

Ficus Pax Private Limited vs Union Of India on 12 June, 2020

Equivalent citations: AIRONLINE 2020 SC 586

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Bench: M.R.Shah, Sanjay Kishan Kaul, Ashok Bhushan

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (C) DIARY No. 10983 OF 2020

FICUS PAX PRIVATE LTD. & ORS.

... PETITIONERS

VERSUS

UNION OF INDIA & ORS.

... RESPONDENTS

WITH

W.P.(C) No. 500/2020
W.P.(C) No.498/2020
W.P.(C) No.480/2020
W.P.(C) No.484/2020
W.P.(C) No.501/2020
W.P.(C)..... Diary No(s).10981/2020
W.P.(C)..... Diary No(s).10993/2020
W.P.(C)..... Diary No(s).11018/2020
W.P.(C)..... Diary No(s).11041/2020
W.P.(C)..... Diary No(s).11048/2020
W.P.(C)..... Diary No(s).11094/2020
W.P.(C)..... Diary No(s).11111/2020
W.P.(C)..... Diary No(s).11180/2020
W.P.(C) No(s).494/2020
W.P.(C)..... Diary No(s).11194/2020
W.P.(C)..... Diary No(s).11223/2020

Signature Not Verified

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ARJUN BISHT
Date: 2020.06.12

W.P.(C)..... Diary No(s).11282/2020
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Reason:

W.P.(C)..... Diary No(s).11309/2020

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W.P.(C)..... Diary No(s).11310/2020

O R D E R

ASHOK BHUSHAN, J.

1. All these writ petitions except one(i.e. W.P.(civil) Diary No.10981/2020) have been filed by different employers, employers' associations questioning the orders issued under Disaster Management Act, 2005 and other consequential orders issued by different States where directions have been issued that all the employers be it in the industries or in the shops, commercial establishment, shall make payment of wages of their workers, at their work place, on the due date, without any deduction, for the period their establishments are under closure during the lockdown.
2. In the writ petitions apart from challenging the D.O. dated 20.03.2020 issued by the Secretary, Government of India, Ministry of Labour and Employment, order dated 29.03.2020 issued by Government of India, Ministry of Home affairs, in exercise of powers under Section 10(2)(l) of Disaster Management Act, 2005, the vires of Section 10(2)(l) of Disaster Management Act, 2005, has also been questioned, in event, Section 10(2)(l) is interpreting as conferring power to Central Government to direct the private employers to make full payment of wages to the employees during the period of lockdown. In few of the writ petitions, directions have also been sought to subsidise 70 to 80 percent of the wages for the lockdown period by utilising funds collected by Employee State Insurance Corporation or the PM Cares Fund or through any other Government funds/schemes. To understand the nature of relief in different writ petitions, it shall be sufficient to refer reliefs claimed in few of the writ petitions since in other writ petitions reliefs claimed are more or less similar. In W.P.(Civil) D.No.10983/2020, Ficus Pax Limited Private Limited and others versus Union of India and others, the Union of India had filed a common counter affidavit and prayed that the counter affidavit be adopted in other writ petitions referred to in paragraph 4 of the counter affidavit. W.P.(Civil) Diary No.10983/2020 is being treated as leading writ petition. Various interventions applications have also been filed in the leading writ petition. The intervention applications filed in the leading writ petition are allowed.
3. The petitioner in W.P.(C)Diary No.10983 of 2020 is a company incorporated under the Companies Act and is engaged in the business of packaging with eleven factories spread across seven states. The petitioner is registered as Medium Industry (manufacturing) under Micro, Small, Medium Enterprises Development Act, 2006. The petitioner company before the lockdown employed 176 permanent workers and 939 contract workers across all its factories, warehouses and offices. The petitioner's case is that after the lockdown period although petitioner being in a supply chain of several essential items such as pharmaceuticals, food products has been permitted to operate but its business has been reduced to the level of near 5-6 percent. The petitioner challenges

the order dated 29.03.2020 and the D.O. dated 20.03.2020 as being violative of Article 14, Article 19(1)(g) of the Constitution of India.

