

CALCUTTA HIGH COURT

B.S.E. Board

Vs.

Patna Electric Supply Co. Ltd

A.F.O.O. No.16 of 1980

(Murari Mohan Dutt and Ajit Kumar Sarkar, JJ .)

20.07.1981

JUDGEMENT

M.M. Dutt, J.

1.The appellant, the Bihar State Electricity Board has, in this appeal, challenged the propriety of the judgment of Sabyasachi Mukharji, J. whereby the learned Judge made the Rule Nisi issued on the application under Article 226 of the Constitution of the respondents Nos.1 and 2, the Patna Electric Supply Company and one of its directors, absolute.

2. On Feb.6, 1924, a license was granted by the Government of Bihar to Octavius Steel and Co. Ltd. for the supply of electrical energy. The said license was transferred in favour of the respondent No.1, the Patna Electric Supply Co. Ltd. on Jan.5, 1973, the Bihar State Electricity Board served a notice upon the company under sub-section (1) of Section 6 of the Electricity Act, 1910 (hereinafter referred to as the Act), requiring the company to sell the undertaking to the Bihar State Electricity Board on the expiry of the period of 50 years from the commencement of the license, that is, at 12 O'clock in the night between the 5th and 6th Feb. 1974 and further to deliver possession of the undertaking on the expiration of the above period of 50 years pending the determination and payment of the purchase price.

3. At this stage, it is necessary to refer to some of the provisions of the Act and the amendments made thereto in order to appreciate the respective cases of the parties.

4. Section 6 (1) of the Act provides as follows :

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

(a) in the case of a licensee granted before the commencement of the Indian Electricity (Amendment) Act, 1959, on the expiration of each such period as is specified in the licensee; and

(b) in the case of a license granted on or after the commencement of the said Act, on the

expiration of such period not exceeding twenty years and of every such subsequent period, not exceeding ten years, as shall be specified in this behalf in the license; have the option of purchasing the undertaking and such option shall be exercised by the State Electricity Board serving upon the licensee a notice in writing of not less than one year requiring the licensee to sell the undertaking to it at the expiry of the relevant period referred to in this sub-section."

Sub-sections (2), (3), (4) and (5) of Section 6 *inter alia* provide that the State Electricity Board will be entitled to exercise the option of purchasing the undertaking if the State Government or any local authority constituted for an area within which the whole of the area of supply is included refused elected not to purchase the undertaking. Sub-sections (6) and (7) provide as follows :

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

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

Section 7 of the Act *inter alia* provides for the vesting of the undertaking in the purchaser upon the completion of the sale on the date on which the undertaking is delivered to the intending purchaser whichever is earlier. Sub-section (1) of Section 7-A is as follows :

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

Sub-section (2) of Section 7-A provides for the computation of the market value of an undertaking. Under sub-section (4), where an undertaking of a licensee is purchased under Section 6, the purchase price shall be the value thereof as determined in accordance with the provisions of sub-sections (1) and (2).

5. Under the notice dated Jan.5, 1973 issued by the Bihar State Electricity Board exercising its option to purchase the undertaking of the company, the company was required to deliver possession of the undertaking to the Bihar State Electricity Board at 12 O'clock in the night between the 5th and 6th Feb., 1974 pending determination and payment of the purchase price. Before the company had delivered the undertaking as required under the said notice, on Feb.2, 1974, the Governor of Bihar promulgated an Ordinance being Bihar Ordinance No.50 of 1974

amending certain provisions of the Act in its application to the State of Bihar. By Section 3 of the Ordinance, Section 6 of the Act was substituted. The material change that was effected by the substituted Section 6 of the Act was that contained in sub-section(1) thereof, namely, instead of the service of one years notice, service of a notice in writing of not less than six months upon the licensee requiring him to sell the undertaking to it on the expiry of the relevant period referred to in sub-section (1), was provided for.

