

(1993) 03 KL CK 0021
In the High Court Of Kerala
Case No : O.P. No. 9505 of 1989-F

Dr. Thomas Eapen

APPELLANT

Vs

Asst. Labour Officer and Others

RESPONDENT

Date of Decision : 17-03-1993

Acts Referred:

Kerala Shops and Commercial Establishment Act, 1960 — Section 5
Travancore-Cochin Shops and Establishments Act, 1125 — Section 23, 6

Citation : (1993) 2 LLJ 847

Hon'ble Judges : P.K. Shamsuddin, J

Bench : Single Bench

Advocate : S. Sankara Subban, Govt. Pleader, for the Appellant; V.J. John and Baby Issac, for the Respondent

Final Decision : Allowed

Judgement

P.K. Shamsuddin, J.—The petitioner is the managing partner of Kadampuzha Hospital, Kanjirappally. Respondents Nos. 3 to 5 are working as nurses in the said institution. The first respondent issued three notices, Exhibits P-1, P-1(a) and P-1(b) to the petitioner alleging that the petitioner failed to comply with the provisions of the Maternity Benefit Act, 1961, in the cases of respondents Nos. 3 to 5. The petitioner sent a reply Exhibit P-2 stating that hospitals were not covered by the provisions of the Maternity Benefit Act. Thereafter, a notice was issued by the first respondent stating that respondents Nos. 3 to 5 were not allowed prenatal leave as contemplated under the Act and requiring the petitioner to show cause as to why an amount of Rs. 1,031.25 should not be directed to be paid to T.A. Thressiakutty, the fifth respondent, towards maternity benefit and medical bonus. On receipt of this the petitioner sent Exhibit P-4 reiterating his contention and pointing out that the Government have issued Notification No. LDS 2156/57 L&LAD, dated April 17, 1957, published in the Kerala Gazette, dated April 23, 1957, exempting establishments in the erstwhile Travancore-Cochin area like doctors' consulting rooms, dispensaries attached to doctors' consulting rooms and nursing homes, hospitals and other institutions for

the treatment of the sick, the infirm, the destitute or the mentally unfit. However, overruling the objection filed by the petitioner the first respondent issued Exhibits P-5, P- 5(a) and P-5(b) directing to pay an amount of Rs. 1,024.50 towards maternity benefit to third respondent, an amount of Rs. 963.50 to the fourth respondent and Rs. 1,031.50 to the fifth respondent towards maternity benefit and medical] bonus. These orders were issued u/s 17 of the Maternity Benefit Act. Exhibits P-6, P-6(a) and P-6(b) are demand notices issued pursuant to these orders. In this original petition, the petitioner challenges the orders Exhibits P-5 series and P-6 series.

2. The main contention raised in the original petition is that in view of the Notification No. LDS 2156/57 L&LAD, dated April 17, 1957, published in the Kerala Gazette, dated April 23, 1957, hospitals and nursing homes are permanently exempted from all provisions of the Travancore-Cochin Shops and Establishments Act, 1125. The said notification reads as follows:

"In exercise of the powers conferred by Section 6 of the Travancore-Cochin Shops and Establishments Act, 1125 (Act IX of 1125), and in supersession of the Travancore-Cochin Notification No. L6- 7100/52/DD, dated July 16, 1952, the Government of Kerala hereby exempt permanently from all the provisions of the said Act the following classes of establishments in the former Travancore-Cochin area of the State, namely:-

- (1) Doctors" consulting rooms;
- (2) Dispensaries attached to Doctors" consulting rooms; and
- (3) Nursing homes, hospitals and other institutions for the treatment or care of the sick, the infirm, the destitute or the mentally unfit."

3. A counter-affidavit has been filed by the first respondent. It is admitted in paragraph 7 that such a notification has been issued. However, it is contended that the exemption itself would show that hospitals, dispensaries, etc., are establishments as defined in the Kerala Shops and Commercial Establishments Act. It is further averred in the counter-affidavit that the Maternity Benefit Act is applied to establishments as per as notification which is marked as Exhibit R-1. The said notification, Exhibit R-1 reads as follows:

"Whereas under the provision to sub-section (1) of Section 2 of the Maternity Benefit Act, 1961, the State Government may with the approval of the Central Government after giving not less than two month"s notice of its intention of so doing, by notification in the Gazette, declare that all or any of the provisions of the said Act shall apply to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.

And, whereas the Government of Kerala have given notice of its intention of applying all the provisions of the said Act to the establishments as defined in Clause (8) of Section 2 of the Kerala Shops and Commercial Establishments Act, 1960, by notification in the Gazette as required by the proviso to Sub-section (1)

of Section 2 of the said Act (Central Act 53 of 1961).

