(2006) 10 BOM CK 0049

In the Bombay High Court

Case No : Writ Petition No. 5467 of 2005

Maharashtra Suraksha Rakshak Aghadi APPELLANT

Vs

State of Maharashtra and others RESPONDENT

Date of Decision : 10-10-2006

Acts Referred:

Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981 — Section 15, 19, 20, 21, 23

Citation : (2007) 1 ALLMR 769 : (2006) 6 BomCR 493

Hon'ble Judges : J.H. Bhatia, J;H.L. Gokhale, J

Bench : Division Bench

Advocate : Sushil Mahadeshwar, for the Appellant; P.M. Mokashi, A.G.P. for Respondent No. 1, P.M. Topkar, for Respondent No. 2, P.K. Rele instructed by Piyush Shah and A.K. Jalisatgi, for the Respondent

Final Decision : Allowed

Judgement

H.L. Gokhale, J.—The petitioner herein is a registered Trade Union which espouses the cause of the private security guards. Through the present Petition, the petitioner Trade Union is seeking to challenge the two Notifications dated 24.7.2003 and 8.11.2004 issued by the State of Maharashtra granting exemption u/s 23 of the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981 (hereinafter referred to as "the said Act") and prays that the same may be quashed and set aside. These two Notifications grant exemption to two agencies supplying private security guards to the factories and/ or establishments run by the principal employer. This Section 23 empowers the State Government to grant such exemption if the security guards concerned are in the receipt of benefits which are on the whole not less favourable to the security guards provided under the said Act or the Scheme thereunder. It is the contention of the petitioner - Trade Union that, in fact, they are not so favourable and, therefore, the present Writ Petition.

2. Before we examine the submissions of the various parties, we may advert to

the salient features of the said Act and particularly Section 23 of the said Act granting exemption to the security guards from the coverage of the said Act or the Scheme in certain circumstances. This Act was passed by the legislature of the State of Maharashtra, principally for regulating the employment of private Security Guards employed in factories and establishments in the State and for providing better terms and conditions of employment and welfare through the Board established for that purpose. That is the declared object of this Act as per its preamble. This Board is constituted u/s 6 of this Act and is a body corporate. The State Government is supposed to prepare a scheme for ensuring regular employment of the Security Guards for the matters which have been mentioned in Section 3 of this Act. The Board is made responsible for administering the above Scheme u/s 8 of this Act. The Scheme gives detailed provisions with respect to the registration of the Security Guards and regulating their recruitment and registration of the Guards and the principal employers and about the maintenance of the registers etc. The concepts of agency, employer, principal employer and Security Guards are defined under the said Act. Under Sections 19, 20 and 21 of the said Act, certain responsibilities are cast on the principal employers under the Workmen''s Compensation Act, 1923, Payment of Wages Act, 1936 and the Maternity Benefits Act, 1961. Section 23 of the said Act provides for exemptions to the Security Guards employed by the agencies, if the Security Guards are on the whole receiving not less favourable benefits than those under the said Act or the Scheme.

3. This Section 23 of the said Act reads as follows:

23. Exemptions. - The State Government may, after consulting the Advisory Committee, by notification in the Official Gazette, and subject to such conditions and for such period as may be specified in the notification, exempt from the operation of all or any of the provisions of this Act or any Scheme made thereunder, all or any class or classes of Security Guards employed by the agency or agent as may be specified in the notification and deployed in any factory or establishment or in any class or classes of factories or establishment, if in the opinion of the State Government, all such Security Guards or such class or classes of Security Guards are in the enjoyment of benefits, which are on the whole not less favourable to such Security Guards than the benefits provided by or under this Act or any Scheme made thereunder.

Provided that, the State Government, may, by notification in the Official Gazette, at any time, for reasons to be specified, rescind the aforesaid notification.