6. By Section 5 of the Ordinance, Section 7-A of the Act was substituted. Sub-section (1) of Section 7-A as substituted is as follows :

"7-A (1). Where an undertaking of a licensee is sold under sub-section (1) of Section 5 or purchased under Section 6, the amount payable for the undertaking shall be the book value of the undertaking at the time of purchase of where the undertaking has been delivered before the purchase under sub-section (3) of Section 5, at the time of delivery of the undertaking."

Sub-section (2) of the substituted Section 7-A provides for the computation of the book value of the undertaking. Sub-section (3) of the substituted Section 7-A provides for the payment of a solatium of 10 per cent of the book value as determined under sub-sections (1) and (2) for the purchase of the undertaking.

7. Thus it appears that by virtue of the amendment made by the Bihar Ordinance 50 of 1974 in the provisions of Sections 6 and 7-A of the Act, the licensee will not be entitled to receive the market value of the undertaking in the event of the undertaking being purchased by the State Government, the local authority of the Bihar State Electricity Board, as the case may be, but the licensee will only be entitled to get the book value of the undertaking to be computed in the manner provided in sub-section (2) of the substituted Section 7- A. After the promulgation of the Bihar Ordinance 50 of 1974 on Feb.2, 1974, possession of the undertaking was taken by the Bihar State Electricity Board from the company on Feb.5/6, 1974 and, in view of the provision of Section 7 of the Act, the undertaking vested in the Bihar State Electricity Board.

8. As the Bihar Assembly was not in session two further Ordinances being Bihar Ordinance No.83 of 1974 and Bihar Ordinance No.123 of 1974 were promulgated on similar terms as the Bihar Ordinance No.50 of 1974. Thereafter, on Jan.15, 1975, Electricity (Bihar Amendment) Act, 1974 (Bihar Act 15 of 1975) was passed replacing Bihar Ordinance No.123 of 1974.

9. The company and its director, the respondents Nos.1 and 2 in this appeal, filed a writ petition before this Court *inter alia* praying for a writ in the nature of mandamus commanding the appellants to pay the purchase price of the undertaking in accordance with the provision of Section 7-A of the Act as it stood before it was amended by the Ordinances and/or by the said Amendment Act of 1974. Further, the said respondents prayed for a declaration that the Ordinances and the said Amendment Act of 1974 did not apply to the respondents, and that the Ordinances and the said Amendment Act were unconstitutional, void and of no effect.

10. During the pendency of the writ petition, the Bihar Legislature passed another Act, namely, Indian Electricity (Bihar Amendment) Act, 1975 (Bihar Act 7 of 1976). By this Act, the

provisions of Sections 6 and 7-A as substituted by the said Ordinances and replaced by the Bihar Act 15 of 1975 have been validated and made applicable with respective effect. Sections 2 (ii) and 3 of Bihar Act 7 of 1976 are set out below:

"2. In Section 6 of the Indian Electricity Act, 1910 (Act IX of 1910) as substituted by the Indian Electricity (Bihar Amendment) Act, 1974 (Bihar Act XV of 1975) -

(ii) after sub-section (5), the following sub-section shall be added, namely :-

"(6). Where a notice exercising option of purchasing the undertaking has been served upon the licensee before the commencement of the Indian Electricity (Bihar Amendment) Act, 1974 (Bihar Act XV of 1975) and the undertaking has been purchased thereafter the amount payable to the licensee on account of the purchase of the undertaking shall be determined in accordance with the provisions of Section 7-A of the Indian Electricity Act, 1910 as substituted by the Indian Electricity (Bihar Amendment) Act, 1974 (Bihar Act XV of 1975) as if the last mentioned Act was then in force, and it will be deemed to have been always in force."

