

Right to Employment vis-a-vis Security

- Shefali Malhotra with inputs from Subhaprad Mohanty

The Hon'ble High Court of Gujarat, in *Mahila Utkarsh Trust vs Union of India* (2014 SCC OnLine Guj 7642), held the provisions contained in Section 66(1)(b) of the Factories Act, 1948 – prohibiting women from working in factories between 7.00 pm and 6.00 am - to be ultra vires Articles 14, 15, 16, 19(1)(g) and 21 of the Constitution of India, relying on the decision of the Hon'ble Supreme Court in *Anuj Garg vs Hotel Association of India* (AIR 2008 SC 663).

Facts

The present batch of three Special Civil Applications challenged the validity of Section 66(1) (b) of the Factories Act, 1948 and its proviso, as infringing upon Articles 14, 15, 16, 19(1) (g) and 21 of the Constitution of India. The impugned Section prohibits engagement of women in any gainful employment between 7.00 pm to 6.00 am.

Analysis

The Hon'ble High Court based its reasoning on the following grounds: a) Judgment of the Hon'ble Supreme Court in *Anuj Garg vs Hotel Association of India* (*supra*), wherein Section 30 of the Punjab Excise Act, 1914 – prohibiting employment of women in premises where liquor or intoxicating drug was consumed by the public – was held to be *ultra vires* the Constitution; b) In view of sub-clauses (2) and (3) of the impugned Section, wherein female workers engaged in fish-curing or fish-canning were exempted from the aforesaid prohibition, thereby diluting the basis on which the restriction was originally imposed; and c) Placing reliance on the judgments of the Hon'ble High Courts of Madras and Andhra Pradesh in *Vasantha R. Vs Union of India* (2001) II ILJ 843 and *Triveni K.S. vs Union of India* (2002) III ILJ 320 respectively, wherein the impugned Section was held to be unconstitutional.

The Court observed that the fundamental difference between the *Anuj Garg* case and the present case was that the former challenged total prohibition for the entry of women while the latter challenged partial prohibition only during night time. However, the reason for prohibition was the same, i.e., the security of women. Consequently, the Supreme Court having held the said reason to be an unreasonable encroachment on the fundamental right of women, the same had to be applied in the present case as well.

The Court placed reliance on the Apex Court's observation that:

"Privacy rights prescribe autonomy to choose one's profession whereas security concerns texture methodology of delivery of this assurance. But it is a reasonable proposition that the measure to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee is lost. State protection must not translate into censorship."

In doing so, it laid emphasis on the duty of the State to ensure circumstances of safety which inspire confidence in women to discharge their duty freely in accordance to the requirements of the profession they choose to follow. It further observed that the cost of security in the establishment can be shared between the State and the employer.

Lastly, the Court issued directions directing all employers to ensure adequate measures for the safety and security of female employees working in the night shift, including transportation, medical and crèche facilities. The employer is required to inform the State authorities of their intention to employ women in night shifts, and this shall only be permitted after due inspection by the State.

The judgment of the Hon'ble High Court seeks to establish parity in the right to employment between men and women. It underlines the duty of the State to ensure security. However, the judgment falls short in the following respects: a) On the one hand, the Court has emphasised on the duty of the State to ensure circumstances of safety, while on the other hand, the entire onus of ensuring security of female workers is placed on the employer; and b) Passing directions imposing conditions of compulsorily providing facilities of a medical unit and crèches, irrespective of the same being provided under the Act, goes beyond the purview of the judgment, and in fact has no relation with the issue at hand, namely, ensuring security of women working on night shifts.

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