Thus, this section provides that the State Government has to first consult the Advisory Committee on the question of granting exemptions. This Advisory Committee is constituted u/s 15 of the said Act which provides that the Advisory Committee will include an equal number of members representing the principal employers, the Security Guards, the legislature and the State administration. The State Government has thereafter to form an opinion that all such security guards or such class or classes of security guards employed by the agency are in the enjoyment of benefits which are on the whole not less favourable when compared with the benefits provided to the security guards under the said Act or the Scheme made thereunder. A Security Guards Board is constituted under the Act and the Scheme framed under the said Act lays down the various service conditions of the security guards who are registered with the Board and this Board supplies the guards to the principal employers. Thus, it is clear that the State Government has to form an opinion after consultation with the Advisory Committee that the security guards engaged by an agency are receiving such better service conditions, when compared with the security guards employed through the Board. While granting such exemption, the State Government may impose such conditions as may be specified in the notification and it may also specify the period for which the exemption is granted. It is most important to note that as the section itself declares that the State Government must form an opinion that the private security guards concerned are in enjoyment of benefits which on an overall basis not less favourable than those under the Board. As far as the benefits under the Board are concerned, they are very much available for anybody and in any case to the Government to look in and compare. Thus, there is a clear yardstick under the Statute which the State Government is expected to follow before it issues the notification.

4. The notification under challenge in this Writ Petition is one dated 24.7.2003 and the subsequent notification is dated 8.11.2004. Copies of these notifications are annexed at Exhibits ''C'' and ''C1'' to the Writ Petition. These notifications grant exemption to the security guards, whose names are mentioned in the two notifications. They are all employees of respondent No. 4 -security agency. Both these notifications say that the security guards who have already been employed by this agency are in the enjoyment of benefits which are on the whole not less favourable than the benefits provided under the said Act and the Scheme framed thereunder. The first notification grants exemption to the security guards whose names are mentioned therein for a period of three years from 24th July 2003 and the second notification grants exemption to some more security guards with effect from 8th November 2004. In the first notification, some 21 establishments and/or factories are mentioned. One of those establishments has been joined to represent them i.e. respondent No. 3 and the names of the employees engaged by respondent No. 3 are listed at Exhibit-A to the Petition.

5. Schedule-II to the notifications contains the conditions to be followed by the employer-agency and the principal employer. The first condition is that the certificate regarding antecedents of the guards as well as the employer i.e. the agency of such guards is to be verified by the Police and the Police verification certificate is to be obtained. Thereafter the provisions regarding the training, educational qualifications and physical fitness are given. Clause 4 of the Schedule provides for uniform, shoes and rainy and winter uniforms. There is no dispute that the same is being provided to these guards. Clause 5 is on wages and other statutory benefits. It states that the wages of the employees concerned are to be deposited by opening an account in a Nationalized Bank. Thereafter it is stated

that every month certain amounts, as mentioned therein, are forwarded to the Board towards the ex-gratia payment, gratuity, leave with wages and paid holidays. However, how much monthly wage is to be paid to the security guards is not mentioned at all. Clause-5 of the Schedule provides that the security guards are to be paid overtime allowance which will be not less than double the rates of wages. Clause-13 provides that when a guard leaves his job the agency will pay all his legal dues. There is, however, no mechanism under these provisions as to when and in which circumstances the services of the security guard can be terminated and if so, what is the remedy for him.

6. An affidavit in reply dated 30th November 2005 has been filed on behalf of respondent No. 2-Board by one Shri A.K. Wagh, Personnel Officer. In paragraph 1(h) thereof, he has referred to the report of inspection when the Inspector of the Board visited the establishment of respondent No. 3 on 15.9.2005. It was found that respondent No. 3 was engaging about 35 security guards since 1999, though the agency had received the exemption only for 18 security guards. Thus, respondent No. 3 was found to be engaging non-exempted security guards. The Inspector obtained the copies of the daily muster and also the copies of bills raised by respondent No. 4 against respondent No. 3 towards the wages of the security guards for the months of June, July and August 2005. What he found was that the guards were being paid wages far less than what were being paid under the Board. Para-10 of the affidavit in reply dated 21st September 2005 of one Shri Kushwaha Kant Mishra, Managing Director of respondent No. 4 clearly states that the wages were being paid at the rate of Rs. 3,200/- per month. Thereafter he states:

We have already paid arrears to our security guards for the months of January to June 2005.

This is while denying that the guards were being paid lower wages than the wages fixed by the Board. The Board was paying more than Rs. 4,000/-at the relevant time. The inspection carried out by the Board coupled with the above admission of the Managing Director of respondent No. 4 clearly shows that the security guards were being paid less wages, though it is now stated that subsequently the arrears are cleared.