3. Validation- Notwithstanding anything contained in any judgment, decree or order of any Court, every delivery of an undertaking effected by a licensee to the Bihar State Electricity Board, the Government of Bihar or local authority as the case may be, after the 2nd day of Feb., 1974 and before the commencement of this Act, shall be deemed to have been exercised or effected, as the case may be, under Section 6 of the Indian Electricity Act, 1910 (Act XV of 1910) as amended by Bihar Act XV of 1975 and this Act, as if the said Section 6 so amended was in force at material times when the delivery was effected and accordingly every delivery of the undertaking so effected and all things done or actions taken in consequence of such delivery of the undertaking shall be, and shall be deemed always to have been valid and shall not be called in question in any Court or Tribunal or before any other authority merely on the ground that Section 6 of the Bihar Act XV of 1975 did not provide for payment of any interest on the amount payable for the period from the date of delivery of the undertaking to the date or dates of its payment."

11. The only question that came up for consideration before the learned Judge at the hearing of the Rule was, whether the respondents Nos.1 and 2 were entitled to compensation on the basis of Section 6 read with Section 7-A of the Act or on the basis as provided by the Bihar Ordinance 123 of 1974 read with the provisions of the Bihar Act 15 of 1975. In that connection, the learned Judge had also to consider whether the provision of Section 7-A as substituted by the said Bihar Ordinances and the provisions of the Bihar Act 15 of 1975 were constitutionally valid or not.

12. The learned Judge, after considering the facts and circumstances of the case and the submissions made on behalf of either party held that the Bihar Ordinance 50 of 1974 in so far as it altered the basis of compensation to be paid under Section 7-A of the Act was void and unenforceable. If the appellant was directed to pay to the respondent No.1 the purchase price of the said undertaking in accordance with the provision of Section 7-A of the Act as it stood at the relevant time, ignoring the provision of the Bihar Ordinance 50 of 1974 and the subsequent Ordinances as well as the provisions of the Bihar Act 15 of 1975. Hence this appeal.

13. Mr. S.K. Acharya, the learned Advocate-General assisted by Mr. Bhaskar Gupta has appeared before us on behalf of the appellant, the Bihar State Electricity Board. It is submitted on behalf of the appellant that the transaction between the appellant and the respondent company was that of sale and purchase. The right of the licensee to get the purchase money did not accrue before the purchase had taken place. The purchase of the undertaking having been effected after the amendment of the Act by the Bihar Ordinance 50 of 1974, the licensee was entitled only to the purchase price to be determined in accordance with the provision of Section 7-A as substituted by Section 5 of the said Ordinance or the subsequent Ordinances including the Bihar Ordinance No.123 of 1974 which was replaced by the Indian Electricity (Bihar Amendment) Act, 1974 (Bihar Act 15 of 1975). Our attention has been drawn to sub-section (1) of Section 7-A of the Act which *inter alia* provides that the purchase price of the undertaking shall be the market value of the undertaking at the time of purchase or where the undertaking has been delivered before the purchase at the time of the deliver of the undertaking. It is contended that as both the delivery and purchase of the undertaking had taken place after the Bihar Ordinance 50 of 1974 was promulgated, the respondent Company will be entitled to the purchase price to be computed in the manner laid down in Section 7-A as substituted by the said Ordinance. Further, it is submitted on behalf of the appellant that the right of the respondent company to get the price could not arise anterior to the appellant's right to get the property, nor did, the right to get the purchase price to be computed in certain manner accrue during the notice period. It is, accordingly, contended that the provision of Section 7-A as substituted by the Bihar Ordinance 50 of 1974 and ultimately enacted in the said Bihar Act 15 of 1975 would apply.

14. On the other hand, it is contended by Mr. Bajoria, learned Counsel appearing on behalf of the respondents that the moment the option is exercised, the contract comes into being under which the market value as on the date the undertaking is taken possession of is to be paid. It is submitted by him that the Bihar Ordinance 50 of 1974 which was promulgated on Feb.2, 1974 did not apply to the respondent company, for the said Ordinance was applicable only to cases where option was exercised under Section 6 as substituted by the said Ordinance.

