon between the successor States, failing which such directions as may, from time to time found necessary, be issued by the Central Government.

Sub-section (3) of Section 58 of the 2000 Act empowers the Central Government to fix a date as it may by order appoint. Once such a date is fixed, the Board would cease to function. With effect from the date so appointed by the Central Government, the Board shall be deemed to be dissolved. Sub-section (3) of Section 58 of 2000 Act also provides for consequences of such dissolution, i.e., upon such dissolution, its assets, rights and liabilities shall be apportioned between the successor States. Such apportionment is to be made in the manner, in absence of an agreement between the two States, as the Central Government may by order determine. Sub-section (4) of Section 58, on the other hand, contains a special provision. It enables both the States to constitute respective State Electricity Boards. Such constitution of the State Electricity Boards could only be made on or after the appointed day, i.e., 1.11.2000.

In the event of constitution of such Boards by either of the States before the dissolution of the Board by the State concerned, the Central Government by order direct take over of the new Board or Corporation from the existing Board or Corporation all or any of its undertakings, assets, rights and liabilities thereof. Clause (b) of Sub-section (4) of Section 58 contemplates that upon such dissolution any asset, right and liability which would otherwise have passed to that State by or under the provisions of sub-section (3) shall pass to the new Board or the new Corporation instead of to or by that State.

The principal question which arises for consideration is that if the Central Government had directed that the Board constituted by the respective States shall act in a particular manner, whether the same could subsequently be changed. The difficulty which arises in application of the provisions of Sub-sections (3) and (4) of Section 58 of the 2000 Act lies principally due to the fact that both the Boards have been constituted with effect from different dates. Whereas CSEB was constituted with effect from 15.11.2000, the MPSEB was constituted with effect from 1.1.2001. Unfortunately, the Central Government passed a provisional order. It is, however, difficult to accept the submission of Mr. Vivek Tankha, learned senior counsel appearing on behalf of the Petitioner, that no provisional order could at all be passed. Passing of a provisional order, in our opinion, in terms of sub-section (4) of Section 58 is implicit. By reason of the said provision, not only the States are enabled to constitute separate State Electricity Boards which even otherwise could have been done in terms of the 1948 Act but also to take over the functions of the erstwhile Board. Such taking over of the functions may be in its entirety or in phases. We may notice that whereas in clause (a) of sub-section (4) of Section 58 of the 2000 Act the expression "all or any of its undertakings, assets, rights and liabilities in that State" having been used, the word "all" is missing in clause (b) thereof. Evidently, the Parliament thought it to be unnecessary. Whereas clause (1) provides for mere take over of function from the existing Board all or any of its undertakings; clause (b) has a direct nexus with the

final order which may be passed under Sub-section (3) of Section 58 of the 2000 Act.

We may notice that factually the CSEB started functioning with effect from 15.11.2000 although it had remitted all the revenues collected to the MPSEB from 15.11.2000 to 31.11.2000. It had started independent collection of revenue with effect from 1.12.2000. MPSEB as also the State of Madhya Pradesh although had all along been aware that the CSEB had been realizing revenue from the consumers, a protest was made. Only in the meeting it was recorded that no new State should do it unilaterally. The minutes of the said meeting or the direction of an officer of the Central Government was not and could not have been a direction in terms of Sub-section (4) of Section 58 of the 2000 Act.

There must have been some bickering between the two States with regard to collection of revenue. It appears that the Additional Secretary of MPSEB by a letter dated 21.11.2000 directed the Chief Engineer, CSEB that the revenue collections should be kept in Chhattisgarh and should not be remitted to the Madhya Pradesh with effect from 21.11.2000. Yet again in the minutes of discussions between the Chief Ministers of the States of Chhattisgarh and Madhya Pradesh held on 25th November, 2000, it was acknowledged that the State of Chhattisgarh had already set up a separate Electricity Board with effect from 15.11.2000. It was further noticed that it has also approached the Government of India for orders under Section 58(4) of the 2000 Act. In the said backdrop, it was inter alia agreed:

"Since the Government of Chhattisgarh has already set up a separate Electricity Board w.e.f. 15.11.2000 and approached the Government of India for orders u/s 58(4) of the MPRA, 2000, it has become imperative to consider relevant principles for apportionment of assets, rights & liabilities and manpower of the MPEB analogous to the principles enunciated in the Madhya Pradesh Reorganization Act, 2000 for apportionment of assets and liabilities of the State Government (Chapter VI) and for undertakings (Section 43), assets and liabilities should be shared in the same ratio more so because the ability to discharge liabilities is dependant on the productive potential of the assets. Relevant ratios for the successor States of Madhya Pradesh and Chhattisgarh are as follows:

Item

Chhattisgarh

M.P.

