

(1968) 03 BOM CK 0014

In the Bombay High Court

Case No : Special Civil Application No. 1806 of 1966

Shinde (A.G.) and Others

APPELLANT

Vs

Bombay Telephones (By Manager) and Another

RESPONDENT

Date of Decision : 11-03-1968

Acts Referred:

Factories Act, 1948 — Section 59

Citation : (1968) 2 LLJ 74

Hon'ble Judges : J.L. Nain, J;D.V. Patel, J

Bench : Division Bench

Judgement

Patel, J.—By this petition, the petitioners seek to challenge the order made by the Payment of Wages Authority dismissing their applications for overtime wages. The short facts are that the petitioners are employed with the workshops of the Telephones in Bombay, which in theory means that they are the employees of the Central Government, working with the Telephones Department. Their duties consist of inspection of identity cards, the search of workers, while entering in the various departments and coming cut from the departments, inspecting or checking materials taken from one building to another of the same factory, preventing workmen from entering or leaving factory other than at the appointed time or without authority, keeping a watch on the workmen and material within the factory compound, but outside the building when the workmen of painting or packing are at work. Similarly, they also had other incidental duties not directly connected with the manufacturing process. Their allegation was that they were required to work for more than the prescribed hours of work under the Factories Act, and also under the Bombay Shops and Establishments Act. They were not paid for their so working and that during the period in respect of which the present complaints were filed, amounts in each application were due to each of the applicants.

2. On behalf of the Government, a contention was taken that these watchmen were not workmen within the meaning of "workman" defined in the Factories Act,

and that there were not entitled to any overtime allowance as claimed by them and, that the President of India, under Art. 309 of the Constitution, has framed special regulations governing these workmen and they are being paid in accordance with these regulations.

3. The authority held that the petitioners were not covered by the definition of "workmen" in the Factories Act. He further held that S. 70 of the Bombay Shops and Establishments Act was not applicable and, therefore, they were not entitled to get the benefit of the extended provisions of the Factories Act. He further held that they were paid in accordance with rules and regulations framed by the President of India under Art. 309 of the Constitution. Accordingly, be dismissed all these applications.

4. It needs to be said that each worker had filed a separate application. The evidence, however, in one was treated as evidence in all and all these application were disposed of by one judgment. The workmen have find one consolidated petition in this Court. We permit them to do so.

5. Sri Singhvi says that the decision of the learned authority is erroneous. He argues that it is not necessary to decide whether the petitioners fall within the definition of the word "workman" in the Factories Act. According to him, S. 70 of the Shops and Establishments Act extends the operation of the Factories Act even in those workmen in the factory and in connexion with the factory even though they do not fall within the definition of the word, "workmen" in the Factories Act. He further argues that if he is entitled to get benefit under S. 70 of the Shops and Establishments Act, to that extent the rules framed by the President must be deemed to have been modified. His main contention that S. 70 of the Shops and Establishments Act extends the benefit of the Factories Act to those not falling within the definition of the "workman" in the Factories Act, but still in the factory and in connexion with it, is supported by the decision in *Shri B.P. Hira, Works Manager, Central Railway, Parel, Bombay etc. Vs. Shri C.M. Pradhan etc.*, . In this case the Supreme Court decided that Ss. 4 and 70 of the Bombay Shops and Establishments Act, 1948, are two independent sections and they provide for different matters. Section 4 provides for exemption of the application of Shops and Establishments Act to establishments and the persons mentioned in Sch. II attached to the Act, while S. 70 has a different scope. It is intended to extend the provisions of the Factories Act beyond its usual scope and further provide that where that Act as extended applies, the Shops and Establishments Act did not apply, except to a shop or establishment situated within the premises of a factory and further enabling the Provincial Government to extend the provisions of the Factories Act to any such shop or commercial establishment situated within the precincts of a factory. The Court further held that the effect of S. 70 was to extend the provisions of the Factories Act to those persons who were working in and in connexion with the factory, even if they did not fall within the definition of "workman." This decision would afford complete support to the contention of Sri Singhvi. Once by legislation the workmen are

entitled to the benefits under the Factories Act, it is impossible to contend that any rule or regulation regarding conditions of service made by the President under Art. 309 of the Constitution, can affect that right, in as much as the article itself makes those rules subject to the Acts of an appropriate legislature.