15. The question that arises for our consideration is when the right to get the price accrues. The contract of sale and purchase is contained in the license itself. Under the terms of the license, an option has been given to the authority concerned to purchase the undertaking of a licensee on the expiration of the term of the license. In *Fazilka Electric Supply Co. Ltd. v. Commr. of Income-tax*¹, it has been observed by the Supreme Court (at p.468) :

"There was an undertaking on the part of the applicant for the license to sell the undertaking to the local authority or Government upon certain terms set out in the license , and the time at which the option was to be exercised and the price which was to be paid for the property were specified. There was consideration for the contract as the license was granted on those terms. Therefore, all the elements necessary for a contract were present, and the sale in pursuance thereof was not a compulsory purchase or acquisition ..
.."

It follows from the said observation of the Supreme Court that under the terms of the contract as embodied in the license the price which is to be paid in the event of the undertaking being

purchased by the local authority or Government is fixed. At the time

¹ AIR 1963 SC 464

the option was exercised by the appellant under Section 7-A of the Act, the respondent company was entitled to the market value of the undertaking to be determined in accordance with the provisions of sub-section(2) of Section 7-A. There was, therefore, an implied contract between the respondent company and the appellant that the appellant would pay to the respondent company the market price of the undertaking in the event it purchased the undertaking. The option of purchase was exercised by the appellant before the amendment of Section 6 and Section 7-A of the Act by the Bihar Ordinance 50 of 1974. The appellant is therefore, liable to pay to the respondent company the market value of the undertaking in terms of the unamended provision of Section 7-A. On behalf of the appellant, however, a later decision of the Supreme Court in *Gujarat Electricity Board v. Shantilal R. Desai*², was relied upon. In that case, one of the questions that came up for consideration before the Supreme Court was whether on election to purchase the undertaking followed up by a notice to the licensee in pursuance of that election within the period mentioned in Section 7 (4) of the Act before it was amended in 1951, the authority must again exercise its option to purchase on the expiration of the period of license. In that connection, Hegde, J. observed as follows (at p.243) :

"We are not able to find any good reason for reading into Section 7 a requirement that after a notice under Section 7 (4) is issued the authority must again exercise its option to purchase on the expiration of the period of license. It is no doubt true that the right to purchase the undertaking accrues only at the expiration of the period of license but for exercising that right, the authority must make its election within the period prescribed in Section 7 (4) and issue a notice as required by that sub-section"

16. Much reliance has been placed on behalf of the appellant on the observation of the Supreme Court that the right to purchase the undertaking accrues only at the expiration of the period of license. It is contended that as the right accrues after the expiration of the period of license which is also the expiration of the period of notice under Section 6 of the Act in the instant case, the licensee has no right to claim the market value of the undertaking on the ground that it is impliedly fixed under the terms of the contract embodied in the license that is to say, on the basis of the provision of Section 7-A before it was substituted by the Bihar Ordinance 50 of 1974. It has already been noticed in what context the said observation has been made by the Supreme Court. Be that as it may, prior to the said observation, there are other observations by the Supreme Court which do not support the contention of the appellant. It is observed that the exercise of option to purchase as well as electing to purchase is one integral process and not two independent steps, and that once the concerned authority exercises its option and communicates the same to the licensee, the same is binding on the authority as well as the licensee. In other words, when the option is exercised the licensee is bound to sell and the concerned authority is bound to purchase the undertaking. It is difficult to accept the contention that this binding effect on either party will be without the fixation of the purchase price or the consideration for the transaction. As soon as this stage is reached after the exercise of option to purchase by the service of a notice as mentioned in Section 6 of the Act, the concerned authority has to purchase the undertaking on payment of the market value of the undertaking to be determined in accordance with the provision of Section 7-A of the Act. The above observation of the Supreme Court on which much reliance has been

placed by the learned Counsel of the appellant is of no help.

