Indian Drug Manufacturers Association and Others Vs The State of West Bengal and Others

Court: Calcutta High Court

Date of Decision: Sept. 27, 2013

Citation: (2013) 5 CHN 36 : (2014) 140 FLR 419 : (2013) 4 LLJ 543

Hon'ble Judges: Tapen Sen, J

Bench: Single Bench

Advocate: Partha Sarathi Sengupta, Mr. Debasish Sinha and Ms. Sutapa Sanyal, for the Appellant; Kishore Dutta, Debjyoti Basu, Advocates for the Respondents Nos. 3 and 4, Mr. Somraj Mukherjee, Kumar Shantanu, Advocates for the Respondent No. 5, Mr. Anindya Mitra, Ld. Advocate General, Mr. Billwadal Bhattacharya and Mr. Paritosh Sinha, for the Respondent

Final Decision: Allowed

Judgement

Tapen Sen, J.

In Re: WP No. 1172 of 1999

1. In this Writ Petition the petitioner No. 1 is an Association of Drug Manufacturers and the Petitioner Nos. 2 to 5 are all its members. They are

aggrieved by a Notification dated 17.8.1998 (Annexure "C" to the Writ Petition) issued by the Labour Department of the Govt. of West Bengal

whereby and whereunder, in exercise of the powers conferred by Section 3 read with Section 5 of the Minimum Wages Act, 1948, the Governor

of West Bengal, after considering all representations with regard to fixation of minimum wages, was pleased to fix, in consultation with the State

Minimum Wages Advisory Board, the rates specified in the Schedule appended to the said Notification, declaring them to be the minimum rates of

wages payable to the employees employed in the State of West Bengal in the employment in establishments which were added to the Schedule to

the Minimum Wages Act, 1948. The petitioners have prayed for quashing of the said Notification by making a prayer to the effect that a Writ of

Mandamus be issued commanding upon the respondents to withdraw, rescind and/or recall and cancel the said impugned Notification dated

17.8.1998.

2. The petitioners have stated that employment under Drug Manufacturers is not covered in the Schedule of the Minimum Wages Act, 1948

(hereinafter referred to as the 1948 Act). According to them, since their employment is not covered in the Schedule to the said 1948 Act, their

employment does not fall within the definition of ""Scheduled Employment"" as per Section 2(g) of the said Act.

3. Their further case is that no Notification u/s 27 of the 1948 Act has been issued including the employment in the Drug Manufacturing Industry in

the Schedule of the said Act. Section 27 lays down:--

Power of the State Government to add to schedule

27 The appropriate Government after giving by Notification in the official gazette not less than three months'' notice of its intention so to do may by

like notification, add to either part of the schedule any employment in respect of which its is of opinion that Minimum Rates of Wages should be

fixed under this Act, and thereupon the schedule shall in its application to the state be deemed to be amended accordingly.

4. The petitioners have submitted that from a perusal of Section 27 quoted above, it is clear that the 1st part of the said Section deals with a

Notification to be made in the Official Gazette declaring the intention of the Government and the 2nd part deals with a Notification to be published

in the Official Gazette and only thereafter, an employment can be added to the Schedule so as to make minimum wages payable.

5. By a letter dated 9.2.1999 (Annexure "B"), a legal notice was sent to the Assistant Secretary, Govt. of West Bengal, Deptt. of Labour

(Minimum Wages Branch), stating that employment in the Drug Manufacturing Industry was not included in the Schedule and that no Notification

had been published u/s 27 by which such an employment was included. It was also stated that no Notification had been published with regard to

the proposal for fixing the minimum rates of wages in the employment in Establishments covering Drug Manufacturing Industry. Consequently, by

the said legal notice, it was asserted that an employment with the Drug Manufacturing Industry, being not a Scheduled employment within the

purview of the Minimum Wages Act, the impugned Notification should be withdrawn/cancelled. The petitioners have referred to paragraph 27 of

the Writ Petition stating that apart from the fact that employment in the Drug Manufacturing Industry is not included in the Schedule, there has been

no Notification u/s 27.

