
(2011) 05 AHC CK 0437
In the Allahabad High Court
Case No : Writ Petition No. 23970 of 2008

Public Welfare Hospital

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 19-05-2011

Acts Referred:

General Clauses Act, 1897 — Section 21
Minimum Wages Act, 1948 — Section 27

Citation : (2011) 7 ADJ 332 : (2011) 5 AWC 4757 : (2012) 1 LLJ 862 : (2011) 3 UPLBEC 1910

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Heard Sri Sunil Tripathi, learned Counsel for the Petitioner, learned Standing Counsel for Respondent Nos. 1 to 4 and Miss Sumati Rani Gupta, learned Counsel appearing for Respondents-workmen.

2. The writ petition is directed against the order dated 28/29.3.2008 passed by Respondent No. 3, Prescribed Authority under Minimum Wages Act, 1948 (hereinafter referred to as "1948 Act") holding that Petitioner has paid less than the minimum wages to concerned workmen and, therefore, it had to pay a sum of Rs. 1,87,314/- to all the workmen-applicants who have filed Misc. Case No. 57 of 2007 alongwith compensation of the same amount and cost of Rs. 300/-.

3. Learned Counsel for the Petitioner contended that Petitioner is a "hospital" and, therefore, would not be covered by entry "private clinic and private medical shops" which has been ignored by Prescribed Authority. He further contended that out of 22 workmen only three were examined by Petitioner and rest did not appear and, therefore, the Petitioner was denied opportunity to cross-examine them. He further submitted that some of the workmen had given affidavits to Petitioner that they were only part time employees and these affidavits were placed before Prescribed Authority but the same have not been considered at all.

He drew my attention to Annexure-20 to the writ petition which is an affidavit filed by Sunita Prakash, Nurse employed in Petitioner's establishment, who is Respondent No. 19 in the writ petition.

4. On the contrary, learned Counsel appearing for Respondents-workmen contended that entry 63 of earlier notification dated 19.12.1983 issued u/s 27 of 1948 Act was substituted vide notification dated 2.4.1992 and, therefore, all the private hospitals were covered by the provisions of 1948 Act. She further submitted that Petitioner did not dispute the employment of Respondents-workmen but their defence was only that they were part time employees. However Petitioner failed to give any evidence and, therefore, the order impugned in this writ petition warrants no interference. She submitted that a finding of fact has been recorded by Prescribed Authority which has not been shown perverse or contrary to material on record. She further submitted that an employee working from 7.30 in the morning till 1.30 afternoon, i.e., for about six hours, assuming what the Petitioner has said about Sunita Prakash is correct, cannot be said to be a "part time employee". She also pointed out that the Prescribed Authority has recorded a finding of fact that affidavit was obtained by Petitioner-employer under undue influence and pressure.

5. I have heard learned Counsels for the parties and perused the record.

6. The first question is whether 1948 Act is applicable to Petitioner's hospital or not.

7. There is no doubt about the fact that Petitioner's institution is running a "hospital" and not "clinic". This Court also has no manner of doubt that the word "clinic" would not mean or cover a "hospital". This question was considered in *Christian Hospital Vs. State of U.P.* and Prescribed Authority under the Minimum Wages Act, 1948 and Labour Officer, Maunath Bhanjan, with reference to notification dated 19.12.1983 and the Court held that the term "clinic" would not include "hospital" with which interpretation I have respectful concurrence and have no reason to take a different view.

8. However, the matter does not end here. It is the own admission of Petitioner that subsequently a notification was issued on 2.4.1992 u/s 27 of 1948 Act substituting entry 63 of notification dated 19.12.1983 in the following manner.

Earlier entry reads as under:

Employment in Private Clinics and Private Medical Shops.

Substituted entry reads as under:

Employment in Private Hospitals, Clinics and Medical Shops by whatever name called.