17. In this connection, we may notice the other contention of Mr. Bajoria, learned Counsel for the respondents. His contention is that Section 7-A as substituted by the Bihar Ordinance 50 of 1974 will apply only to cases where option to purchase has been exercised under Section 6 of the Act as substituted by the said Ordinances. It is submitted by him that Section 7-A (1) as substituted by the Bihar Ordinance 50 of 1974 and the two other subsequent Ordinances and the replacement of the same by the Indian Electricity (Bihar Amendment) Act, 1974 (Bihar Act 15 of 1975) *inter alia* refers to the purchase of the undertaking under Section 6. It is contended that the reference to Section 6 is undoubtedly to Section 6 as substituted by the Ordinance. In other words, it is submitted by him that Section 7-A as substituted by the said Bihar Ordinances and the Bihar Act 15 of 1974 providing for the payment of book value of the undertaking instead of the market value will apply only where a notice under the substituted Section 6, such notice being of not less than six months, is served upon the licensee. In the instant case, however, one year's notice was served upon the respondent company under Section 6 before it was substituted by the said Bihar Ordinances and the Bihar Act 15 of 1974 and, as such, the substituted Section 7-A will have no application.

18. It has been already stated that during the pendency of the Rule Nisi, Indian Electricity (Bihar Amendment) Act 1975 (Bihar Act 7 of 1976) was enacted. Sections 2 (ii) and 3 of Bihar Act 7 of 1976 purported to validate and apply the provisions of Section 6 and Section 7-A as amended by the Bihar Act 15 of 1975 with retrospective effect. The contention made on behalf of the respondents as to non-applicability of the provision of Section 7-A as substituted by the said Bihar Ordinances and the Bihar Act 15 of 1975 without taking into consideration the later Act, namely, the Bihar Act 7 of 1976, seems to have some force. The said Ordinances and the Bihar Act 15 of 1975 having substituted Section 6, the reference of that section in the substituted Section 7-A must obviously be to the substituted section. The option having been exercised under the unamended Section 6 of the Act, the provision of the substituted Section 7-A was inapplicable. That was the reason why Bihar Act 7 of 1976 had to be enacted. It is, however, conceded by Mr. Bajoria that by virtue of Bihar Act 7 of 1976, the provisions of the substituted Sections 6 and 7-A would apply. The learned Counsel however, submits that Sections 2 (ii) and 3 of the Bihar Act 7 of 1976 are *ultra vires* Article 31 (2) of the Constitution. The contention as elaborated by him is that after the exercise of option by the Bihar State Electricity Board, the respondent company had acquired a right to get the market value of the undertaking in terms of Section 7-A of the Act. Sections 2 (ii) and 3 of the Bihar Act 7 of 1976 purport to acquire part I of the said right of the respondent company, which is property, without making any provision for compensation for such acquisition and, accordingly, they are *ultra vires* the provision of Article 31 (2) read with Article 13 (2) of the Constitution.

19. On the other hand, it is contended on behalf of the appellant that even assuming that there has been acquisition of the right of the respondent company to get the market value of the undertaking, the Ordinances and the Bihar Act 15 of 1975 having provided for the payment of compensation for such acquisition, namely, the book value of the undertaking, they are quite legal and valid. In any event, it is submitted by the learned Counsel, after the deletion of Article 31 of the Constitution by the Constitution 44th Amendment Act, the question of payment of compensation does not arise. The learned Counsel for the appellant invokes the doctrine of

eclipse and submits that Section 7-A as substituted by the Bihar Ordinances and the Bihar Act 15 of 1975 remained in a moribund or dormant state of eclipsed and, consequently, unenforceable against citizens so long as Article 31 (2) was there. But after the deletion of that Article, the substituted Section 7-A became valid and enforceable.

