

(1997) 08 MP CK 0022
In the Madhya Pradesh High Court
Case No : M.P. No. 918 of 1988

Nagda Upabhokta Sangh and Others	APPELLANT
Vs	
State of M.P. and Another	RESPONDENT

Date of Decision : 22-08-1997

Acts Referred:

Madhya Pradesh Shops and Establishments (Amedment) Act, 1982 — Section 13(3A)
Madhya Pradesh Shops and Establishments Act, 1958 — Section 13, 13(3A)

Citation : (1999) 1 MPLJ 606

Hon'ble Judges : Ramesh Surajmal Garg, J

Bench : Single Bench

Advocate : B.L Bharati, for the Appellant; Vinay Zelawat, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Garg, J.

By this petition under Article 226 of the Constitution of India, the petitioner challenges the correctness, validity and propriety of the Notification dated 22nd July, 1988, whereunder Sunday was declared a holiday for the Township of Nagda u/s 13 of the Madhya Pradesh Shops and Establishments Act, 1958.

Petitioner No. 1 is an Upbhokta Sangh of Nagda Township. The petition simply says that it is an Upbhokta Sangh. Whether it is a registered body or registered society or a Consumer Co-operative Society, what are the number of its members and what are the Rules and Bye Laws of the Society nothing is available on record. As the learned counsel says that the petitioner No. 1 represents the interest of public at large for the disposal of this petition and nothing beyond, I will accept the said contention. Petitioner No. 2 has been very artistically made a party. In fact petitioner No. 2 is one Pushpangadan, but the petition shows as if the petitioner No. 2 has been joined in its capacity as a Labour Union. In fact the petitioner No. 2 is Pushpangadan or CIETU representative. Petitioners Nos. 3 to 9 are certain shop keepers. The petitioners

say and submit that contrary to the provisions of law, custom, usage and public interest the respondents have issued a Notification Annexure P-I. The petitioners have stated that on a Sunday, which is a market day, thousands of people collect in the market; that even the traders from other villages also come. In para 6 certain allegations have been made that the Notification was issued at the behest of certain big traders. Unfortunately nobody has taken care to give the details nor anybody has properly verified these allegations. The contention of the petitioners in the petition is that Notification Annexure P-I is not in the public interest, therefore, the same deserves to be quashed.

Contending otherwise, respondents in their return have stated that a survey was made, as many as 350 shop-keepers were asked and as each of them agreed for closure Sunday, the State Government being satisfied that the general public is in favour of closed Sunday issued the Notification. The return further states that if the petitioners or public at large feels inconvenient because of the closed Sunday, then they would have the liberty to approach the Competent Authority and if the Competent Authority feels satisfied, then it may change the closed day. What surprises me at this stage is as to why the petitioners or the public at large did not approach the Competent Authority for last more than nine years. The reason probably must be the interim stay granted by this Court. Once the interim order is granted in favour of a party it becomes lethargic and starts enjoying the shelter of the order. Had there been no order of stay in favour of the petitioners, they would have moved an application either for early hearing of the petition or would certainly have rushed to the Competent Authority for redressal of their grievance. Be that as it may, the petition ultimately came up for final hearing.

The respondents further say that the notification has been issued by them u/s 13(3-A) of the Madhya Pradesh Shops and Establishments Act, 1958. They state that they have not committed any breach of law and the notification cannot be held to be bad or in excess of the jurisdiction of the respondents.

To appreciate the arguments of the parties it would be proper to appreciate certain provisions of the Shops and Establishments Act. Shops and Establishments Act (Act No. 25 of 58) was an Act to provide for the regulation of conditions of work and employment in shops, Commercial Establishments, residential hotels, restaurants, eating-houses, theatres, other places of public amusement or entertainment and other establishments. The Act received the Assent of the President on 20th September, 1958 and was applied, in the first instance, to the local areas specified in Schedule I.