9. This notification, therefore, amended notification dated 19.12.1983 and entry "private clinics and private medical shops" stood deleted and changed by words "private hospitals, clinics and medical shops by whatever name called". This

changed notification was challenged by Petitioner in Writ Petition No. 4819 of 1993, which was decided by this Court vide judgment dated 8.7.2009. It is a very short order and reads as under:

In view of the decision of the Court in *Christian Hospital Vs. State of U.P. and Prescribed Authority* under the Minimum Wages Act, 1948 and *Labour Officer, Maunath Bhanjan*, which is squarely applicable, further proceedings, initiated by the Prescribed Authority, under the Minimum Wages Act, is patently erroneous and is quashed in view of the fact that a "hospital" cannot be included in the word "clinic". The writ petition is allowed.

10. The order clearly shows that the notification dated 12.10.1992 was not quashed by this Court and it only held that the word "clinic" would not include "hospital". Having accepted this finding that the word "clinic" would not include "hospital", but when the word "hospital" has been specifically provided in notification dated 2.4.1992, I find no reason to exclude the Petitioner from the clutches of 1948 Act.

11. In Writ Petition No. 4819 of 1993, another notification dated 12.10.1992 (Annexure-2 to the writ petition) was filed which reads as under:

UTTAR PRADESH SHASHAN

SHRAMANUBHAG-3

The Governor is pleased to order the publication of the following English translation of the notification No. 3910/XXXVI-3-8(MW)/83 dated 12th October, 1992.

NOTIFICATION No. 3910/XXXVI-3-8(MW)/83 dated Lucknow October 12, 1992.

In exercise of the powers u/s 27 of the Minimum Wages Act, 1948 (Act No. 11 of 1948) read with Section 21 of the General Clauses Act 1897 (Act No. 10 of 1897) and after giving notice of intention so to do in Govt. notification No. 1189(1)/XXXVI-3-8(MW)/83 dated April 2, 1992 published in the Uttar Pradesh Gazette Extra Ordinary of date, the Governor is pleased to make the following amendment in part I of the Schedule to the aforesaid Act No. 11 of 1948:

Amendment

In part I of the Schedule to the aforesaid Act No. 11 of 1948 for the employment appearing at serial number 63, the following employment shall be substituted namely:

63. Employment in Private Hospitals, clinics and Medical shops by whatever name called.

12. This notification also reiterate the same entry as was in notification dated 2.4.1992. It appears that there may be some procedural error which was rectified by Government by issuing fresh notification on 12.10.1992.

13. So far as present case is, concerned, the situation remain same. It further appears that while matter was argued in Writ Petition No. 4819 of 1993 only the notification of 19.12.1983 was considered by this Court in the light of decision in Christian Hospital, Azamgarh (supra) and subsequent notification substituting the entry was not considered by this Court. Therefore, the judgment has not answered the question as to what has been stated in notifications dated 2.4.1992 and 12.10.1992. On this aspect the judgment is totally silent and has not considered the issue. Therefore, it would not help Petitioner and would not exclude notifications dated 2.4.1992 and 12.10.1992. To this extent the judgment dated 8.7.2009 in Writ Petition No. 4819 of 1993 suffers from the mischief of per ignorantia or per incurium or sub-silentio.

14. A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. This doctrine was referred to in Lancaster Motor Company (London) Ltd. v. Bremith, Ltd., (1941) 1 KB 675. Earlier in Gerard v. Worth of Paris Ltd. (K), (1936) 2 All ER 905 the question of priority of claimant's debt was argued and only on this argument the order was passed by the Court. There was no consideration to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. In a subsequent case when this point was raised the Court held that the earlier decision would not be binding since the question that which it was confronted was not considered therein. Sir Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. He further observed that point had to be decided by the earlier Court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. The Court said:

Precedents sub-silentio and without argument are of no moment.

15. This principle has been recognised and followed since then in several authorities and in India also.

16. In Salmond's Jurisprudence, 12th Edn., Professor P.J. Fitzgerald explains the concept of sub silentio in the following manner:

A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although

the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub-silentio.