20. The right to receive the market value of the undertaking is a debt or a chose in action and is property within the meaning of Article 19 (1) (f) and Article 31 (2) of the Constitution. Reference in this connection may be made to the decision of the Supreme Court in *Madan Mohan Pathak v. Union of India*³. In that case, it has been observed by Bhagwati, J. that "property within the meaning of Article 19 (1) (f) and Clause (2) of Article 31 comprises every form of property, tangible or intangible, including debts and choses in action, such as unpaid accumulation of wages, pension, cash grant and constitutionally protected Privy Purse". In view of the said decision of the Supreme Court, it follows that such property can be acquired by the State but it must conform to the provision of Article 31 (2) of the Constitution, namely, the law acquiring such property must be for a public purpose and must provide for compensation for the property so acquired; such law cannot be called in question in any Court on the ground that the compensation provided by that law is not adequate.

21. The contention of the appellant is that the provision for payment of book value in the Ordinances and the Bihar Act 15 of 1975 a provision for payment of compensation or the acquisition of the property of the respondent company, that is to say, its right to get the market value. We are unable to accept the contention. The respondent company, as observed earlier, had acquired the right to receive the market value of the undertaking under Section 7-A of the Act before it was amended. By Sections 2 (ii) and 3 of the Bihar Act 7 of 1976, the said right of the respondent company to get the market value was taken away with retrospective effect and the respondent company was only entitled to receive the book value of the undertaking. Therefore, a portion of the property of the respondent company is sought to be acquired by the Bihar Act 7 of 1976 by providing for payment of book value which is less than the market value. The provision for the payment of book value cannot, in my opinion, be regarded as the provision for payment of compensation for the purported acquisition of the property of the respondent company.

22. Counsel for the appellant has drawn our attention to another observation of Bhagwati, J. in Pathak's case (supra). Bhagwati, J. observed: "Where money is given as compensation for taking of money, the theory of forced loan may apply, but it is difficult to see how it can be applicable where chose in action is taken and money representing its value, which in a large majority of cases would be less than the amount recoverable under it, is given as compensation". Relying on the said observation, it is contended on behalf of the appellant that in the instant case also a chose in action is taken and the amount of compensation, that is, the book value of the undertaking is given. It is submitted that the amount of compensation in the shape of book value may be less than the market price of the undertaking, but in view of the provision of Article 31 (2) of the Constitution, the provisions of Sections 2 (ii) and 3 validating and applying the substituted Section 7-A with retrospective effect cannot be called in question on the ground of inadequacy of

³ AIR 1978 SC 803

compensation. We are afraid the said observation of Bhagwati, J. relied on by the learned Counsel for the appellant is not applicable to the facts of the instant case. That observation was made in the context of acquisition by the State of debts and choses in action owing by poor people to rich money lenders and not acquisition of such debts or choses in action due and owing

by the citizens to the State. It has been pointed out by Bhagwati, J. that in the former case, there is no question of augmenting the revenue of the State, but in the latter, if the State acquires such debts and choses in action due and owing by people to the State, it would be a case of augmenting the revenue of the State or reducing State expenditure and that would clearly not be a public purpose and the legislation would plainly be violative of the constitutional guarantee embodied in Article 31 (2) of the Constitution. Pathak's case (supra) is an authority for the proposition that the State cannot acquire any debt or chose in action due to it from citizens, for that would be only for the purpose of augmenting the State revenue or reducing the State expenditure which will not be a public purpose and, as such, void under Article 31 (2). The purported acquisition of part of the debt or chose in action by Sections 2 (ii) and 3 of the Bihar Act 7 of 1976 with retrospective effect is, therefore, without any public purpose. Sections 2 (ii) and 3 also do not provide for payment of compensation. In the circumstances, it must be held that Sections 2 (ii) and 3 of the Bihar Act 7 of 1976 are *ultra vires* Article 31 (2) of the Constitution.