4. The petitioner's case is that notifications are arbitrary, illegal, irrational and unreasonable and contrary to the provisions of law including Article 14, Article 19(1)(g). Notifications are unreasonable and arbitrary interference with the rights of petitioner Employers under Article 19(1)(g). Notifications are also contrary to the principles of Equal work Equal Pay and also No work No pay, for it does not differentiate between the workers who are working during the lockdown period in establishment such as the petitioner who have been permitted to operate during the lockdown period and the workers who had not worked at all.

5. The Home Secretary, Ministry of Home Affairs, Government of India, cannot invoke Section 10(2)(l) or any other provisions of Disaster Management Act, 2005, to impose financial obligations on the private sector such as payment of wages. The Central Government has the power to allocate funds for emergency response, relief, rehabilitation, mitigation of disasters under Disaster Management Act. The ultimate onus for any compensation towards workers shall ultimately be of Government and the said liability cannot be shifted upon the employers in the Private establishment. The impugned notifications have the effect of completely negating the statutory provisions under the Industrial Disputes Act, 1947. The respondent should not compel the employers to pay the wages for lockdown period but instead should utilise the funds collected by Employees State Insurance Corporation (ESIC) to make periodical payment to workers. In the writ petition, following prayer has been made: -

“PRAYER It is therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to: -

i) Issue a writ, order or direction in the nature of a declaration or certiorari or any other appropriate writ, order or directions declaring D.O. No.M-

11011/08/2020- Media dated
20.03.2020 issued by Secretary
(Labour & Employment) and Order
No.40-3/2020-DM-I(A) dated
29.03.2020 passed by Home
Secretary, Ministry of Home

Affairs are ultra vires Article
14, 19(1)(g) of the Constitution
of India; AND/OR

ii) Issue a writ, order or direction in the nature of mandamus or any other appropriate writ, order or directions, thereby directing the Respondents to subsidize the wages of workers to the tune of 70-80% for lockdown period by utilizing the funds collected by the Employees' State Insurance Corporation(ESIC) or the PM

Cares Fund or through any other Government Fund/Scheme, AND/OR

iii) Pass such other order or orders as may be deemed fit and proper and just and necessary in the interest of complete justice.

AND FOR WHICH ACT OF KINDNESS OF THIS HON'BLE COURT, THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY."

6. The prayer made in W.P. (civil) No.484 of 2020, B4S solution Private ltd. and others versus Union of India & others, also need to be noted. The petitioner No.1 is a company incorporated under the Companies Act, 1956. The company has a number of subsidiary/associate companies. In addition to challenging the Government Order dated 29.03.2020, the petitioners have also challenged the consequential order dated 31.03.2020 issued by the Government of Maharashtra, Order dated 28.03.2020 issued by Government of Punjab, Order dated 29.03.2020 issued by State of Haryana and Order dated 05.04.2020 issued by Government of Uttar Pradesh. In one of the prayers, petitioners have prayed that petitioners be permitted to make payment of 50 percent of Basic Pay plus DA to its employees, pending the final disposal of the writ petition. Following are the prayers which have been made in the writ petition: -

"PRAYER In the facts and circumstances of the case, as mentioned above, it is, therefore, most respectfully prayed that this Hon'ble Court may graciously and empathically be pleased to:-

a. Issue a Writ of Mandamus or any other appropriate writ(s), order(s) or direction(s) to quash clause iii of Government Order dated March 29, 2020 issued by the Ministry of Home Affairs, Government of India for being unconstitutional and in violation of Article 14 and 19 of the Constitution of India.

b. Issue a Writ of Mandamus or any other appropriate writ(s), order(s) or direction(s) to quash Government Order dated 31.03.2020 issued by the Government of Maharashtra, Government Order/advisory dated 28.03.2020 issued by the Government of Punjab, Government Order dated 29.03.2020 issued by the State of Haryana, Government order dated 05.04.2020 issued by the Government of Uttar Pradesh only to the limited extent of compelling the Petitioner and its subsidiaries to pay full salary to all its staff, workers, contract workers, casual workers during the period of lockdown for being unconstitutional and in violation of Articles 14 and 19 of the Constitution of India.

c. Permit the Petitioners to make payment of 50% of basic pay plus DA to its workers/employees (without payment of PF and ESIC contribution as the same is not wages), pending the final disposal of the present petition;

d. Waive the Provident Fund and the ESI as there has been no work rendered by the workers during this period of lockdown and the contribution deposited by the Petitioners for the month of March

and April, 2020 may refunded;

e. Pass any order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present petition."

