

(2000) 04 AHC CK 0137
In the Allahabad High Court
Case No : Writ Petition No. 309 (MS) of 2000

Maresh Kumar Garg and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 11-04-2000

Acts Referred:

Child Labour (Prohibition and Regulation) Act, 1986 — Section 10, 3
Constitution of India, 1950 — Article 23, 24, 39

Citation : (2000) 2 UPLBEC 1426

Hon'ble Judges : Pradeep Kant, J

Bench : Single Bench

Advocate : Satish Kumar Keshish, for the Appellant; C.S.C., for the Respondent

Final Decision : Disposed Of

Judgement

Pradeep Kant, J.—"Child Labour" is a universally acknowledged problem with so un-proportionate and explosive dimensions that it had been a cause of serious concern since long and all Acts. Regulations and declarations made in this behalf had not been able to meet the challenge, effectively. The Child Labour (Prohibition and Regulation) Act, 1986 (hereinafter referred to as the "Act" for short) was promulgated looking to the fact that although there were number of Acts which prohibit the employment of children below 14 and 15 years in certain specified employment but there was no procedure laid down in any lay for deciding in which employment's occupations or processes, the employment of children should be banned. It was also found that there was also no law to regulate the working conditions of the children in most of the employments where they were not prohibited from working in exploitative conditions. The Act intended to :

- (i) to ban the employment of children i.e., those who have not completed their 14 years in specified occupations and processes;
- (ii) lay down a procedure to decide modifications to the schedule of banned

occupations or processes;

(iii) regulate the conditions of working of children and the employment where they are not prohibited from working;

(iv) lay down enhanced penalties for employments of children in violation of the provisions of the Act and other Acts which prohibit the employment of children;

(v) and to obtain uniformity in the definition of the child in the related laws.

2. With the aforesaid objects the Act was enforced wherein a person who has not completed 14 years of age was defined as a "Child" u/s 2, Sub-clause (ii) of the Act. Section 2, Sub-clause (iv) defines establishment which includes a shop, commercial establishment, workshop for residential hostel, restaurant, eating house, theater or other place of public amusement or entertainment. In view of Section 2. Sub-clause (x) workshop means any premises (including the precincts thereof) wherein any industrial process is carried on but does not include any premises, to which the provisions of Section 67 of the Factories Act, 1948 (Act No. 48 of 1948) for the time being, apply.

3. Part-II of the Act which contains Sections 3, 4 and 5 deals with the prohibition of the employment of children in certain occupations and process. Section 3 reads as under :--

"3. Prohibition of employment of children in certain occupations and processes.-- No child shall be employed or permitted to work in any of the occupations set forth in part A of the Schedule or in any Workshop wherein any of the processes set forth in part B of the Schedule is carried on :

Provided that nothing in this section shall apply to any workshop wherein any process is carried by the occupier with the aid of his family or to any school established by, or receiving assistance or recognition from, Government."

4. The power to amend the schedule has been given to the Central Government and the Child Labour Advisory Committee may be constituted by the Central Government for the purpose of advising to the Central Government regarding the addition of occupations and processes to the Schedule.

5. Part-III of the Act deals with the regulation of conditions of work of children, which provides by virtue of Section 6 to an establishment or a class of establishments in which none of the occupations or processes referred to in Section 3 is carried on.

6. Sections 7 and 8 deal with the hours and period of work and weekly holidays respectively.

7. Section 9 makes it mandatory for the employer/occupier to give the requisite notice regarding the employment of a child and reads as under :--

"9. Notice to Inspector.--(1) Every occupier in relation to an establishment in which a child was employed or permitted to work immediately before the date of

commencement of this Act in relation to such establishment shall within a period of thirty days from such commencement, send to the Inspector within whose local limits the establishment is situated, a written notice containing the following particulars namely :--

- (a) the name and situation of the establishment;
- (b) the name of the person in actual management of the establishment;
- (c) the address to which communications relating to the establishment should be sent; and
- (d) the nature of the occupation or process carried on in the establishment.

(2) Every occupier, in relation to an establishment, who employs, or permits to work, any child after the date of commencement of this Act in relation to such establishment, send the Inspector within whose local limits the establishment is situated, a written notice containing the particulars as are mentioned in Sub-section (1).