Shri Bharati, learned counsel for the petitioners, submits that the provisions of the Act were not applied to the Township of Nagda. When he was asked to make a candid statement as to whether he had seen the Gazette or has obtained instructions from anybody, his plain answer was "no". The State in its return paragraph 18 has clearly stated that provisions of the Act have been applied to the Township of Nagda. One return has also been filed by Govindlal, Sushil and Thevachand. In para 18 of their return they have stated that provisions of Act

No. 25 of 58 have been made applicable to the Township of Nagda under Notification No. 177-12036-16/ 23rd March 1976 and the Notification has been published in the Gazette, Part I, page 918 (28-5-1976). On teeth of these allegations made by those persons, the petitioners were required to verify the correctness of their allegations before raising the theam that the provisions of the Act were not made applicable to the Township of Nagda. I will accept the contention of the other side because that is more pointed.

Under Section 2, "commercial establishment" "factory" and "holiday" have been defined. A "shop" has separately been defined u/s 2(24) of the Act. Section 3 provides that the Act shall not be applicable to certain persons and establishments. Section 13 deals with holidays in a week in shops and commercial establishments. Section 13 of the Act reads as under :

"13. Holidays in a week in shops and commercial establishments. - (1) Every shop and commercial establishment shall be closed on one day of the week. The employer shall fix such day at the beginning of the year, notify it to the Inspector and specify it in a notice prominently displayed in a conspicuous place in the shop or commercial establishment. The employer shall not after such day more often than once in three months shall notify the alteration to the Inspector and make the necessary change in the notice in the shop or commercial establishment:

Provided that where any shop or commercial establishment comes after the beginning of any year within the purview of this Act, for the first time, the employer shall also fix such day of the week on which the shop or commercial establishment shall remain closed and R.F. 39 notify it to the Inspector within one month of the date on which the shop or establishment so comes within the purview of this Act.

(2) If any day notified as a holiday under sub-section (1) happens to be a day of public festival, the employer may keep the shop or commercial establishment open on such day but in that event he shall keep the shop or commercial establishment closed on some other day within three days before or after the date of such public festival and give notice of the change to the Inspector at least seven clear days before the day of such public festival.

(3) It shall not be lawful for an employer to call an employee at, or for any employee to go to, his shop or commercial establishment or any other place for any work in connection with the business of his shop or commercial establishment on a day on which such shop or commercial establishment remains closed.

(3-A) Notwithstanding anything contained in sub-section (1), the State Government or any officer authorised by it in this behalf may, if it or he thinks fit so to do in public interest by notification, fix any day of the week to be the closed day in respect of all or any class of shops or commercial establishments in any or all the local area or part thereof, and the closed day so fixed shall be deemed to

have been fixed under sub-section (1) :

Provided that the employer shall have no right to alter the closed day so fixed.

(4) No deduction shall be made from the wages of any employee in a shop or commercial establishment on account of any day on which it has remained closed under this section. If any employee is employed on daily wages he shall nonetheless be paid wages for the weekly holiday equal to the average of daily wages earned by him during the preceding six working days. If any employee is paid a piece rate wage, he shall nonetheless be paid his wage for the day on which the shop or commercial establishment remains closed at a rate equivalent in the daily average of his wages for the days on which he has actually worked during the six days preceding such closed day, exclusive of any earning in respect of overtime:

Provided that nothing in this sub-section shall apply to any person whose total period of continuous employment is less than six days."

By amending Act 10 of 1982, Section (3-A) was introduced in Section 13 of the Act and the same came into force with effect from 1-5-1982. According to sub-section (3-A) the State Government if it thinks fit so to do in public interest by notification fix any day of the week to be closed day in respect of shop or any class of shops or commercial establishments in any or all the local area or part thereof. No such declaration shall be deemed to have been issued under sub-section (1). Sub-section (3-A) was introduced to bring uniformity in holidays. It was generally found by the Government that different shop-keepers were observing different holidays, therefore, many markets were open for almost whole of the week and the employees who are entitled to be protected under the provisions of the Shops and Establishments Act were forced to work round the week like bonded labourers. The Legislature in its wisdom, being a welfare State, thought that the uniformity would compel not only the shop keepers or their employees but the public at large and also to discipline them that they are not required to visit the market on one particular day in the week.

