

'Subsidise Wages by Utilising Funds under ESI Act': Plea in SC Challenges Notifications For Full Payment to Workers/Employees

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The Supreme Court has been moved in a plea challenging, as being violative of Articles 14 and 19(1) (g) as well as the Disaster Management Act 2005, government notifications requiring payment of full wages/salaries to the workers/employees, during the COVID-19 lockdown, and restraining the employer from laying off/terminating/retranching any employee.

The petition by the Kerala State Small Industries Association through Advocate Liz Mathew seeks protection of the Court "against the implementation of arbitrary, unreasonable, discriminatory and partisan directions" issued under the following circulars and orders- Advisory bearing D.O. No.M11011/08/2020-Media dated 20.03.2020 issued by the Secretary, Ministry of Labour & Employment";-Circular bearing No. 04/2020 dated 23.03.2020 issued by the Directorate of Factories & Boilers, Kumarapuram, Thiruvananthapuram;- Circular bearing No. 11/2020 dated 24.03.2020 issued by the Labour Commissioner, Thiruvananthapuram, Kerala; Circular bearing No. 11/2020(2) dated 26.03.2020 issued by the Labour Commissioner, Thiruvananthapuram, Kerala.

- Order bearing No.40-3/2020-DM-I(A) dated 29.03.2020 issued by the Home Secretary, Ministry of Home Affairs, Government of India under Section 10(2)(I) of the DM Act "Due to the unprecedented catastrophic situation prevailing in the country due to the outbreak of COVID-19 pandemic and the resultant state imposed lockdown, all industries, productions units, shops, establishments, offices etc. except those providing essential services have been remaining shut since 25.03.2020. All such micro, small and medium industries are now facing threat of insolvency. In such a scenario, the blanket directions to pay full wages to employees, whether permanent, contractual or casual workers, irrespective of whether such employees are actually working or not, is annihilative", submits the petition drawn by Advocate Raghenth Basant and filed by Advocate Liz Mathew.

Grounds for challenge of impugned notifications

The Petitioner, a promotional organisation espousing the collective interest of almost 6500 smallscale industrialists registered in the state of Kerala. seeks to challenge the aforesaid impugned notifications on the following grounds:

I. Impugned Notifications are violative of Article 19(1)(g) of the Constitution of India

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a. Compulsion to pay wages/salary while incurring zero revenue and high losses impinges upon the right to freedom of the members of the Petitioner-Association to carry on any occupation, trade or business under Article 19(1)(g) as the same would lead to the collapse of their industrial units.

b. Imposition of financial liability on the employer is independent and extraneous to the measures required to regulate COVID-19, therefore, beyond the exception of reasonable restrictions including interest of public health.

c. Statute enacted to protect socio-economic rights is always subject to the rights guaranteed to other non-state actors under Articles 19(1)(g), 30(1), 15(1), 16(1) of the Constitution.

"Therefore, claims of the employee for social economic justice have to be balanced with the claims of the employer for freedom to conduct trade", it is argued.

II. Impugned Notifications are ultra vires the Disaster Management Act, 2005

a. Direction under section 10(2)(l) of the DM Act to compel private enterprises to pay full wages/salaries to the workers/employees during lockdown is not in furtherance or even incidental to the object ('effective management of disasters') sought to be achieved by the DM Act i.e. containment of spread of COVID-19 in the country.

b. DM Act does not vest any power upon the State and the Authorities under the Act – National Disaster Management Authority or the National Executive Committee constituted under section 3 and 8 respectively - to impose financial burden upon private enterprises by directing payment of wages and to interfere in matters of employment, wages, layoff, retrenchment etc. of private enterprises. Therefore, it is unreasonable exercise of power and arbitrary under Article 14 of the Constitution.

c. DM Act itself imposes an obligation upon the government at various levels to meet expenses for emergency response, relief and rehabilitation including restoration of means of livelihood. These include National Disaster Response Fund and National Disaster Mitigation Fund set up under section 46 and 47 of the Act.

d. Unilateral direction by the State on the basis of the Advisory and Order issued by the Chairperson, National Executive Committee coercing the private sector to bear the full financial brunt to mitigate the economic hardship of migrant workers due to state imposed lockdown is beyond the object of the Act and legislative competence of the Respondents as well as manifestly arbitrary, unreasonable and unfair and therefore, ultra vires the DM Act.

III. Compulsion to pay full wages/salary is in effect imposition of tax/penalty in disguise that is violative of Article 265 of the Constitution that inhibits imposition of levy and collection of tax unless authorised by law and would fail the test of strict and literal interpretation, therefore, unconstitutional.

