

CHIEF JUSTICE AND ASHOK S.KINAGI,

WP 9143/2020 , 11/09/2020

COMMON ORDER

1. We have heard the learned counsel appearing for the petitioners in support of these petitions where the challenge is to the order of the State Government dated 20th July, 2020 by which the State Government directed that the payment of Variable Dearness Allowance (for short, "VDA") which admittedly forms a part of the minimum wages fixed under the Minimum Wages Act, 1948, will stand deferred from 1st April, 2020 till 31st March, 2021.

2. Common submissions have been made in W.P. No.9350 of 2020. The learned senior counsel appearing for the petitioner in the said writ petition firstly submitted that though a stand has been taken now by the State Government that the exercise of power while passing the impugned order is under sub-section (2) of Section 26 of the Minimum Wages Act, 1948 (for short, "the said Act"), the impugned order does not say so, and in any case, the power which could be exercised under sub-section (2) of Section 26 of the said Act is completely different. It is a power to direct that the provisions of the said Act or any of them shall not apply to all or any class of

employees employed in any scheduled employment, or to any locality where a scheduled employment is being carried on.

3. The learned senior counsel has invited our attention to various provisions of the said Act. He pointed out Section 12 and submitted that once by virtue of a notification under Section 5 of the said Act, minimum wages are fixed, it is the obligation of every employer to pay to every employee wages at a rate not less than the minimum wages fixed. He submitted that there is no exception carved out under the provisions of the said Act as far as the applicability of Section 12 is concerned. He invited our attention to a decision of this Court in the case of PRIVATE HOSPITAL AND NURSING HOMES ASSOCIATIONS, PHANA AND OTHERS .v. THE SECRETARY, LABOUR DEPARTMENT, GOVERNMENT OF KARNATAKA, VIKASA SOUDHA AND OTHERS . He submitted that this Court has reiterated the well established principle of law that VDA is a part of minimum wages and cannot be separated from the minimum wages. He submitted that the fixation of minimum wages is a legislative act. In this behalf, he relied upon a decision of this Court in the case of MANGALORE GANESH BEEDI AND ALLIED BEEDI FACTORIES WORKERS ASSOCIATION .v. STATE OF KARNATAKA AND OTHERS . He submitted that there is a categorical pronouncement of law in the said decision that where the minimum rates of wages are linked with VDA, it forms a part of the minimum wages. He also relied upon two decisions of the Apex Court which hold that non-payment of minimum wages to the employees would amount to bonded labour which is completely prohibited under Article 23 of the Constitution of India. The other learned counsel appearing for the petitioners in the other petitions have supplemented the submissions made by the learned senior counsel.

4. The learned Additional Advocate General invited our attention to the provisions of sub-section (2) of Section 26 of the said Act. He firstly submitted that it is not necessary that the order passed by the State Government must contain a reference to a particular provision under which the power is sought to be exercised. He submitted that if the order can spell out exercise of power under a particular statutory provision of law, that is sufficient. He submitted that what has been done by passing the impugned order is only deferment of payment of VDA which is, undoubtedly, a part of the minimum wages. He submitted that by exercising the power under sub-section (2) of Section 26 of the said Act, the State Government can always specify that certain provisions of the said Act will not apply to all the classes of employees. He submitted that it is this power which is exercised by directing that a part of the minimum wages which is payable under Section 12 of the said Act will not be paid and the payment thereof would be deferred. He submitted that the exercise of power squarely falls within the purview of sub-section (2) of Section 26 of the said Act. He submitted that the only order passed by the State Government is of deferment of VDA and there is no direction not to pay any part of the minimum wages.