1.

Population ratio

(S.2(h), MPRA)

176.2

485.7

2.

Own generation

31.03%

69.87%

3.

Energy supply

(ex-bus)

21.43%

78.57%

Assets, rights and liabilities of the MPEB can provisionally be shared between the successor States according to any of these ratios, since entry/ operation of non-State owned organizations is now not barred by law as well as practice. However, in order to maintain present arrangements for generation, transmission and supply of electric power in both the successor States safeguards should also be provided u/s 75 of the Madhya Pradesh Reorganization Act."

Yet again the Chief Secretary of the Government of Madhya Pradesh by a letter dated 28.11.2000 addressed to the Secretary, Ministry of Power opined that the principles for apportionment of the assets should be as given in the record of discussions of the meeting dated 25th November, 2000. The Government of Madhya Pradesh expressed its view that the assets, rights and liabilities of the MPSEB provisionally be shared between the successor States according to any of those ratios. It was, however, suggested:

"However, while issuing orders under Section 58(4)(a) of the MP Reorganisation Act, 2000, prior to dissolution of the MPEB, the Government of India should simultaneously make provision for the division of : -

A. Fixed assets

B. Movable assets/ stores

C. Right to revenues/ receivables

D. Right to collect arrears

E. Liabilities (mutual payment to be backed by State Govt. mandate to RBI)

F. Contracts (including PPAs)

G. Allocation of employees

So that the successor organizations may be enabled to become fully functional without any delay."

Yet again, the Chief Minister of the Government of Madhya Pradesh in a letter dated 27.12.2000 addressed to the Chief Minister of the State of Chhattisgarh recognized the necessity of having talks at their level so as to arrive at a mutually acceptable solution to the issues relating to the division of Electricity Board. From a circular letter dated 19th December, 2000 issued by the MPSEB, it appears that it was recognized that the CSEB had been constituted and it had started working independently with effect from 1.12.2000 stating:

"The new State of Chhattisgarh has been constituted w.e.f. 1.11.2000. Thereafter a separate Chhattisgarh State Electricity Board has been constituted for the new State, which has started working independently w.e.f. 1.12.2000. In respect thereof, it has been decided that after the issue of this circular, matters relating to the various offices/ employees of the Electricity Board situated in the State of Chhattisgarh may not be forwarded to the Board for its approval and all such pending matters may be returned after listing them out."

The Minister of Power, Government of India noticing certain grid indiscipline as regards drawal of power from the grid requested the Chief Minister of the State of Chhattisgarh stated:

"I would also urge upon you to take in immediate review of the pattern of drawls from the regional grid and ensure that drawls under no circumstances exceed the quantum is scheduled by Regional Load Despatch Centre. For this purpose you may kindly give instructions to your SEB to strictly maintain grid discipline, including resort to load shedding it and when necessary."

This also goes to show that the functioning of the CSEB had been recognized by the Central Government.

Yet again the Chief Secretary of the Government of Madhya Pradesh by a letter dated 29th January, 2001 addressed to the Secretary, Ministry of Power stated:

"I would also urge that while assets, rights and liabilities may be transferred to the successor Boards in the respective States by the order of the Central Govt. u/s 58(4), unilateral appropriation by States is not permissible under the Act; and this view was confirmed by Govt. of India, in the meeting convened by the Ministry of Home Affairs on 10.1.2001, who had made clear that no unilateral action is to be taken by any State and revenues realized within the State relating to distribution of power should be remitted without fail to the MPEB till the Board is bifurcated on the date as certified by a competent authority."

Allocation of power between the two States had also started, as would appear from an order of the Central Government of the Ministry of Power dated 31st January, 2001.

Furthermore, the Chief Minister of the Government of Madhya Pradesh in a letter dated 20th February, 2001 addressed to the Minister of Power, Government of India stated:

"As you are aware, the State of Madhya Pradesh was bifurcated on 1st November 2000 and the rights, assets and liabilities of the MP Electricity Board have to be divided between the successor States under Section 58 of the MPRA, 2000.