The intention of the Legislature for enacting sub-section (3-A) was to inform the public at large that whole of the market or a particular market or any class of shops shall remain closed on a particular day. Shri Bharati submits that the Notification is based on the report Annexure R-I and is ex facie bad. Annexure R-I shows that certain survey was made by the departmental Officers. Out of 1487 shops and establishments registered with the department, about 350 shop-keepers were put certain question, a detailed survey was made and the department recorded the opinion that the general public and shops and establishment were agreeable for the closed Sunday. Shri Bharatiya further submits that the manner in which the sampling was made or the survey was done was contrary to law. Forced to concede that neither the Act nor the Rules framed thereunder provides for such a survey, Shri Bharati still maintains that in the public interest such a survey ought to have been made. In the opinion of this

Court when the law does not provide for a particular procedure to be adopted, then the Authority in its own discretion may adopt some procedure, which appears to be reasonable and legal.

In the instant case almost 20 per cent people were surveyed. They had agreed for the closed Sunday. It cannot be said that the sampling or its manner was bad. It cannot be lost sight of at this stage that the petitioner No. 1, according to his own saying in the Court, is having a membership of around 600 consumers, only. It is not the case of respondent No. 1 that he represent the shops and establishments also. If the population of Nagda township is around 1,25,000, then the petitioner No. 1 represents hardly 1/2 per cent of the public. If survey of 22 per cent people is on the lesser side, then representation of 1/2 per cent of the total population is virtually negligible and the petitioners cannot be considered to be the persons who are fighting for the public at large.

After the survey was made the Government issued the Notification. Prima facie it does not appear that the Government had exercised the jurisdiction not vested in it by law or the recommendations made to it were contrary to law. In a democratic set-up, where the Government is of the People, by the People and for the People, one has to give little margin to the State that it really represents public cause. A presumption is always attached to the official duties that those are done in a legal, justifiable and official manner. A simple stone throw at a long distance would not cause any dent on the intention of the State Government. I do not find any wrong with the Notification. The State had powers to issue the notification and exercising the said powers in accordance with law it had issued a valid notification.

Shri Bharati now submits that the State must be called upon to justify its action and the Notification itself. As I have already found that it is legal and valid the State simply has to say that it exercised its powers in accordance with law. Any person who challenges the correctness, validity, propriety or legality of the Notification has to say so in such positive words. In the present case the petitioners say that the Notification is not justiciable. The burden to prove that the notification is not justiciable is on the present petitioners. The State is required to prove that it is legal and valid. The justiciability of the Notification can only be considered on the touchstone of the public interest. Public interest is a very wide term; in its sweep it covers various aspects. In the present petition, except filing certain letters, representations or resolutions of certain people, past and present Councillors, and some other persons, nothing has been said. I fail to understand as to how the justiciability of the Notification can be challenged. In the opinion of this Court the challenge to the Notification on this ground should fail.

Lastly Shri Bharati submits that this Notification has remained under suspension for long years because of the interim writ issued by this Court, therefore, petitioners be given liberty to approach the Competent Authority and satisfy it. It is also submitted that the respondents in their return have observed that if the

petitioners or the public at large approach the respondents/Competent Officer, they were ready to revise their opinion and were also ready to allow another closed day. Shri Bharati submits that the Court may direct the other side to consider the representation made by the petitioners to the Competent Authority. This offer was made by the respondents to the present petitioners in the year 1988. This request could be made by the petitioners in the year 1988 itself, but as observed above they were enjoying their hibernation because they had a protective stay order in their favour. It is not expected from a litigant that he would unnecessarily delay in the disposal of a matter simply because there is some interim order in his favour. When a bona fide offer has come from the respondents, the petitioners ought to have pounced upon the opportunity. Unfortunate it is that what was offered to the petitioners in the year 1988, is now being prayed by the petitioners after a lapse of 9 years. Considering the totality of the circumstances and also taking into view the offer made by the respondents, I direct that the petitioners shall be free to approach the Competent Authority, who shall, after giving opportunity to the petitioners or any other person and after affording an opportunity of hearing shall decide the representation. It is made clear that this direction does not mean that the respondent Authority is duty bound to change the holiday. If in its discretion it is satisfied that the public interest demands the change of the holiday, then the Competent Authority shall be free to exercise its discretion.

The petition on the merits is dismissed, but the liberty to approach the respondents is given. The respondents shall be entitled to their costs quantified to Rs. 1000/-.