5. The learned senior counsel appearing for the private respondents firstly invited our attention to sub-section (1) of Section 4 of the said Act. He submitted that by exercising the power under sub-section (2) of Section 26 of the said Act, it can always be directed that a part of the provisions of Section 4 in relation to payment of VDA will not apply to all or any particular category of industries and therefore, the State Government was well within its powers to exercise the power under sub-section (2) of Section 26 of the said Act. The learned senior counsel submitted that though the exercise of power to fix minimum wages may

be in the discharge of a legislative function, but under sub-section (2) of Section 26 of the said Act, a specific power is conferred on the 'Appropriate Government' to declare that any particular provision of the Act will not apply to any industry or generally in case of all the employees. He invited our attention to a decision of the Apex Court in the case of M/s BHIKUSA YAMASA KSHATRIYA AND ANOTHER .v. SANGAMNER AKOLA TALUKA BIDI KAMGAR UNION AND OTHERS . He submitted that the Apex Court has held that there is no particular procedure which is required to be followed for passing an order under sub-section (2) of Section 26 of the said Act. He also relied on a decision of the Division Bench of the Bombay High Court in the case of RAMBHAU SAKHARAM NAGRE .v. D.G.TATKE AND OTHERS and submitted that the High Court has held that the nature of power under sub-section (2) of Section 26 of the said Act is an administrative power. He also relied on the observations made by the Allahabad High Court in the case of SHIKOHABAD SAHAKARI KRAL SAMITIS LTD. .v. PRESCRIBED AUTHORITY UNDER MINIMUM WAGES ACT, AGRA, AND OTHERS.

6. We have carefully considered the submissions. Considering the issues involved in the writ petitions, we issue Rule Nisi. The learned counsel for the respondents waives service. We have considered the submissions made across the Bar in the light of the prayer for interim relief.

7. Firstly, it is necessary to make a reference to the impugned order. As pointed out earlier, the impugned order does not refer to the exercise of power under sub-section (2) of Section 26 of the said Act. However, that is not determinative. The relevant part of the order reads thus:

“GOVT.ORDER NO. LD 72 LWA BANGALORE
DATED 20.07.2020.

In view of the facts as described above in the preamble, it is informed in the Guidelines of the Central Government to pay the salary during the period of Lockdown declared I the emergency situation of Covid-19, VDA also included in the total amount of minimum wages payable to the labourers. But, at this juncture of emergency situation and by considering the interest of employers, the VDA amount payable from 01.04.2020 to 31.03.2021 has been postponed.”

In the preamble of the impugned order, there is a reference to three letters.

8. Now, we turn to the statement of objections filed by the State Government in W.P. No.9143 of 2020. In paragraph 3 of the statement of objections, it is stated that a meeting was convened on 26th May, 2020 which was attended by the representatives of the industries and the Labour Unions. The meeting was convened as various representations were received from various industrial bodies seeking deferment of payment of VDA. Paragraph 4 of the statement of objections is relevant which reads thus:

“4. It is submitted that proceedings dt.26.05.2020 along with the letter dt. 29.05.2020 was put up before the Hon’ble Minister for Labour for

suitable orders. The Hon'ble Minister, upon perusal of the relevant note, approved the same on 17.06.2020, pursuant to which the Government Order bearing No.LD 72 LWA 2020, Bengaluru dated 20.07.2020 (copy of which is produced herewith as Annexure-B to the writ petition) was issued, which is impugned in the present writ petition.”

[Underlining supplied]

9. The impugned order shows that it is also based on a letter dated 22nd April, 2020 addressed by the Principal Secretary to the Government, Commerce and Industries Department, Government of Karnataka, to the Secretary of the Labour Department. Secondly, the specific stand of the State Government is that the proceedings of the meeting dated 26th May, 2020 were placed before the Hon'ble Minister for Labour. Along with the minutes, a copy of the letter dated 29th May, 2020 addressed to the Additional Chief Secretary to the Government, Labour Department, by the Commissioner of Labour were placed before the Hon'ble Minister who approved the same.

10. When we made a specific query to the learned Additional Advocate General whether there is any file noting which suggests that proceedings were initiated to exercise power under sub-section (2) of Section 26 of the said Act, or whether file notings refer to sub-section (2) of Section 26 of the said Act, he has candidly stated that there is no such reference in the notings on the file.