23. Now we may consider the question of applicability of the doctrine of eclipse to the instant case. It is contended on behalf of the appellant that it may be that the substituted Section 7-A which was made retrospective in operation by Sections 2 (ii) and 3 of the Bihar Act 7 of 1976 remained ineffective and unenforceable against the respondent-company so long as Article 31 (2) of the Constitution was there, but after the deletion of Article 31, the bar of constitutional limitations is removed and the substituted Section 7-A read with Sections 2 (ii) and 3 became valid and enforceable in spite of the fact that it sought to acquire a part of the property of the respondent-company, namely, its right to get the market value of the undertaking, without providing for payment of compensation. In support of his contention that the doctrine of eclipse is applicable not only to pre-Constitutional laws but also to post-Constitutional laws, the learned Counsel for the appellant has placed reliance on the following decisions of the Supreme Court: *Bhikaji Narain Dhakras v. State of Madhya Pradesh*⁴, *M. P.V. Sundararamier and Co. v. State of Andhra Pradesh*⁵, *L. Jagannath v. Authorised Officer*, *L.R. Madurai*⁶, and *The State of Gujarat v. Shri Ambica Mills Ltd*⁷. On the other hand, Mr. Bajoria, learned Counsel for the respondents has relied on some other decisions of the Supreme Court in support of his contention that the doctrine of eclipse is not applicable to post-Constitutional law. These decisions are: *Saghir Ahmad v. State of U.P.*⁸, *Behram Khurshid Pasikaka v. State of Bombay*⁹, *Bashesar Nath v. Commr. of Income tax, Delhi and Rajasthan*¹⁰, *Deep Chand v. State of U. P.*¹¹, and *Mahendra Lal Jaini v. State of U.P.*¹².

24. It appears from the above decisions of the Supreme Court that there is a divergence of opinion as to the applicability of the doctrine of eclipse to post-Constitutional laws. We do not, however, propose to enter into the conflict, but we may proceed on the assumption that the doctrine is also applicable to post-Constitutional laws. It is true that by Section 2

⁴ AIR 1955 SC 781

⁶ AIR 1972 SC 425

⁸ AIR 1954 SC 728

⁵ AIR 1958 SC 468

⁷ AIR 1974 SC 1300

⁹ AIR 1955 SC 123

¹⁰ AIR 1959 SC 149

¹² AIR 1963 SC 1019

¹¹ AIR 1959 SC 648

(ii) and Section 3 of the Bihar Act 7 of 1976 the substituted provisions of Sections 6 and 7-A have been validated and made applicable with retrospective effect. But there is a serious

difficulty in applying the doctrine of eclipse to the instant case with retrospective effect. The constitutional limitations under Article 31 (2) were operative when the Bihar Act 7 of 1976 was enacted. It is quite immaterial that Article 31 has been deleted from Part III of the Constitution by the Constitution (44th Amendment) Act, 1978 with effect from June 20, 1979. The deletion of Article 31 not being retrospective, any law passed before such deletion must stand the test of the provision of Article 31 (2). In this connection, we may refer to the decision of the Supreme Court in *Waman Rao v. Union of India*¹³, In that case, Chandrachud, C. J. observed as follows (at p.278):

"By Section 7 of the Constitution (Forty-fourth Amendment) Act, 1978 the reference to Article 31 was deleted from the concluding portion of Article 31-A (1) with effect from June 20, 1979, as a consequence of the deletion by Section 2 of the 44th Amendment of Clause (f) of Article 19 (1) which gave to the citizens the right to acquire, hold and dispose of property. The deletion of the right to property from the array of fundamental rights will not deprive the petitioners of the arguments which were available to them prior to the coming into force of the 44th Amendment, since the impugned Acts were passed before June 20, 1979 on which date Article 19 (1) (f) was deleted."

Reference may also be made to the decision of the Supreme Court in *Ishwari Khetan Sugar Mills (P.) Ltd. v. State of U.P.*¹⁴, where Desai, J. who delivered the majority judgment observed (at p.1971) :

"And now to the oft beaten track of legislation being void as being in contravention of Article 31 (2) as it stood at the relevant time. The impugned legislation was put on the statute book on Aug.27, 1971. Therefore, Article 31 (2) as it stood on the relevant date may be noticed. The Article as amended by Constitution (Twentyfifth Amendment) Act, 1971, will, therefore, not be attracted."