It is understood that the Government of India contemplate issue of provisional orders in the near future, since successor Boards have already set up by the Governments of Madhya Pradesh and Chhattisgarh. MPEB has huge financial liabilities and the future interests of creditors (including GoI institutions) have also to be borne in mind. It is our earnest desire that this distribution, though a complex task, be fair to both the States by ensuring that assets and liabilities are divided in the same proportion; and should not lose sight of the fact that, unlike the State Government, the MPEB is a commercial entity.

You will agree that the earning capacity (turnover sales revenue) of any enterprise is by far the best index of its capability to discharge liabilities. While this capacity can be assessed by experts, in the interim suitable proxies should be used to estimate the situation closely enough so that neither of the successor Boards is handicapped at start. As you know, sales revenues of the Electricity Boards are dependant on the generation capacity (variable), the tariff rate and the consumer profile (which are relatively constant). Generation capacity is, thus, directly correlated with sales revenues and we have, therefore, suggested that this measure be used for distribution of liabilities instead of population, which has no economic nexus with the earning capacity of the Electricity Board. I request that the Government of India may abjure any unequal, interim division based on simplistic assumptions which will endanger the viability of the successor boards, while making subsequent adjustments an arduous task. The provisional order may also come into force prospectively; and revenues unilaterally appropriated by the CSEB remitted to the MPEB before that date, so that the organization may discharge accrued liabilities towards coal companies, NTPC, etc."

It appears that a meeting was also held between the Empowered Committees on 3rd July, 2002 at Bhopal in regard to the division of assets and liabilities wherein a large number of officers represented their respective States participated. In the context of independent working of the two State Electricity Boards, it appears, an order dated 12th April, 2001 was issued. Paragraph 2 of the said Order categorically states that the assets, liabilities, rights and undertakings of the existing Board would provisionally pass on to the successor Boards with effect from 15.4.2001 in the manner specified therein. CSEB contends that the said order was an artificial one. Such a contention must have been raised by it before the Central Government also.

It may or may not be legal but indisputably it was a provisional one. Although there does not exist any provision in Sub-section (4) of Section 58 therefor, the Central Government in exercise of its statutory power was not denuded to pass a provisional order. Even under Section 14 of the General Clauses Act, a statutory authority may exercise his statutory power from time to time. Furthermore, on a plain reading of the provision of Sub-section (4) of Section 58 vis-à-vis Sub-section (3) thereof, it appears that any order passed by the Central Government directing a new Board or Corporation to take over from an existing Board or Corporation evidently would be a provisional power in the sense that the same would be subject to a final decision which may be taken by the Central Government in terms of Sub-section (3) of Section 58 of the 2000 Act.

It is difficult to accept the contention of Mr. Tankha that sub-section (3) of Section 58 of the 2000 Act must follow an order passed under sub-section (4) thereof. If such a contention is accepted, the same would result in anomaly or absurdity. As we have noticed hereinbefore, in terms of sub-section (4) of Section 58, the Central Government is not required to pass a final order in the sense that the take over may be in relation to all or any of the undertakings and the assets, rights and liabilities are qualified by the expression "take over". Whereas sub-section (3) of Section 58 contemplates dissolution of the erstwhile Board, as we have noticed hereinbefore, the date on which

the new Board takes over from the existing Board may be different from its dissolution. Constitution of two boards admittedly has been made from different dates. The Central Government was to fix any of them or specify another date.

Once an appointed day was fixed by the Central Government, this Court can interfere therewith only if it is violative of Article 14 of the Constitution of India being arbitrary in nature. The order impugned in the writ petition was admittedly passed by the Central Government upon giving an opportunity of hearing to both the parties. We have referred to some of the correspondences exchanged between the parties and/ or the respective State Governments inter se or with the Central Government only for the purpose of showing that there had been certain materials before the Central Government to appoint a day for the purpose of sub-section (3) of Section 58 of the 2000 Act. Sub-sections (3) and (4) provide for a scheme. A meaningful interpretation is required to be given thereto. Both the provisions are required to be construed harmoniously.

The Central Government under the 2000 Act has an important role to play. Such a statutory role is envisaged only when the States differ in their approach. It was, therefore, required to resolve the dispute wherefor it was obligatory on its part to arrive at an independent decision.

The respective Boards had come into being on 15.11.2000 and 1.1.2001. The Central Government as indicated hereinbefore could have chosen any of the aforementioned dates. For the said purpose, the functioning of the respective Boards was required to be considered.