7. W.P.(civil) D.No.10981 of 2020, Aditya Giri versus Union of India & others, is a petition filed by an individual as a Public Interest Litigation to espouse the cause of employees and employers who have been laid off and who are on the verge of Bankruptcy due to lockdown. In the prayers which have been made in the writ petition, directions have been sought to the respondent to frame policy to mitigate the problems of employees of the Private Sector as well as of the employers who are financially not in position to maintain the employees. In the writ petition, following are the prayers which have been made: -

"PRAYER In the facts and circumstances of the case, as mentioned above, it is, therefore, most humbly prayed that this Hon'ble Court may graciously be pleased to:

-

a) Issue a Writ in the nature of Mandamus directing the Respondent No.1 to formulate a policy/measures to mitigate the problems of sudden laying off of the employees of private sector during the covid-19 lockdown period.

b) Direct the respondents to intervene in a situation where the employer is financially not in a position to maintain the employees the respondents to support those employees who are not able to maintain their families and fulfil the basic needs.

Pass any order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case to meet the ends of justice.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER SHALL, AS IN THE DUTY BOUND EVER PRAY."

8. Prayers made in one more writ petition needs to be noted i.e. W.P.(Civil) D.No.11180 of 2020, Chamber of Small Industry Associations and others versus Union of India and others. Apart from challenging the order dated 29.03.2020 issued by the Home Secretary, Ministry of Home Affairs, and order dated 31.03.2020 issued by Government of Maharashtra, one of the prayers made in the writ petition as prayer

(v) is to the following effect: -

"Issue a writ of Mandamus to pass appropriate direction to the respondent to strike a balance between the interest of MSMEs and the interest of workers and employees in a manner that neither is unduly prejudiced "

9. As noted above, a common counter affidavit has been filed in writ petition (civil) D.No.10983 of 2020 with prayer to adopt the counter affidavit in other writ petitions. At the outset, in counter affidavit, it has been pleaded that impugned notifications have been withdrawn by the Union of India; hence, the Union of India is not filing a para-wise reply to the writ petition but filing a limited affidavit to bring on record -

i) legal authority, competence under which the said impugned direction was passed;

ii) the facts and circumstances behind withdrawal of said orders, directions.

10. The Union of India has craved for leave to file a detailed para-wise reply at subsequent stage, if required.

11. In the counter affidavit, it has been stated that all orders passed under Section 10(2)(l) of the Disaster Management Act, 2005, have been withdrawn w.e.f. 18.05.2020 vide an order dated 17.05.2020. Counter affidavit states that D.O. dated 20.03.2020 issued by Secretary, Ministry of Labour and Employment, to the Chief Secretaries of all the States was an advisory and an order was issued on 29.03.2020 by National Executive Committee in exercise of powers under Section 10(2)(l) of Disaster Management Act, 2005, directing all the employers to make payment of wages of their workers at their workplace without any deduction for the period their establishments are under closure during the lockdown.

12. Applications for interventions have been filed by employees, different employees' unions, namely All India Central Council of Trade Union, Trade Union Centre of India and few other employees' organisations in leading writ petition. The intervenors in their applications and affidavits have supported the order dated 29.03.2020. It has been stated that under Disaster Management Act, 2005, the Central Government has full authority to issue such directions.