In *Tara Prasad Singh v. Union of India*¹⁵, the Supreme Court had to consider the constitutional validity of the Coal Mines (Nationalisation) Amendment Act, 1976. In that connection, Chandrachud C.J. speaking for the Court observed "We are not concerned with the amendment introduced by the 44th Amendment Act which deleted the reference to Article 31, since that Amendment Act came into force prospectively with effect from June 20, 1979."

25. In the instant case, the Bihar Act 7 of 1976 was passed before June 20, 1979 on which date Article 31 (2) was deleted from the Constitution and, accordingly, in view of the above decisions of the Supreme Court, the validity of the said Act can be assailed on the ground that it is violative of Article 31 (2) of the Constitution. It has been already held by us that Section 2 (ii) and Section 3 of the Bihar Act 7 of 1976 having sought to apply the

¹³ AIR 1981 SC 271

¹⁵ AIR 1980 SC 1682

¹⁴ AIR 1980 SC 1955

provisions of Sections 6 and 7-A as substituted by the Bihar Act 15 of 1975 with retrospective effect depriving the respondent-company of its right to get the market value of the undertaking, which is property within the meaning of Articles 19 (1) (f) and 31 (2) of the Constitution, without

any public purpose and without any provision for compensation are violative of Article 31 (2) of the Constitution and are void. The doctrine of eclipse has no manner of application in the instant case on the ground of deletion of Article 31 from the Constitution, such deletion being prospective and not retrospective.

26. The position, therefore, is that the Bihar State Electricity Board having exercised its option to purchase the undertaking of the respondent- company under the unamended Section 6 of the Act, Section 7-A as substituted by the said Bihar Ordinances and ultimately by the Bihar Act 15 of 1975 will not apply. Sections 2 (ii) and 3 of the Bihar Act 7 of 1976 which made the substituted provisions of Sections 6 and 7-A applicable to the exercise of option under the unamended provision of Section 6 of the Act being *ultra vires* Article 31 (2) of the Constitution and void, and the doctrine of eclipse not being applicable, the right of the respondent-company to receive the market value of the undertaking under Section 7-A of the Act before it was substituted remains unaffected.

27. It is, however, made clear that so far as the prospective application of the substituted provisions of the said Ordinances as replaced by the Bihar Act 15 of 1975 is concerned, they are valid and effective. In other words, after the said provisions were substituted by the Bihar Ordinance 50 of 1974 any notice given under the substituted Section 6 exercising option by the concerned authority for the purchase of an undertaking, the licensee would only be entitled to the book value of the undertaking to be determined in accordance with the provisions of the substituted Section 7-A. But, as held already where, as in the instant case, the option was exercised under Section 6 before it was amended by the said Bihar Ordinance 50 of 1974, the provisions of the substituted Section 7-A providing for the payment of book value would not apply. In such a case, the licensee would be entitled to market value of the undertaking under Section 7-A of the Act.

28. Before we part with this appeal, we may notice the contention of Mr. Somendra Chandra Bose, learned Counsel appearing on behalf of the added respondent, the Bank of India, which claims to be the creditor of the respondent-company. It is contended that in view of the provision of Section 37 (1) of the Electricity (Supply) Act, 1948, the debt due to the added respondent is attached to the purchase money payable to the respondent-company who is liable to pay the debt of the added respondent out of such purchase money. We do not think that in this appeal we are called upon to consider the claim of the added respondent. All that we say is that we have not said anything in this judgment which may prejudice the right, if any, of the added respondent to realize the debt due to it from the purchase price payable to the respondent- company, in accordance with law.

29. In the circumstances and for the reasons aforesaid, this appeal is dismissed. In view, however, of the facts and circumstances of the case, there will be no order for costs.

A. K. Sarkar, J.

30. I agree.

Appeal dismissed.