While interpreting the said provisions for determining the dispute between the Boards, the Central Government was bound to consider the hardships which may have been faced by the parties. It may also be that the writ petitioner Board had altered its position, pursuant to the provisional order of the Central Government, but the same was not decisive. It could have been only one of the factors for arriving at a decision by the Central Government.

Sub-section (3) of Section 58 may not be a stand alone clause, but it envisages passing of a final order. Once an order is passed, a legal fiction is raised by reason whereof the existing Board would be deemed to be dissolved. For such purposes, it was not necessary that actual state of affairs should have been the putative state of affairs.

In *Ashok Leyland Ltd. v. State of T.N. and Another* [(2004) 3 SCC 1], this Court observed:

"In *Bhavnagar University v. Palitana Sugar Mill (P) Ltd.* (SCC 111 at p. 123) it was stated that the purpose and object of creating a legal fiction in the statute is well known. But when a legal fiction is created it must be given its full effect. It was held in *East End Dwellings Co. Ltd. v. Finsbury Borough Council*: (All ER p. 599 B-C) "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that, having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs." (See also *ITW Signode India Ltd. v. CCE* Scale : SCC para 58.)

71. These decisions, therefore, show that whenever a legal fiction is created by a statute, the same shall be given full effect."

[See also *Bharat Petroleum Corporation Ltd. v. P. Kesavan and Another*, (2004) 9 SCC 772]

What is, thus, contemplated by clause (b) of Sub-section (4) of Section 58 of the 2000 Act is that upon dissolution of the existing Board, the assets, rights and liabilities instead of vesting or continuing to vest in the State as was contemplated under Sub-section (3) shall vest in the new Board.

In that view of the matter, the submission of Mr. Tankha that the word "and" used in between clauses (a) and (b) of sub-section (4) of Section 58 of the 2000 Act must be read conjointly is devoid of any merit. The word "and" has been used for the purpose of showing the two different consequences arising therefrom.

Clauses (a) and (b) of sub-section (4) of Section 58 of the 2000 Act operate in different fields. They have different consequences and, thus, both cannot operate simultaneously. When an order is passed by the Central Government under clause (a) of sub-section (4) of Section 58, it merely provides for only take over of the existing Board by the new Board but the same would not mean that the date provisionally fixed must be the date of dissolution as envisaged under sub-section (3) thereof. Two different dates are, thus, possible to be fixed, one provisional and other final. When a date is appointed in terms of sub-section (3) of Section 58 of the 2000 Act, the same shall be final and the consequences arising therefrom shall ensue.

In the backdrop of the aforementioned events and particularly in view of the fact that the Central Government had passed the impugned orders in terms of its undertaking given before the High Court of Delhi and upon compliance of the principles of natural justice, it is difficult for us to agree with the contention of the learned senior counsel that the Central Government has failed to apply its mind.

We, however, agree with Mr. Tankha that sub-section (1) of Section 58 of the 2000 Act contemplates only a situation where the existing Board is dissolved after the appointed day and it is continued till its dissolution. The Act to that effect is anomalous but it does not lead to an absurdity. Although the writ petitioner Board came into force from 1.1.2001, having regard to the fixation of the appointed day as 1.11.2000, there cannot be a vacuum and with a view to avoid an absurd situation, all attempts must be made to iron out the creases. When a statute is ambiguous, the construction which better serves the ends and answers the principles of fairness and justice should be accepted.

Unfortunately, in this behalf, while enacting the 2000 Act, the Parliament did not follow the corresponding provisions of the 1956 Act in terms whereof the original State Electricity Board was to function for a period of one year from the appointed day. The said provision evidently was made in the 1956 Act evidently for giving effect to the arrangements in regard to commencement of functioning of the new Board which would take some time and with a view to avoid a situation of this nature. But only because there does not exist any such provision, the same leads to some amount of ambiguity, it would not mean that we would not give effect to the substantive provision as contained in Sub-section (3) of Section 58 of the 2000 Act.

Illegality, if any, committed by CSEB in taking over of the assets of the Madhya Pradesh Electricity Board without there being any formal order of the Central Government in terms of Section 58(2) of

the 2000 Act by itself may not be enough to arrive at the conclusion that the cut-off date fixed would be vitiated in law.

It could have been a relevant consideration but not the only one.

We, therefore, are of the opinion that the cut-off date fixed by the Central Government cannot be said to be so arbitrary so as to attract the wrath of Article 14 of the Constitution of India. The logical corollary of our finding would be that the said date has been fixed in supersession of the earlier orders.