Now, therefore, in exercise of the powers conferred by the proviso to Sub-section (1) of Section 2 of the Maternity Benefit Act, 1961, the Government of Kerala with the approval of the Central Government hereby declares that all the provisions of the said Act shall apply to the establishments as defined in Clause (8) of Section 2 of the Kerala Shops and Commercial Establishments Act, 1960."

4. It is true that by virtue of this notification the provisions of the Maternity Benefit Act have been made applicable to all the establishments as defined in Clause (8) of Section 2 of the Kerala Shops and Commercial Establishments Act, 1960. Clause (8) of Section 2 says that "establishment" means a shop or a commercial establishment. It is not disputed that this expression will take in hospitals, nursing homes and dispensaries. But, the contention raised is that permanent exemption is granted for hospitals, nursing homes and dispensaries by virtue of Notification No. L.Dis/2186/57/LAD, dated April 17, 1957, quoted above and the said notification has not been cancelled. It is true that the Travancore-Cochin Shops and Establishments Act, 1125, was repealed and re-enacted by the Kerala Shops and Commercial Establishments Act. A provision similar to Section 6 of the Travancore-Cochin Shops and Establishment Act, 1125, is enacted in Section 5 of the Kerala Shops and Commercial Establishments Act, 1960. So this notification will be consistent with the provisions of the latter Act and so long as the said notification has not been cancelled, it may be taken as having been issued under the latter Act by virtue of Section 23 and shall continue in force until it is cancelled. Moreover, proviso to Section 36 states that anything done under the repealed Act which could have been done under the later Act shall be deemed to have been done under the Kerala Shops and Commercial Establishments Act. In the circumstances, learned counsel contended that the exemption still holds good and, therefore, Exhibits P-5 series and P-6 series are illegal and are liable to be quashed.

5. I feel that there is great force in the contention raised by learned counsel. In regard to the Payment of Wages Act, a similar notification was issued applying the provisions of the Kerala Shops and Commercial Establishments Act and a single Judge of this Court had occasion to consider in *Sherthallai Sree Narayana Medical Mission General Hospital, v. Damodaran Krishnan Unni* (1975) KLT 572, whether the provisions of the Payment of Wages Act are applicable to hospitals, nursing homes and dispensaries which were exempted under the notification referred to above in exercise of the powers conferred under the Travancore-Cochin Shops and Establishments Act. Learned Judge took the view that since the exemption notification issued has not been cancelled and a provision similar to Section 6 of the Travancore Cochin Shops and Establishments Act is enacted in Section 5 of the Kerala Shops and Commercial Establishments Act, the notification issued under the former Act will hold good so long as that notification has not been cancelled and that notification will be treated as having been issued under the latter Act by virtue of the proviso contained in Section 36 of the Kerala

Shops and Commercial Establishments Act.

6. In a similar situation a single Judge of this Court in *State of Kerala v. Adichan Sasi*, held that a notification issued under the Travancore Forest Act should be deemed to be a notification issued under the Travancore-Cochin Forest Act and the Kerala Forest Act by virtue of saving clause contained in the Kerala Forest Act and Section 23 of the Interpretation and General Clauses Act.

7. Learned Government Pleader heavily relied on a Division Bench decision of this Court in *Jayachandran v State of Kerala* (1984) KLT 903, where the question arose whether a private hospital, dispensary or pharmacy will come within the purview of the Minimum Wages Act, 1948. It was held that a hospital, dispensary or pharmacy would be understood in common parlance either as an establishment or as a shop which are added as item 21 to the Schedule of the Act. That decision cannot have any application to this case as the addition of shops and establishments was not a referral legislation in that case and the effect of exemption Notification No. L.Dis/2186/57/LAD, dated April 17, 1957, issued under the Travancore-Cochin Shops and Establishments Act never came for consideration of the Division Bench. In the circumstances, I do not find any force in the contention that *Jayachandran's* case (*supra*) is applicable to the facts of this case.

8. It is lastly contended by the Government Pleader that the petitioner has got an alternative remedy of appeal u/s 17(3) of the Maternity Benefit Act and on this ground this original petition is liable to be dismissed. Having entertained the original petition, I do not think that I will be justified in dismissing the original petition for the reason that there is an alternative remedy available to the petitioner, especially in view of the nature of contention raised in the original petition.

9. The foregoing discussion would show that the petitioner is entitled to the benefits of exemption contained in Notification No L.Dis./2186/57/L&LAD. Accordingly, orders Exhibits P-5, P-5(a) and P-5(b) and consequential demand notices issued as per Exhibits P-6, P-6(a) and P-6(b) are quashed and original petition is allowed.