Explanation.--For the purpose of Sub-sections (1) and (2), "date of commencement of this Act. in relation to an establishment" means the date of bring into force of this Act in relation to such establishment.

(3) Nothing in Sections 7, 8 and 9 shall apply to any establishment wherein any process is carried on by the occupier with the aid of his family or to any school established by, or receiving assistance or recognition from, Government."

8. If there is any dispute regarding the age of a child, the Act provides by means of Section 10 a procedure for resolving such dispute u/s 10 which reads as under :--

"10. Disputes as to age.--If any question arises between an Inspector and an occupier as to the age of any child who is employed or is permitted to work by him in an establishment, the question shall, in the absence of a certificate as to the age of such child granted by the prescribed medical authority, be referred by the Inspector for decision to the prescribed medical authority."

9. It is obligatory for the occupier to maintain a register u/s 11 in respect of children employed or permitted to work in any establishment, which should be available for inspection by an Inspector at all times during working hours showing the details of the child as provided in Sections 11(1)(b), (c) and (d). Section 13, deals with the health and safety of the children employed are permitted to work in an establishment or a class of establishments for which the appropriate Government is vested with the powers of making rules by issuing a notification and the Official Gazette.

10. Part IV of the Act is under the head of "Miscellaneous". Section 14 in this part deals with the penalties which could be imposed over any employer who employs or permits any child to work in contravention of the provisions of

Section. Section 16 gives locus standi to any person, police officer or Inspector for filing the complaint of the commission of an offence under this Act, in any Court of Competent Jurisdiction. Sub-clause (2) of Section 16 makes the age certificate, given by the prescribed medical authority, as a conclusive evidence for the purpose of this Act, as to the age of child to whom it relates. The Sub-clause (3) of Section 16 provides that no Court inferior to that of a Metropolitan Magistrate or a Magistrate of the First Class shall try any offence under this Act.

11. Section 17 deals with the appointment of inspectors and reads as under :--

"17. Appointment of Inspectors.--The appropriate Government may appoint Inspectors for the purposes of securing compliance with the provisions of this Act and any Inspector so appointed shall be deemed to be a public servant within the meaning of the Indian Penal Code (Act No. 45 of 1860)."

12. The appropriate Government has been empowered to make rule u/s 18 in the manner prescribed.

13. Various social organisations. N-G.O.s social anthropologists have-seriously considered the menace of child labour and the Supreme Court while tracing the history and the steps taken by the International Labour Organisation in the year 1919 till the promulgation of the present Act, found itself convinced that the measures which have been taken for routing the ill of child labour or exploitation of child could neither prove appropriate nor effective and therefore, in the case, of M.C. Mehta Vs. State of Tamil Nadu and others, , fastened the employers/occupiers of every establishment given in the Act with a civil liability of paying the compensation of 20,000/- per child in case the employment has been done by the employer or the child is permitted to work in violation of the provisions of the Act. The scheme of the Act did not provide for any such compensation as it only confined to launching of a criminal prosecution against erring employer/occupier u/s 16 of the Act, permitting the Magistrate to impose penalises as provided under Sections 14 and 15 of the Act. The civil liability of making payment at the rate of Rs. 20,000/- per child arises out of the orders passed by the Apex Court in M.C. Mehta's case (supra).

14. The Hon"ble Supreme Court while considering the plight of the child labourer and the causes of such vast magnitude of such exploitation laid down that a Child Labour Rehabilitation-cum-Welfare Fund should be created district wise or area wise. Every offending employer shall deposit Rs. 20,000/- per child in the said fund. The funds so generated shall form corpus whose income shall be used for the child concerned. The quantum could be the income earned, deposited to qua the child. To generate greater income, fund can be deposited in high-yielding scheme of any nationalised bank or other public body. Multiple directions were issued to the States for giving shape to the directions, issued by the Hon"ble Supreme Court in which the States were required to undertake a sincere and vigorous exercise as provided in the report.