11. We have perused the proceedings of the meeting dated 26th May, 2020. The Minutes record the contentions of the representatives of the employers and the representatives of the Unions. What is recorded therein are the views expressed in the meeting. The representatives of the employers insisted on passing an order for deferment of VDA which was strongly opposed by the representatives of the Unions. There is no decision or conclusion recorded in the minutes. The letter dated 29th May, 2020 addressed by the Commissioner of Labour Department to the Additional Chief Secretary to the Government, Labour Department, again refers to the minutes of the meeting dated 26th May, 2020 and the views expressed therein by the representatives of the industries and the representatives of the employees. The third document which is relied upon in the impugned order is a letter dated 22nd April, 2020 of the Principal Secretary, Commerce and Industries Department. It refers to a memorandum submitted by certain industries and employers' associations to defer payment of VDA till 31st July, 2020 similar to income tax date postponement by the Income Tax Department. All that the letter records is that the above suggestions by the Micro, Small and Medium Enterprises (MSMEs) may be considered for providing immediate relief.

12. At this stage, we may make a reference to the decision of the **Bombay High Court** relied upon by the learned senior counsel appearing for the private respondents. The said decision, as pointed out by the

learned senior counsel, holds that the exercise of power under sub-section (2) of Section 26 of the said Act is an administrative action. In paragraph 4 of the said decision, the Division Bench of the Bombay High Court has observed that the Legislature has left it to the discretion of the Appropriate Government to grant exemption under sub-section (2) of section 26 of the said Act, if for any special reasons it thinks fit to do so. Further, it is observed that it is a subjective satisfaction of the executive authority to form an opinion, regarding the exercise of power. The formation of an opinion is on the question whether it is necessary or not necessary to apply the provisions of the said Act to a particular locality or to a particular class of employees in a scheduled employment. Thus, the condition precedent for the exercise of power under sub-section (2) of Section 26 of the said Act is the formation of an opinion regarding the existence of a necessity to exercise the power under sub-section (2) of Section 26 of the said Act. In fact, the sub-section (2) of Section 26 itself refers to the existence of special reasons. The said special reasons must be reflected from the record.

13. Taking the contents of the impugned order as correct, there is no indication that for special reasons, the State Government formed an opinion regarding necessity to exercise the power of directing that the provisions of the said Act shall not apply to a class of employees. Moreover, we must note here that the impugned order does not say that

any particular provision of the said Act will not apply to any class of employees. It only defers the payment of VDA to all the categories of employees. The order itself does not record that there is a direction issued that a particular provision of the said Act will not apply to any or all the classes of employees employed in scheduled employments. Taking the order as correct, it is not at all an order passed in exercise of power under sub-section (2) of Section 26. As pointed out by the learned Additional Advocate General, there is no noting on the file which refers even to a proposal for the exercise of power under sub-section (2) of Section 26 of the said Act. The power is exercised by the Hon'ble Minister on the basis of the communication dated 22nd April, 2020, the minutes of the meeting dated 26th May, 2020 and the letter dated 29th May, 2020. None of these three documents even refer to necessity of passing of an order under sub-section (2) of Section 26 of the said Act. The formation of an opinion regarding the necessity of passing an order under sub-section (2) of Section 26 is not reflected from any document produced by the State Government or the statement of objections of the State Government. As stated earlier, the State Government has supported the order only by relying upon sub-section (2) of Section 26 of the said Act. Therefore, in our view, the impugned order is ex facie illegal.

14. The learned senior counsel appearing for the private respondents relied upon the observations made in the case of FICUS PAX PRIVATE

LIMITED AND OTHERS .v. Union of India AND OTHERS . Apart from the fact that the said decision will not be of any use to support the impugned order, for dealing with a situation created by the pandemic, employers and employees can always meet and arrive at a workable solution. But an order fixing minimum wages in exercise of power under Section 5 of the said Act cannot be set at naught in this fashion. 15. Therefore, a strong prima facie case is made out. The result of the impugned order is that the employees will not be entitled to VDA which is an integral part of the minimum wages fixed under the provisions of the said Act for the period specified in the impugned order and the employees will get VDA for the said period only after the expiry of the said period. This is something which is clearly impermissible under the said Act and especially, keeping in mind the object of the said Act. The impugned order, as observed earlier, is ex-facie illegal and deserves to be stayed.

16. Therefore, we pass the following interim order: Till the final disposal of the petitions, the execution and operation of the order bearing No. LD 72 LWA 2020, Bangalore dated 20th July, 2020 will remain stayed.