In Re: WP No. 805 of 2006

6. The other Writ Petition has been filed by the petitioner Nos. 1, 3 & 5 of WP No. 1172 of 1999. These petitioners have challenged the

subsequent Notifications dated 12th February, 2002 and 22nd November, 2002. In this Writ Petition it has been stated that the Government, by

the first Notification dated 17.8.1998 (impugned in WP No. 1172 of 1999) had fixed certain rates specified in the Schedule for certain classes of

employment within the Drug Manufacturing Industry and therefore being aggrieved, the petitioners filed WP No. 1172 of 1999 and on 28.6.1999

Hon''ble Mr. Justice Kalyan Jyoti Sengupta (as his Lordship then was) passed an interim Order which has been quoted in paragraph 8 of the 2nd

Writ Petition and which reads as follows--

There will be an interim order staying the operation and further operations of the impugned Notification so far as it relates to item No. 5 i.e.

Medical Representative Employees. The interim order will continue until further orders of this Court. I make it clear that this order will not prevent

or prejudice the concerned authority to recall and/or withdraw the decision of enhancing the minimum wages of Medical Representative and

Employees and to take decision afresh in accordance with law.

7. It is further stated that when the matter came up for final hearing on 31.1.2003 before the Hon''ble Mr. Justice Girish Chandra Gupta, the

Counsel appearing for the State submitted that Notifications dated 20.2.2002 and 22.11.2002 have been issued in supersession of the 1st

Notification which was under challenge in WP No. 1172 of 1999.

By Order dated 31st January, 2003, his Lordship therefore disposed of the said Writ Petition holding that in view of such a statement having been

made in Court, the Learned Advocate who was appearing on behalf of the petitioners had submitted that since the impugned Notification in WP

1172 of 1999 had been superseded, the said Writ Petition had lost its force and in case the petitioners were still aggrieved by the subsequent

Notification they would be entitled to challenge the same in accordance with law. The Writ Petition was thus Disposed of. A copy of the Order

dated 31.1.2003 has been brought on record vide Annexure P2 in WP No. 805 of 2006.

8. The petitioners have stated that they were under a bonafide impression and belief that the impugned Notification dated 17.8.1998 had been

withdrawn and had been replaced by the subsequent Notification dated 20.2.2002 and 22.11.2002 and according to them, the reason for such an

impression was that by the Order dated 28.6.1999 passed by the Hon''ble Mr. Justice Kalyan Jyoti Sengupta, liberty had been given to the

authorities to recall and/or withdraw the impugned Notification and to take a decision afresh in accordance with law.

9. It is stated that when the Writ Petitioners procured the Notifications dated 12th February, 2002 (published in the Official Gazette on 20.2.2002)

as well as the Notification dated 22.11.2002, they realized that the earlier Notification dated 17.8.1998 had neither been cancelled nor withdrawn.

On the contrary, a Notification dated 19.12.2000 had been issued adding ""Employment in Sales Promotion of Medicine"" to Part 1 of the Schedule

of the 1948 Act and this was subsequently cancelled by yet another Notification dated 25.6.2001 (Annexure P3).

10. Since the petitioners came to know that the impugned Notification dated 17.8.1998 had not been withdrawn or cancelled, they immediately

filed an application being GA No. 1441 of 2003 praying for recalling of the Order dated 31.1.2003 passed by the Hon"ble Mr. Justice Girish

Chandra Gupta. The said Application was taken up on 4.4.2006 (Annexure P4) and after hearing the parties, the Order dated 31.1.2003 was

recalled and the Writ Petition was directed to be placed before the appropriate Bench for hearing.

11. It is in the background of the aforementioned facts and circumstances that both these two Writ Petitions have been filed challenging the

Notifications referred to above.

12. From the facts as stated above it is evident that the subsequent Notifications dated 12th February, 2002/20th February, 2002 and 22nd

November, 2002 are Notifications which were issued without withdrawing the earlier Notification dated 17th August, 1998. Merely because the

1st notification was stayed did not mean that the same was quashed or set aside. The operation of an Order does not lead to such a consequence.