7. It is seen that under Clause-23 of the Scheme the guards are entitled to the paid holidays of four days in a year i.e. 15th August, 26th January, 1st May and one more holiday. They are not so being provided under the agency. They have also not been given leave with wages. It is also seen from the inspection carried out by respondent No. 4 that the salary was being paid on 15th of the subsequent month and though there was a rule of overtime, the same was not being paid.

8. Mr. Mahadeshwar, learned Counsel appearing for the petitioner, pointed out that under Clauses 32 to 35 of the Scheme, it is provided as to when a disciplinary action can be taken against the security guard and when his services

can be terminated. An Appeal is available against any such decision under Clause 35 of the Scheme to the Chairman and then to the State Government. There is no such protection under the private contractor. He, therefore, submits that the notifications deserve to be quashed and set aside and respondent No. 3 - principal employer as also the various principal employers mentioned in the notifications should be directed to register under the Board.

9. Mr. Rele, learned Counsel appearing for respondent No. 3 - principal employer, submitted that the wages payable to the security guards need not be specifically mentioned in the exemption notification for the reason that they are changed from time to time, depending upon the wages payable under the Board.

10. Mr. Jalisatgi, learned Counsel appearing for respondent No. 4 - contracting agency, referred us to paragraph 10 of the reply filed by Shri Mishra to state that the difference of wages between what was paid and what ought to be paid will be cleared.

11. Mr. Topkar, learned Counsel appearing for the Board, submitted that the Board was neither consulted nor heard before any such notification was issued and it ought to have some role in this behalf.

12. Mr. Mokashi, learned AGP appearing for the State Government, defended the notifications but very fairly passed on to us the Government File containing the Minutes of the decision granting exemption. It is seen from this File that whenever any such exemption is applied for, a standard questionnaire is furnished to the security agency concerned. It includes various requirements such as the date from which the agency is functioning, its registration number, the information about its security supervisors and security guards, benefits which are being given to them, including with respect to wages, overtime, weekly off, maternity benefit, provident fund, gratuity, uniform, etc.

13. Thereafter the officers in the Labour Department prepare the submission which is also in a standardized form which has in all 21 clauses in paragraph 3. As far as the present respondent No. 4 is concerned, it is seen from the File that the information in some of the relevant clauses in paragraph 3 is as follows:

(i). Clause-3 is concerning professional tax under which it is stated that though registration certificate is enclosed, no particulars are given with respect to payment of professional tax.

(ii). Clause-4 is on provident fund and against which, it is mentioned that no particulars are given as to whether P.F. amounts are paid and with respect to whom.

(iii). Clause-5 pertains to Employee''s State Insurance Scheme, under which a code number is given, but it is not stated whether any amount is paid towards any of the security guards.

(iv). Clause-6 contains Income Tax clearance certificate.

(v). Clause-7 pertains to Shop and Establishment certificate which is not enclosed in the present case.

(vi). Clause-8 contains registration under the Contract Labour (Regulation and Abolition) Act. In the present case, the same is not enclosed.

(vii). Clause-10 contains agreements with the principal employer. In the present case, they are enclosed.

(viii). Clause-13 is on wages. It is stated that the monthly wages of the security guards are equal to the Board. However, it is further stated that according to the report of the President of the Board the wages are less than the Board and the wages for the holidays are not being paid. Under Clause-14 the number of security guards is mentioned as 163 and under Clause-15 the number of guards making applications is written as 163. Against the column of Police scrutiny it is written that the Police Scrutiny Reports of 162 security guards are not received as yet.

(ix). Clause-17 contains the names of companies where guards are already supplied. Under this clause, names of six companies are mentioned.

(x). Clause-18 contains Police scrutiny of the employers of the agency. Under this clause, it is written that certificate is not produced.

(xi). Clause-19 states whether any offence is registered against the agency, under which it is written that the Police Report is not received.

(xii). Clause-20 deals with Court cases. Under this clause, it is written that a case is pending against the agency.

(xiii). Clause-21 contains the report from the Labour Commissioner, under which it is mentioned that the same is not received.