6. Sri S. A. Desai contends, in the first place, as a preliminary objection, that under the provisions of S. 17 of the Payment of Wages Act, appeals are provided to the Small Causes Court, but the petitioners have not availed themselves of the same. The petitioners have not exhausted the remedy available to them and, therefore, this Court should not exercise its power under Art. 227. Examination of several applications discloses that in some the subject-matter of the claims is more than Rs. 20 and in such cases appeals would lie, but in some, the claim is less than Rs. 20 and no appeals could lie. In these cases the only remedy is under Art. 227. Apart from this, the original applications were of 1964 and we are now in 1988. We do not see, therefore, our way to refuse to interfere and drive some of the petitioners to appeals in the Small Causes Court.

7. On the merits, Sri S. A. Desai tried to distinguish the Supreme Court case on the ground that the Court was considering the case of timekeepers, while in the present case we are concerned with watchmen. He says that the duties of a timekeeper are entirely different from that of a watchman and the case should not be treated as an authority on the question whether the petitioners should now get benefit of S. 70 of the Shops and Establishments Act read with the Factories Act. It is impossible to find facts of two cases exactly alike. No Court treats a precedent as authority on facts. We are, however, concerned with the decision on principle, the question being whether S. 4 affects S. 70 of the Shops and Establishments Act, and if it does not, whether it will apply to the case of the petitioners in the present case. The only question to which we have to address ourselves is whether the petitioners are persons employed in and in connexion with the factory. It could not possibly be contended that the petitioners were not employees in the factory. Some lame attempt was made by Sri S. A. Desai to suggest that merely because a workman stands outside one departmental building of the factory, he cannot be regarded as a workman employed in the factory, though he admitted that they were all in the compound of the factory. It is impossible to accept such a contention. Whether the workman stands outside the factory premises or inside it, if his duties are connected with the business of the factory or connected with the factory, he is really employed in the factory and in connexion with the factory. We do not see why these workmen do not come within the words "employed in and in connexion with the factory." We have no doubt, therefore, that even assuming that they do not fall within the meaning of the word "workman" as contained in the Factories Act, because of the extension of the Factories Act, to all employees as have been employed in the factory or in connexion with the factory, the petitioners are entitled to get the benefit of S. 59 of the Factories Act.

8. Sri S. A. Desai tried to rely upon second proviso to S. 70 of the Factories Act

which has been relied upon by the authority below. With respect, it appears that the authority has not appreciated the scope of the second proviso. The second proviso is itself a proviso to the first proviso. Section 70 provided for two things, firstly, it provided that the Bombay Shops and Establishments Act, 1948 would not apply to a factory to which the provisions of the Factories Act applied. Secondly, it went on to provide for extension of the application of the Factories Act to those classes of workmen who did not satisfy the definition of the word "workmen" in the Factories Act but who were employed in and in connection with the factory. The first proviso grafts an exception to the main part of the section by providing that this Act would supply to a shop or a commercial establishment even if situated within the factory if it had no connexion with the manufacturing process of a factory. The second proviso is an enabling proviso and it permits the State Government by a notification to apply the provisions of the Factories Act 1948 even to such an establishments and if applied in this manner, then the application of this Act is taken away. It can immediately be seen that neither the first proviso nor the second proviso curtails in any manner the provisions of the main part of S. 70 which extend the Factories Act to other classes of workers. The second proviso, therefore affords no answer to the contention raised on behalf of the petitioners. We accordingly hold that the petitioners are entitled to get the benefit of S. 59 of the Factories Act.

9. Before authority, the respondent had filed a statement showing the dues of each workman in case he succeeded in his contention that he was entitled to the benefit of S. 59. In view of this, it is not necessary really to send the matter back to the authority for making final orders in the matter. We direct that respondent 1 pay each petitioner in accordance with the schedule attached herewith.

10. It appears, petitioners 3, 15 and 30 have died during the pendency of these proceedings. We direct that the amount due to them should be paid to their heirs.

11. We direct that respondent 1 shall pay court-fees due on the several claims of the petitioners in accordance with S. 15(a)(2) of the payment of Wages Act. In the circumstances of the case, we direct that the respondents will pay no compensation under the provisions of the Act, for the delayed payment.

12. Costs of the application are quantified at Rs. 10 per application before the authority and a single cost in this petition so quantified at Rs. 250.