It only means that the Order was stayed and would not be operative but it does not mean that the same was wiped out from existence. Such a

theory has been propounded by the Hon"ble Supreme Court in the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust

Association CSI Cinod Secretariat, Madras,

13. Consequently and at this stage itself, this Court holds that the subsequent Notification on the same field, could not have been issued without

withdrawing the 1st notification. As such the 2nd Notifications published on 20th February, 2002 and 22.11.2002 cannot be held to be proper

Notifications. They are accordingly set aside.

14. Now coming back to the 1st notification, we have to now look into various aspects of the Minimum Wages Act. Section 27 quoted above

clearly lays down that the appropriate Government, after publishing a Notification in the Official Gazette notifying its intention to do so, should, by a

similar Notification add to either part of the Schedule, any employment in respect of which, it is of the opinion that minimum rates of wages should

be fixed under the said Act and it is only thereafter that the Schedule shall be deemed to have been amended in the concerned state. Now the

preamble to the Minimum Wages Act clearly lays down that it is an Act to provide the fixation of minimum rates of wages in certain employments.

Certain employments therefore means employments which are Scheduled in terms of Section 2(g). Section 3 also clearly lays down that the

appropriate Government in the manner prescribed therein shall fix the minimum rates of wages payable to employees employed in any employment

specified in Part 1 or part 2 of the Schedule or added to either Part by Notification u/s 27. Section 5 of the Minimum Wages Act lays down that in

fixing the minimum rates of wages in respect of any Scheduled Employment, the appropriate Government shall follow the procedure prescribed

therein.

15. Evidently, till date the medical representatives have not been added to the Schedule of the Minimum Wages Act. The State, in their affidavit-in-

opposition have stated that the medical and sales representatives cannot be decorated as a privileged class/community and thereby be deprived of

the minimum wages. This Court is of the view that the Notification dated 22nd November, 2002 having been issued without withdrawing the 1st

Notification is bad and so far as the 1st Notification is concerned, there being nothing to show that medical representatives have been included in

the Schedule by following the procedure laid down in the 1948 Act, cannot also survive. Under the circumstances, the Notification dated 17th

August, 1998 is also set aside and quashed.

16. At this juncture, it would not be fair by not referring to an important argument raised on behalf of the State. The argument was that under the

Sales Promotion Employees (Conditions of Service) Act, 1976, the provisions of the Minimum Wages Act, 1948 has been made applicable to

sales promotion employees, who have been defined as-

any person by whatever name called (including an apprentice) employed or engaged in any establishment for hire or reward to do any work

relating to promotion of sales or business, or both, but does not include any such person--

(i) who, being employed or engaged in a supervisory capacity, draws wages exceeding sixteen hundred rupees per mensem; or

(ii) who is employed or engaged mainly in managerial or administrative capacity.

To appreciate, it would be relevant to quote Section 6 of the Sales Promotion Employees (Conditions of Service) Act, 1976 which reads as

follows-

Application of Certain Acts to sales promotion employees.--(1) The provisions of the Workmen"s Compensation Act, 1923 (8 of 1923), as in

force for the time being, shall apply to, or in relation to, sales promotion employees as they apply to, or in relation to, workmen within the meaning

of that Act.

(2) The provisions of the Industrial Disputes Act, 1947 (14 of 1947), as in force for the time being, shall apply to, or in relation to, sales promotion

employees as they apply to, or in relation to, workmen within the meaning of that Act and for the purposes of any proceeding under that Act in

relation to an industrial dispute, a sales promotion employee shall be deemed to include a sales promotion employee who has been dismissed,

discharged or retrenched in connection with, or as a consequence of, that dispute or whose dismissal, discharge or retrenchment had led to that

dispute.

(3) The provisions of the Minimum Wages Act, 1948 (11 of 1948), as in force for the time being, shall apply to, or in relation to, sales promotion

employees as they apply to, or in relation to, employees within the meaning of that Act.