Thereafter at the end of this scrutiny sheet, the Desk Officer and the Deputy Secretary have made a report as follows:

Having seen the information from Clauses 3, 4, 5, 8, 13, 16, 18, 19, 20 and 21 from paragraph 3, we are of the view that it will not be proper to grant exemption to M/s.Industrial Guards Services Private Limited u/s 23 of the Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act.

14. Thereafter the File contains a photo copy of a printed Note below which the then Minister of State for Labour Shri Hemant Deshmukh and the then Cabinet Minister for Labour Shri Satish Charturvedi have signed on 3rd April 2003. The said Note records that this agency has applied for exemption u/s 23. The only thing to be examined is whether the security guards are in receipt of benefits better than the Board. Thereafter it is stated in para-3 that although the points raised by the department are correct, what is most important is only Clause 3(13) which is on the wages of the employees concerned. Paragraph 4 of this

Note, when translated into English from Marathi, reads as follows:

It will not be fair to deny exemption to the security guards only on the ground of deficiencies on the points other than point No. 3(13). That will deny the opportunity to the security guards to receive equal or more benefits as available under the Board. That will be improper and outside the legal provisions. The recommendation of the department not to grant exemption on the basis of clauses other than Clause 3(13) will not stand to a scrutiny in the Court of law. It will be improper not to grant exemption to security guards for the failure of the agency to furnish the requisite papers.

Thereafter the two Ministers write that the agency be asked to fulfil the other requirements within three months. If the agency does not fulfil these requirements within three months, then the exemption be cancelled. Police verification be also obtained. The Ministers thereafter direct in Clause-7 of this letter that the Police scrutiny be obtained and the exemption will be granted for a period of three years.

15. A separate File regarding the scrutiny of the Advisory Committee is shown to us but it is not seen therefrom as to when the subject of the application for exemption of respondent No. 4-agency with full particulars was placed before the Advisory Committee. The only relevant Minutes appeared to be one dated 9th January 2003 wherein it is stated that some 119 applications were received by the State Government u/s 23 of the said Act. We have also been shown the Minutes of the meeting dated 28.11.2002. The views expressed by some of the members at the time of the meeting are noted. Thereafter the Cabinet Minister who was presiding over the meeting, has informed the members that the applications received have been examined at the level of the administration. It is thereafter recorded that the report of the Security Guards Board be obtained and all the information be made available to the members. It, however, further stated that the administration may examine all the applications and take appropriate decision with respect to the grant of exemption at the administrative level. It is not seen from the File whether the report of the scrutiny done at the level of the administration was ever shown to the members of the Advisory Committee or whether the final decision was ever placed before the Advisory Committee. As stated earlier, no scrutiny has been done through the Security Guards Board, though that was suggested by some of the members of the Advisory Committee. However, in the note prepared by the Administration as seen above there is a reference to the comments of the President of the Board. The affidavit of the Board in this Court clearly states that the Board has noted that the number of security guards engaged is more than what was permitted by the exemption notification and they were being paid wages less than what was being given under the Board. This is seen with respect to a good principal employer like respondent No. 3 which is a multi national Company.

16. From what is stated above, the following aspects are very clear:

(a). It is difficult to say that there has been any meaningful consultation with the Advisory Committee.

(b). The administration had clearly recommended in no uncertain terms that the agency does not deserve to be granted exemption and that was after the scrutiny of all the relevant factors by the labour department.

(c). This Note is signed by the Secretary on 31st March 2003. Yet the Ministers have signed a decision to the contrary granting exemption on 3rd April 2003.

17. As stated above, the main reason given in the decision of the Ministers is that if the guards are receiving equal or better wages on par with the Board, then there is no reason to deny exemption if the benefits are less on other counts. First of all the Ministers have ignored the report of the President of the Board which is referred to in Clause 3(13) of the Note made by the Secretary. The President of the Board has in terms stated that the wages paid are less than what are paid under the Board and that the wages were not being paid for the holidays. In the other clauses, it is clearly stated in the report of the Secretary of Labour that no particulars are given with respect to the contribution towards the Provident Fund and Employees'' State Insurance Scheme. Even the Police Scrutiny of 162 out of 163 security guards was not done. Prima facie, therefore, the decision arrived at by the Minister of the State and the Cabinet Minister are without any supporting material.