15. In para 29 of the said report the Lordships of the Hon"ble Supreme Court

observed "...We are, however, of the view that till an alternative income is assured to the family, the question of abolition of Child Labour would really remain a will-of-the-wisp. Now, if employment of child below the age of 14 is a constitutional indication in so far as work in any factory or mine or engagement in other hazardous work, and if it has to be seen that all children are given education till the age of 14 years, in view of this being a fundamental right now, and if the wish embodied in Article 39(e) that the tender age of children is not abused and citizens are not forced by economic necessity to enter avocation unsuited to their age, and if children are to be given opportunities and facilities to develop in a healthy manner and childhood is to be protected against exploitation as visualised by Article 39(f). it seems to us that the least we ought to do is to see to the fulfilment of legislative intendment behind enactment of the Child Labour (Prohibition and Regulation) Act, 1986. Taking guidance therefrom we are of the view that the offending employer must be asked to pay compensation for every child employed in contravention of the provisions of the Act a sum of Rs. 20,000/- and the Inspectors, whose appointment is visualised by Section 17 is to secure compliance with the provisions of the Act, the employer concerned pays Rs. 20,000/- which sum could be deposited in a fund to be known as "Child Labour Rehabilitation-cum-Welfare Fund."

16. In obedience of the orders passed by the Apex Court various employers have been subjected to recovery proceedings at the rate of Rs. 20,000/- per child, for realisation of which recovery proceedings have been initiated and coercive methods are being adopted for realisation as arrears of the land revenue. The Court is flooded with writ petitions where the employer/occupier of an establishment have been required to make the payment as aforesaid in pursuance of the recoveries issued by the Labour Inspectors for complying with the terms of the order. It is a common ground in almost all such cases that no opportunity much less any reasonable opportunity have been given to the employers/occupiers before asking them to make the payment or compensation and the recovery proceedings have been initiated without giving any such opportunity. In some cases show cause notices have been issued by the Labour Inspectors and the reply is submitted by the employers/occupiers but without deciding the objections a final recovery certificate is issued and the recoveries have been initiated. Further, grievance is that even if the employers/occupiers disputes the age of the alleged child the Labour Inspector does not proceed to get the age determined by the Prescribed medical authority and proceeds to make recoveries. Likewise even if the objection is to the effect that the so called child was never in employment of the establishment nor they were permitted to work, such objections are not considered at all.

17. In the instant case a show cause notice was issued to the petitioners on 24.6.1999 in pursuance of an inspection made by the Survey team on 2.2.1999, stating therein that the petitioners have violated the provisions of Section 3 of the Act and therefore, they should show cause within a period of 7 days as to why action should not be taken against them in this regard. The petitioner No. 1

who is the partner of the petitioner No. 2 submitted his reply to the Labour Enforcement Officer, Gonda on 17.7.1999. In his reply the petitioner asserted that the said children shown to be in their employment have never been remained in their employment nor they were engaged by him. A further objection was raised that no evidence has been provided to the petitioners regarding the age of the aforesaid children nor any certificate of the prescribed medical authority has been made available. Besides this, certain other objections were also raised regarding the non-making of the inspection on 2.2.1999 etc. After submission of the reply to the show cause notice the petitioners were not informed about any decision taken on their reply and straightforward recovery proceedings were initiated by coercive means which have been informed by the citation demands issued by the Tehsildar, Gonda (Sadar) for an amount of Rs. 1,32,000/- as contained in Annexure I. Learned Counsel for the petitioners submits that the authorities were not at liberty to proceed with the recovery, that too by adopting coercive methods without deciding the objections raised "by the petitioners. As a corollary to the aforesaid arguments, the learned Counsel for the petitioners further submits that the petitioners were not afforded any opportunity much less reasonable opportunity to support their defence nor were they given any opportunity of hearing. Besides this the ages of the children have not been got determined u/s 10 of the Act by the prescribed medical authority. The arguments is that the firstly, so named children were not employed by them and second, there was no basis or evidence with the Labour Enforcement Officer even prima facie to take their ages below 14 years.

18. This Court in the case of Anil Kumar Agarwal v. Assistant Labour Commissioner and Ors., reported in 1998 (16) LCD 1028, has considered the question of affording opportunity to the erring employer/occupier before he is made to make payment of compensation at the rate of Rs. 20,000/- per child. In deference of the orders passed by the Hon'ble Supreme Court Hon'ble S.R. Singh, J. while taking into account the various provisions of the Act and also the Constitutional provisions contained in Articles 23 and 24 of the Constitution of India held in para 7 of the said report which is as under :--