IV. The Impugned Circulars issued by the Office of the Labour Commissioner and the Directorate of Factories & Boilers in State of Kerala were issued prior to the Impugned Order

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dated 29.03.2020 (by MHA) and fail to mention any provision of law for their issuance. Being without due authority under a law, the impugned circulars are arbitrary and capricious.

V. Impugned Notifications are violative of Article 14 of the Constitution

a. Impugned Notifications discriminate on the ground of economic and contractual status of the employer vis-à-vis the employee while granting disproportionate measures in favour of the employees and against the employers without any basis or intelligible differentia, therefore, manifestly arbitrary, unreasonable and prima facie illegal.

b. There is no rational basis for classification of the employees as a separate class when the threat and ramifications of corona virus is equal for all and such classification is grossly unfair and unjust.

c. Non-classification of all private establishments/entities into micro, small, medium and large enterprises and laying down a uniform direction for payment of wages of employees of these industries irrespective of profit, loss, debt or revenue is manifestly arbitrary and discriminatory.

d. Non-classification of entities that have been working during the lockdown from entities that have not been working at all is discriminatory. It is further discriminatory to direct payment of wages to employees who are not working at par with those employees who have actually been working in the same industrial unit. It is settled law that equals cannot be treated unequally, and unequals cannot be treated equally.

e. State is creating unfair sectoral discrimination within a class as only construction workers have been selected for receiving financial assistance from the State through Direct Benefit Transfer (DBT) mode from the Cess Fund (Rs.52000 crore) collected by the Labour Welfare Boards.

f. State ought not to cause unjust enrichment of employees who have not worked at the expense of the employers and thereby render the business unsustainable, unviable and force such micro, small and medium industries into insolvency resulting in permanent unemployment and loss to the economy.

VI. Payment of salary implies divestment of money that entails deprivation of property, therefore, unilateral imposition of financial obligations on employers for the benefit of the employees is violative of Article 300A as it deprives the employer of property without the express authorisation of law.

VII. It is the obligation and socio-economic duty of the state under Article 43 of the Constitution and doctrine of Parens Patriae to secure living wage to all workers and provide help, assistance and support to the victims of natural disasters.

VIII. Employers are independently and equally suffering the economic consequence of the pandemic due to closure of all economic activity resulting in zero revenue and continuous outflow of cash for commercial obligations such as rent, loans, electricity etc.

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IX. Payment of wages to temporary or casual or daily wage workers during the lockdown period is part of the moral / humanitarian / contractual obligations of the company according to the Ministry of Corporate Affairs

X. Compulsion on private enterprises to pay full wages/salary to employees during the period of lockdown is absolutely unjust, unfair, discriminatory and illegal when the various state governments including Andhra Pradesh, Maharashtra, Telangana, Rajasthan and Orissa have issued orders deferring or deducting salary/wages due to financial constraints being faced by the public exchequer. Pertinently, Government of Kerala has promulgated an Ordinance dated 30.04.2020 for deferment of one-fourth of the total payment due to any person/institution, government employee and employee of institutions owned, controlled or aided by the government in the event of a disaster and public health emergency. Further, the High Court vide order dated 5.05.2020 has refused to grant stay of the operation of the Ordinance upon challenge.

XI. Impugned Notifications are in violation of the Industrial Disputes Act, 1947 in so far as the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment are to be determined in accordance with the provisions of the Industrial Disputes Act, 1947.

Relief sought

The Petitioner is praying for the issuance of a direction to the Centre and the state governments to subsidise the wages of employees/workers for the lockdown period by utilising the funds collected by the Employees' State Insurance Corporation under the Employees' State Insurance Act, 1948 or through any other Government Fund / Scheme including Rajiv Gandhi Shramik Kalyan Yojana and Atal Beemit Vyakti Kalyan Yojana.

It is submitted that ESI Act is a social security legislation intended for the welfare of employees by providing financial protection against health hazards and possessing a huge reserve to the tune of Rs.91000 crores. "During the present public health emergency, Government may be advised to extend the benefit of the ESI Act, including the schemes, through relaxations of the eligibility criteria, and make use of the full potential of ESI Act for the benefit of the employees/workers", it is pleaded.

"This Hon'ble Court has recently considered similar cases bearing Diary No. 10983 of 2020 titled as Ficus Pax Private Limited v. Union of India & Ors and Diary No. 10993 of 2020 titled as Ludhiana Hand Tools Association v. Union of India challenging the impugned order herein dated 29.03.2020, wherein the learned Solicitor General has submitted that a response would be filed in the said cases within two weeks. Further, another Writ Petition bearing Diary No. 11018-2020 PIL- W and titled 'The Twin City Industrial Employers Association v. Union of India & Ors' has been tagged with the aforesaid Writ Petitions", the plea points out.