17. This passage has been quoted as such with approval by Apex Court in *Municipal Corporation of Delhi Vs. Gurnam Kaur*, Same principles has been followed in *State of U.P. and Another Vs. Synthetics and Chemicals Ltd.* and *Another, Arnit Das Vs. State of Bihar*, *M/s. A-One Granites Vs. State of U.P. and Others*, *Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others*, *The Divisional Controller, KSRTC Vs. Mahadeva Shetty and Another*, *Cement Corporation of India Ltd. Vs. Purya and Others*, *Deb Narayan Shyam and Others Vs. State of West Bengal and Others*, *State of Punjab and Another Vs. Devans Modern Breweries Ltd. and Another*, *Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate*, *Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others*, and *State of U.P. and Others Vs. Jeet S. Bisht and Another*, This doctrine of sub-silentio is an exception to the Rule of precedents.

18. Then comes the doctrine of per incurium. What constitute "per incurium" need not detain our attention since time and again it has been explained by the Apex Court. Recently a Full Bench of this Court in *Farhat Hussain Azad Vs. State of U.P. and Others*, after referring to the law with respect to "per incurium" laid down by the Apex Court in catena of decisions, has observed as under:

The concept of "per incurium" has been considered by the Apex Court time and again explaining that the expression means through inadvertence or a point of law is not consciously determined. If an issue is neither raised, nor argued, a decision by the Court after pondering over the issue in depth would not be precedent binding on the Courts. Per incurium are decisions given in ignorance or forgetfulness of some statutory provisions or where the Court omits to consider a binding, precedent of the same Court or the superior Court rendered on the same issue or where Court presumes something contrary to the facts of the case. (Vide *Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs., Rajput Ruda Meha and Others Vs. State of Gujarat*, *A.R. Antulay Vs. R.S. Nayak and Another*, *Municipal Corporation of Delhi Vs. Gurnam Kaur*, *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and Others*, *State of West Bengal v. Synthetics and Chemicals Ltd.* (1991) 1 SCC 139 ; *Maharashtra State Cooperative Cotton Growers' Marketing Federation Ltd. and Another Vs. Employees' Union and Another*, *M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs. U.P. State Electricity Board and others*, *Ram Gopal Baheti v. Girdharilal Soni and Ors.*, (1999) 3 SCC 112 *Sarnam Singh and Another Vs. Dy. Director of Consolidation and Others*, *Govt. of Andhra Pradesh v. B. Satyanarayana Rao* AIR 2000 SC 1729 ; *Arnit Das Vs. State of Bihar*, *M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.*, *M/s. A-One Granites Vs. State of U.P. and Others*, *Suganthi Suresh Kumar Vs. Jagdeeshan*, *Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another*, *S. Shanmugavel Nadar Vs. State of Tamil Nadu and Another*, *State of Bihar Vs. Kalika Kuer @ Kalika Singh and Others*, and *Manda*

Jaganath Vs. K.S. Rathnam and Others,

In B. Shama Rao Vs. The Union Territory of Pondicherry, the Constitution Bench of the Supreme Court observed as under:

It is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein.

In State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, the Apex Court followed the aforesaid judgment in B. Shyama Rao and held as under:

Any declaration or conclusion arrived without application of mind or proceeded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent....A conclusion without reference to relevant provision of law is weaker than even casual observation.

Similar view has been reiterated in The Divisional Controller, KSRTC Vs. Mahadeva Shetty and Another, observing that casual expressions in a judgment carry no weight at all, nor every passing remark, however eminent, can be treated as an ex-cathedra statement having the weight of authority.

19. In N. Bhargavan Pillai (Dead) by Lrs. and Another Vs. State of Kerala, the Apex Court said that if a view has been expressed without analysing the statutory provision, it cannot be treated as a binding precedent and at the most is to be considered as having been rendered per incuriam. The same law has been reiterated in Faujdar v. Deputy Director of Consolidation and Ors. 2006 (1) ADJ 705(DB).