18. It is material to note that Section 23 of this Act speaks of the employees concerned receiving on the whole not less favourable service conditions. It is the overall package which has got to be examined. This is also the approach when it comes to examining the benefits under any industrial settlement as laid down by the Apex Court in Herbertsons Ltd. v. Workmen reported in AIR 1977 S.C. 322 In the present case, the Advisory Committee does not appear to have been consulted meaningfully. When the Statute speaks of consultation with the Advisory Committee, the consultation has got to be meaningful. From the record of the Committee, it does not appear to be so. Besides, the Government has to form an opinion as to whether the benefits are on the whole not less favourable. As far as the administrative wing of the Government dealing with this work on a regular basis is concerned, it has clearly given an opinion that the agency did not deserve to get exemption since the benefits were on the whole less favourable. The views expressed by the administrative wing of the Government have come to be endorsed by the Security Guards Board in its affidavit made in this Court and the fact that the guards of the agency were being paid lesser wages is not even controverted in the affidavit of the agency. In this background, we fail to see as to how the political executive came to the conclusion to the contrary as stated above.

19. We have got to note that this Act is a welfare legislation. It is enacted with a view to protect the private security guards who are not much educated and, therefore, they put in hard labour in various factories and establishments. With a

view to stop exploitation, a Board is created under the said Act. The provision of exemption u/s 23 of the said Act is an exception and not a rule. That being so, the State Government must zealously protect and scrutinise as to whether there is a real case for exemption after an overall examination of the facilities under a particular contracting agency. It is then only an exemption ought to be granted and not otherwise.

20. We must also add that the exemption is supposed to be granted on an application on behalf of the security guards. Therefore, a copy of the exemption notification must be given to the guards concerned. Clause-5 of Schedule-II of the Notification is on wages and statutory benefits. It must clearly provide for the following:

(i). What are the monthly wages to be paid in terms of rupees to the guards concerned to begin with ? Whether they will at all material times be paid wages equal or more than those that are paid to the security guards working under the Board ?

(ii). What other benefits will be given to the security guards and which clauses of the Scheme of the Board will apply to them ?

(iii). The Notification must be issued in Marathi so that the security guards understand the same. We expect the State to make such provisions in future.

21. In the circumstances aforesaid, as far as the present Notifications are concerned, this Writ Petition will have to be allowed. We accordingly allow the Writ Petition and quash and set aside the Notifications dated 24th July 2003 and 8th November 2004.

22. The Petition is basically filed to protect the services of the security guards whose names are listed in Exhibit-A to the Petition. They have been working for different periods i.e. from September 2002 through respondent No. 4 - agency. Respondent No. 3 -principal employer has not pointed out any improper functioning on the part of these guards. They are seeking their registration with respondent No. 2-Board and to allot them to respondent No. 3-establishment which is prayer (c) of this Petition.

23. Prayer (b) of the Petition is to direct respondent No. 3 to get itself registered with the Security Guards Board. Respondent No. 3 - principal employer is duty bound to register itself with the Board under the provisions of the said Act unless it is employing exempted guards. This being the position, since the Notifications are being set aside, we grant prayer Clauses (b) and (c) of the Petition and direct respondent No. 3 to register itself with the Board. We further direct respondent No. 2-Board to consider these guards for registration and consider them for allotment to respondent No. 3-establishment.

24. Inasmuch as the Notification dated 24th July 2003 was issued in the absence of a proper consultation with the Advisory Committee and on facts in a situation when according to the Administration the guards were not likely to receive better

benefits, the arrangement between respondent No. 4 - agency and all the principal employers on the basis of the exemption will come to an end if that is actually so. There is no specific prayer with respect to the guards employed under other establishments. However, on parity of reasoning, it will be expected of the Board to make a report of actual benefits and if it is adverse, the Government will cancel the exemption for such guards under the proviso to Section 23 of the Act. In that case the Board will consider those guards for registration and call upon those principal employers to get registered with the Security Guards Board and thereafter consider these guards and allot these guards to those principal employers.

25. Rule is accordingly made absolute in the aforesaid terms. Respondent Nos. 1 and 4 are responsible for this situation. Each one of them will pay costs quantified at Rs. 10,000/- to the petitioner.