We have noticed hereinbefore that the said order has been issued in supersession of all earlier orders. The writ petitions filed by the CSEB questioning the validity of the said orders, therefore, become infructuous.

The only question which survives now is as to whether the order dated 4.11.2004 regarding division of assets and liabilities between two successor Boards is just and proper. The apportionment of current assets and liabilities has been made on the basis of power consumption ratio of States. Any other variable might not have any rational nexus with the apportionment of current assets and liabilities. It was submitted that the Central Government had adopted the most rational method of apportionment of current assets and liabilities as the power consumption ratio had a rational link with the subject matter of apportionment. It was further submitted that any change from this principle would have resulted in the same grievance from the CSEB. Long term assets and liabilities were divided in the ratio of 90:10 and hence, overall, the MPSEB had been given 85% of the assets and 84% of the liabilities. The action on the part of the Central Government cannot hence be said to be irrational. It may be observed that the revenue generation capacity would be the most favourable variable to them as would be clear from the table given below:

Criteria

Madhya Pradesh

Chhattisgarh

Consumption

77%

23%

Connected load

79%

21%

Energy Consumption

77%

23%

Installed Capacity

67%

33%

Revenue Generation

64%

36%

We have noticed hereinbefore that at one point of time, the MPSEB was agreeable for apportionment of the assets on any of the grounds.

Revenue generation capacity may although be one of the grounds, the same cannot be said to be an irrelevant criteria as it has a rational nexus with current assets and liabilities. Fixing current liabilities on the basis of revenue generation capacity is not and cannot be held to be arbitrary or irrational.

Population ratio as defined in Section 2(h) is not relevant for application of Section 58. Whenever population ratio is to be applied for the purpose of apportionment of assets and liabilities, the Parliament stated so categorically. We may refer to, by way of example, that in Sections 42 and 43 the division of assets and liabilities have been made relatable to the population ratio. In the instant case, the Central Government had maintained two other criteria, viz., geographical constitution and fixed assets.

Ordinarily, in a matter of this nature, this Court, in exercise of its discretionary jurisdiction under Article 32 of the Constitution of India shall not interfere. It would exercise judicial restraint. It may be erroneous but not illegal. It may not be just and proper for one of the State Boards, but it is for the other.

In *UJ. Fernandes & Co. v. The Deputy Chief Controller of Imports & Exports and others* [(1975) 1 SCC 716], this Court held: "Really, the petitioner's contention is that the licensing authorities misapplied or wrongly applied the Imports and Exports Control Act. A petition under Article 32 will not be competent to challenge any erroneous decision of an authority. (See *Gulabdas & Co. v. Assistant Collector of Customs and State of J.&K. v. Mir Gulam Rasul.*) A wrong application of law would not amount to a violation of fundamental right. Das, C.J. said in the case of *Gulabdas & Co.* that if the provisions of law are good and the orders passed are within the jurisdiction of the authorities there is no infraction of fundamental right if the authorities are right or wrong on facts. In the case of *Gulabdas & Co.* the petitioners challenged the order of the Assistant Collector of Customs The Customs Authorities assessed duty under Item 45(4) of the Indian Customs Tariff. The petitioners in that case contended that the duty should have been assessed under Item 45(a). This Court held that there was neither any violation of fundamental right under Article 19 or any unequal treatment and the petition was not maintainable. This Court in the case of *Ujjam Bai v. State of U.P.*

as also in the case of Bhatnagars & Co. Ltd. v. Union of India held the same view that any erroneous decision would not be a violation of fundamental rights."

In Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others v. Union of India and Others [(1981) 1 SCC 568], this Court held:

"In view of the fact that neither the decision to sell nor the sale proceedings were unreasonable, unjust or unfair, it cannot be held that the petitioner's rights if any, under Article 14 are violated. The learned Attorney-General contended that arbitrariness would be actionable under Article 32, only if it causes injury to the fundamental rights of the petitioner, and that the petitioners in the instant case have no fundamental right in the exercise of which they can challenge the sale. We consider it unnecessary to examine this contention because the sale is not vitiated by any unfairness or arbitrariness. If and when a sale of public property is found to be vitiated by arbitrariness or mala fides, it would be necessary to consider the larger question as to who has the right to complain of it."

We, therefore, are of the opinion that it is not a case where the Court would exercise its extraordinary jurisdiction under Article 32 of the Constitution of India.

For the reasons aforementioned, the writ petition filed by MPSEB is dismissed and the transfer cases filed by CSEB are allowed. No costs.