20. In M/s J.K. Construction Engineers and Ors. v. Union of India and Ors. 2006 (3) ADJ 471 (DB), a Division Bench of this Court held:

The doctrine of per incuriam is applicable where by inadvertence a binding precedent or relevant provisions of the Statute have not been noticed by the Court....(Para 106)

21. Similar view has been taken by another Division Bench in Brahma Prakash v. State of U.P. and Ors. 2006 (2) ESC 1017 (All)(DB). In para 40 of the judgment this Court held as under-

Thus in view of aforesaid discussion, it is clear that while rendering the decision in Radha Krishna Gupta's case earlier Division Bench of this Court with all respect did neither ascertain the ratio of decisions referred in the judgment, nor discussed, as to how the factual situation fits in with the fact and situation of the decision on which reliance was placed. Contrary to it the decision of Hon"ble Apex Court which requires consideration of various factors in this regard, referred herein before in our judgment has been completely ignored by the Division Bench, therefore, being a decision given per incuriam, cannot be held to be binding authority under law.

22. In the judgments referred to above, the aforesaid doctrine of per incuriam

has been discussed in detail and it has been held that a judgment per incuriam does not lay down a binding precedent.

23. In the judgment relied by learned Counsel for the Petitioner, it is no doubt true that the notification dated 2.4.1992 and 12.10.1992 though were involved in the writ petition but from the judgment it does not appear that the Court adverted to those notifications and their effect to the question as to whether the Act, 1948 would apply to private hospitals by virtue of substitute entry 63 incorporated by amending the earlier notification dated 19.12.1983. It also does not appear that the Court ever was pointed out this fact. Subsequent notifications of 1992 were not considered by the Court in earlier decision in Christian Hospital, Azamgarh (supra). Without referring to 1992 notification, the Court simply followed the decision in Christian Hospital, Azamgarh (supra) which was in respect to notification dated 19.12.1993 as it was enacted before its amendment in 1992. Hence both the doctrine, in my view, would apply to this judgment and it would not be a binding precedent upon this Court to consider "whether Act 1948 is applicable to Petitioner's hospital or not in the light of notification dated 2.4.1992 and 12.10.1992".

24. Learned Counsel for the Petitioner could not place any submission with reference to entry 63 substituted by 1992 notification so as to exclude the application of Act, 1948 to Petitioner's hospital.

25. This Court, therefore, has No. hesitation in holding that in view of subsequent notification dated 12.10.1992 hospitals are covered by provisions of 1948 Act and Petitioner cannot be absolved of its liability under the provisions of 1948 Act.

26. Now coming to other aspects of the matter that Petitioner was not given any opportunity of cross-examination of nineteen witnesses, the submission is thoroughly misconceived. Admittedly, the provisions of Evidence Act are not applicable for the proceedings before Prescribed Authority under 1948 Act. Some of the workmen appear and deposed their statements who were also cross-examined by Petitioner. The employment of workmen were not disputed but what Petitioner has contended that employment was a part time employment. This fact that employment was part time have to be proved by Petitioner which he has failed to prove. The finding of fact has been recorded by Prescribed Authority in favour of workmen concerned which has not been shown to be perverse or contrary to material on record. In the circumstances, this Court has no reason to interfere with such finding of fact recorded by Prescribed Authority

27. Lastly, learned Counsel for the Petitioner contended that in the notification dated 31.10.1996 where the minimum wages for certain employment were revised, Appendix-1 thereof does not mention private hospital and still mention private clinics and private medical shops.

28. That being so, it would only mean that notification dated 31st October, 1996 may not be applied to claim revision of wages to the employees of private

hospitals. For the said purpose, it would be covered by only such notification prescribed minimum wages, which are issued in respect to the private hospitals. However, notification dated 31st October, 1996, which prescribes revised minimum wages, would not nullify the effect of the notifications dated 2nd April, 1992 and 12th October, 1992 since the scope and ambit of the two sets of notification is wholly different. The later one relates to applicability of the Act and the former one i.e., 1996 relates to the rates of wages payable to the employees of the industries mentioned in said notification at the relevant time. Learned Counsel for the Petitioner could not show any discrepancy on this aspect of the matter and therefore, I need not to go in further details thereof.

29. In the circumstances, I find no merit in the writ petition. Dismissed. Interim order, if any, stands vacated. No costs.