(4) The provisions of the Maternity Benefit Act, 1961 (53 of 1961), as in force for the time being, shall apply to, or in relation to, sales promotion

employees, being women, as they apply to, or in relation to, women employed, whether directly or through any agency, for wages in any

establishment within the meaning of that Act.

(5) The Provisions of the Payment of Bonus Act, 1965 (21 of 1965), as in force for the time being, shall apply to, or in relation to, sales promotion

employees as they apply to, or in relation to, employees within the meaning of that Act.

(6) The provisions of the Payment of Gratuity Act, 1972 (39 of 1972), as in force for the time being, shall apply to, or in relation to, sales

promotion employees as they apply to, or in relation to, employees within the meaning of that Act.

(7) Notwithstanding anything contained in the foregoing subsections,--

(a) in the application of any Act referred to in any of the said subsections to sales promotion employees, the wages of a sales promotion employee

for the purposes of such Act, shall be deemed to be his wages as computed in accordance with the provisions of this Act;

(b) where an Act referred to in any of the said sub-sections provides for a ceiling limit as to wages so as to exclude from the purview of the

application of such Act persons whose wages exceed such ceiling limit, such Act shall not apply to any sales promotion employee whose wages as

computed in accordance with the provisions of this Act exceed such ceiling limit.

Now upon a perusal of the provisions of Section 6(3) we find that it is specific to the extent that the provisions of the Minimum Wages Act, 1948

shall apply to or in relation to sales promotion employees as they apply to or in relation to employees within the meaning of that Act.

The words ""that Act"" obviously refers to the Minimum Wages Act and if we were to look into the Minimum Wages Act we find the definition of

employees which, for adjudication of this case would be relevant to quote and consider. Section 2(i) of the Minimum Wages Act reads as follows-

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(i) ""employee"" means any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in a scheduled

employment in respect of which minimum rates of wages have been fixed; and includes an out-worker to whom any articles or materials are given

out by another person to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the

purposes of the trade or business of that other person where the process is to be carried out either in the home of the out-worker or in some other

premises not being premises under the control and management of that other person; and also includes an employee declared to be an employee

by the appropriate Government; but does not include any member of the Armed Forces of the (Union).

(Emphasis by underlining by this Court)

Upon a perusal of the aforementioned definition, it is evident that an ""employee"" would mean any person who is employed for hire or reward to do

any work, skilled or unskilled, manual or clerical in a scheduled employment in respect of which minimum rates of wages have been fixed. In other

words, the condition precedent for an employee to claim that his employment is covered under the Minimum Wages Act, 1948 must be that his

employment should be a ""scheduled employment"".

17. This Court has already deliberated on the scope and effect of the words ""scheduled employment"" in the earlier paragraphs but for the sake of

repetition, this Court would like to once again state that upon a perusal of the Schedule, employment under the Drug Manufacturers is not included.

Under these circumstances, neither the Minimum Wages Act can be made applicable nor can the Sales Promotion Employees (Conditions and

Services) Act, 1976 be routinely applied to such employees. They can certainly take benefit under the provisions of the said Sales Promotion Act

only when they become ""employees"" within the meaning of the Minimum Wages Act, 1948 by inclusion of their employment in the Schedule. This

Court therefore is not in a position to appreciate the submissions of the State that since Pharmaceutical Industry is an establishment, therefore they

should be deemed to be employees under the Sales Promotion Act and consequently the provisions of the Minimum Wages Act should be made

applicable to them. Such an argument, in the opinion of this Court, cannot be accepted.

Having thus quashed both the notifications, this Court Allows the said Writ Petitions. They are both Allowed. There shall however, be no Order as

to costs.

This Order however should not be construed to be an Order by which the State Government can be said to be permanently barred from taking

action u/s 27 of the Minimum Wages Act, 1948. They will be at liberty to take action afresh in accordance with law.

Later:

The Court: After the aforementioned judgment was dictated in Court, learned Counsel appearing for the State prayed for stay of this judgment.

Having considered the said prayer and having given my anxious consideration to the facts, circumstances and points involved in these writ petitions,

there is no question of granting any stay of this judgment.

The prayer for stay is, therefore, refused.

Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.