"7. Right against exploitation is guaranteed by Articles 23 and 24 of the Constitution. Article 39(f) casts a duty upon the State to direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Infringement of fundamental right guaranteed by Article 24, it seems, is a tort which is actionable per se that is without proof of actual damage and consent by the child and/or his parents is not defence and if right to education is a fundamental right. State is equally liable to pay compensation for not providing free education to children; upto the age of 14 years belonging to weaker section of Society. There is no denying the fact that the laudable constitutional objectives afore-stated were sought to be achieved by the Supreme Court in the manner indicated in M.C. Mehta's case (supra), but the

principle of law well-settled is that no man should be condemned unheard and therefore, follows that before, an employer is asked to pay compensation he must be given reasonable opportunity of being heard as against the report submitted by the Inspector for realisation of the compensation at the rate of Rs. 20,000/- per child. The objections, if any, filed by the employer on receipt of the show cause notice must also be reckoned with analytically in a lawful and adjudicatory manner before proceeding to realise the amount of compensation. The imperative function of the Inspector appointed u/s 17 of the Act, is to secure compliance with the provisions of the Act, and see that for each child employed in antagonism of the provisions of the Act, the Employer concerned pays Rs. 20,000/-. The position of the Inspector quo, the provision encapsulated in the Act is that of Prosecutor and it must not be expected of him to discharge the adjudicatory functions. It would have been ideal, if the "appropriate Government" had been provocative in framing the rules and procedure for the enforcement of rights and liabilities arising from large scale infringement of fundamental rights of the children below the age of 14 years as a result of failure to perform path law duty under the Constitution which is sue generis i.e., a class in itself as recognised by the Supreme Court in its judgment in M.C. Media's case. In the absence of rules. I find no other judicial alternative/forum for adjudication of any dispute arising out of Inspection Report except the authorities empowered to issue recovery certificates for realisation of the amount of compensation vide G.O. dated 5.6.1998, namely, the Addl./Deputy/ Asstt. Labour Commissioner who are well equipped to perform adjudicatory function after notice to the Employer to show cause why the recover)" certificate for realisation of the amount of compensation at the rate of Rs. 20,000 per child be not issued. It cannot be repudiated that Addl./Deputy/Asstt. Labour Commissioner appointed for issuance of a recovery certificates are independent authorities and being connected with adjudication of Labour disputes, it would be within their briefs to decide any controversy such as the controversy whether the child labour is below 14 years and whether the child labour said to have been engaged is pursuing any employment of hazardous nature. In Seth Benarsi Das v. District Magistrate/Collector, Meerut (1986) 2 SCC 689, the Supreme Court held that proceedings for recovery are like execution proceedings and Recovery Officer/Collector too can examine all questions going to the root of liability but since the Government have appointed Addl./Deputy/Asstt. Labour Commissioner to issue recovery certificates propriety dictates that disputes, if any, going to the root of liability be resolved by such officer before issuing the recovery certificates."

19. Thus in respectful obedience to the orders passed by the Hon''ble Supreme Court, Hon''ble S.R. Singh, J. found that it was necessary for him to create a alternative forum for adjudication of any dispute arising out of any inspection report.

20. I am in respectful agreement with the view taken by Hon''ble S.R. Singh, J. in the aforementioned case. However, I would like to add that placing absolute reliance upon the report of the Labour Inspector/Labour Enforcement Officer for

the purpose of making liable the employer/occupier to pay the compensation at the rate of Rs. 20,000/- per child without giving any reasonable opportunity to the offending employer/occupier would not be in consonance with the principle of natural justice and would also be violative of the principle of "Audi Alteram Partem" secondly the jurisdiction or authority to impose and realise the amount of compensation would only arise if it is found that a child has been engaged "in contravention of the Act". The Labour Inspectors whose function is to secure compliance with the provisions of the Act cannot be entrusted with adjudication function.

21. Under the Scheme of the Act the employers/occupiers could be subjected only to criminal proceedings and in case it is found that they have contravened the provisions of the Act, they are liable to be punished as per the provisions of the Act. The Civil liability to pay the compensation for violating the provisions of the Act in engaging the child labour mandates from the law propounded by the Hon"ble Supreme Court in M.C. Mehta's case (supra). The moment a liability more so a civil liability is to be fastened upon any employer/occupier, it inherently requires the determination of liability by some authority before proceeding to make recoveries in pursuance thereof. As a consequence, for this determination it goes without saying that the offending persons should be given opportunity before the liability could be imposed, since there may not be any determination of liability without knowing the version of the other side. "Civil liability" is "independent of criminal liability" as envisages under the Act. The two liabilities have to be determined separately. The Supreme Court's observation that it is the duty of the Inspector to secure compliance of the provisions of the Act. would mean that if it is found that child labour has been engaged in contravention of the Act the offending employer, would be liable to pay the compensation. This necessarily means that the contravention of the Act has to be found first and only thereafter the compensation can be asked, but if no compensation of any provision of the Act, is detected, the question of asking for any compensation does not arise.

22. In the case, where only the age of the child is disputed by the employer/occupier it is bounded duty of the Inspector to refer the matter to the prescribed medical authority u/s 10 of the Act. The certificate so granted by the Prescribed Medical Authority, would be conclusive evidence regarding the age of the child for the purpose of this Act. In case, the Prescribed Medical Authority records the age of the child below 14 years, that would be conclusive for launching criminal prosecution for punishing the offending employer/occupier under the provisions of the Act. But in case, the age is found to be more than 14 years, no prosecution can be launched. The contention that unless the prosecution launched against the employer, in which he is found guilty for violating the provisions of the Act, no money (compensation) can be recovered from him, cannot be said to be correct interpretation of the Act and the Specific directions issued by the Hon"ble Supreme Court. As already stated the civil liability of paying compensation has nothing to do with the criminal prosecution under the

Act and both can continue simultaneously. It is no-doubt true that if the age of the child is disputed by the employer/occupier and the challenge is made to the age mentioned in the inspection report, the reference has to be made to the Prescribed Medical Authority by the Inspector himself. Failure to make reference in accordance with the provisions of Section 10 would render the action of realisation of compensation as invalid. Section 10 which deals with the determination of the age, in case of dispute regarding the age of child, has to be taken assistance of even, in the matter where civil liability is to be fastened upon the employer/ occupier.

23. In the case of disputed age once the Prescribed Medical Authority grants certificate it may not be necessary for any other authority to adjudicate upon the said matter and it would also not be necessary to get the said dispute decided before the alternative forums as provided by Hon"ble S.R. Singh, J. in the case of Anil Kumar Agarwal (supra).

24. So far other objections like non-employment and non-engagement of the child by the employer/occupier or like objections are concerned, they have to be decided by the authority as provided in the aforesaid judgment of Anil Kumar Agarwal (supra), namely viz., By the Addl./Deputy/Asstt. Labour Commissioner. The necessity to provide a forum for determination of such disputes arises because firstly absolute and total reliance cannot be placed upon the inspection report, that too, without affording any opportunity to the offending employer/occupier which necessarily requires that the matter should be considered by an authority who is competent to look into the same. The Inspector himself being the complainant cannot be authorised to decide these objections, which are against his own report. Any decision given by the Inspector, in such a case may fail on the charge of "bias" and also because "no one can be Judge of his own cause".

25. The Supreme Court also while reminding the Inspectors, that it is their duty to secure compliance of the provisions of the Act was conscious of the machinery provided under the Act. The violation of the provisions of the Act has to be determined by the machinery provided therein. If no machinery has been provided for the purpose, under the Act, then independent forum has to be formed. The instructions issued by the Apex Court, only supplement the existing law and an attempt has been made to fill in the gaps in the Act, for making it more effective and useful. Such directions have been issued. Only in occurrence of the object of the Act.

26. Since in the instant case no decision has been taken on the objections filed by the petitioners and the recovery has been initiated, I provide that the Assistant Labour Commissioner shall consider the objections and decide the same expeditiously. I do not propose to quash the recovery certificates but direct that the recovery shall remain in abeyance till the objections are decided by the Assistant Labour Commissioner.

27. I., therefore, provide that in all cases of like nature an inspection has to be made by the Inspector and in case, the Inspector is of the view that the Child Labour has been engaged in contravention of the Act, a show-cause notice shall be issued to the offending employer/occupier who within the time stipulated, may file objection against the said inspection report raising the plea regarding the age or any other relevant objections. The matter shall be considered and decided by the alternative forum as ordered by Hon''ble S.R. Singh, J. In the case of Anil Kumar Agarwal, namely Addl./Deputy/Assistant Labour Commissioner by exercising adjudicatory function in accordance with the directions issued in the said order.

28. With these observations the present writ petition is disposed of.