13. It is further stated that right to wages is a pre-existing right which flows inter alia from the contract of employment as well as broader constitutional and statutory scheme flowing from Article 14 and 21 of the Constitution and encompassing Payment of wages Act, Minimum Wages Act, The Contract labour (Regulation and abolition) Act and the Industrial Disputes Act, 1947. Nationwide lockdown and resultant closure of the workplace directly affected the sustenance and livelihood of members of the Employees Union. All measures taken by the Government of India are within its legislative competence. The prayer of the petitioner to utilise the ESIC fund has been refuted.

14. We have heard learned counsel for the petitioners. Learned Attorney General, Shri K.K. Venugopal, has appeared for the Union of India. We have also heard learned counsel appearing for the different intervenors.

15. Learned counsel for the petitioners contends that impugned notifications are arbitrary, unreasonable, and contrary to the provisions of law including Article 14, & Article 19(1)(g) of the Constitution of India. It is submitted that by way of impugned notifications an otherwise stable and solvent industrial establishment can be forced into Insolvency and loss of control of Business.

16. The Home Secretary, Ministry of Home Affairs, cannot invoke Section 10(2)(l) or any other Section of Disaster Management Act, 2005, to impose financial obligations on the Private Sector. The Central Government under Disaster Management Act, 2005, has the power to constitute National Disaster Response Fund. Similarly, the State Disaster Response Funds have been constituted, which can be utilised for payment of any compensation towards workers which liability cannot be shifted upon the employers in Private establishments. The respondent should not compel the employers to pay the wages for the lockdown period but instead should utilise the funds collected by Employees State Insurance Corporation (ESIC) to make periodical payment to the workers.

17. Some of the counsel have also raised the submissions that the order dated 29.03.2020 was issued only with regard to migrant labour and the scope of order should not be extended to cover the entire workforce of the establishment. Further, the order dated 29.03.2020 was not a direction to the employer but it is an order to the State/UT Government and other statutory bodies to take necessary action. The violation of Article 14 and Article 19(1)(g) and Article 300A has also been alleged by the impugned orders.

18. Learned counsel submits that if the impugned order is read in the manner contended by the respondent, it would mean that the employer should be compelled to not only continue to retain their migrant workers but also their regular workers and also pay full wages at a time when the business is effectively closed, and there is no income. Failure to comply for any reason, including the complete absence of funds, would render them liable to prosecution. Such order is ex facie arbitrary and unreasonable.

19. Learned counsel have further submitted that all industries and private establishments have different financial capacity, circumstances and all establishments cannot be grouped in one category for issuing a direction to pay wages to its employees during lockdown period and in possibility cannot be directed by any executive action. Some of the petitioners have come forward with the prayer that they are ready to pay 50 percent wages during the said period. Some of the learned counsel have also submitted that they are also negotiating with their workers regarding payment of wages during the period of lockdown and some of the workers have re-joined their work.

20. Shri K.K. Venugopal, learned Attorney General, submits that the power to issue order dated 29.03.2020 can certainly be traced to inter alia Section 10(1) and nothing under Section 10(2) restrict the ambit or scope of Section 10(1). The order dated 29.03.2020 was fully in conformity with the provisions, schemes of Disaster Management Act, 2005.

21. The direction dated 29.03.2020 was issued in public interest by the Competent Authority. The directions are neither arbitrary nor capricious. The ground of financial hardship, incapacity which has been pleaded by the petitioner is legally untenable ground to challenge the direction issued by competent authority in exercise of statutory power. The Union of India issued the above direction as a temporary measure to mitigate the financial hardship of the employees and workers especially contractual and casual workers during the lockdown period. The measure was proactively taken by the respondent to prevent perpetration of financial crisis within the lower strata of the society,

labourers and employees. Directions issued by the Government of India where an economic and welfare measure as a benevolence in the object sought to be achieved.

22. Shri Venugopal further submits that by order dated 17.05.2020, the National Executive Committee has revoked its earlier impugned directions w.e.f. 18.05.2020, hence, the order remain in operation only for 54 days. The impugned notifications have been outlived their lives, the adjudication of the same would only entail an academic exercise.

23. Learned counsel appearing for the intervenors have supported orders issued by the Government of India dated 29.03.2020 and other orders and consequential directions. It is submitted that orders dated 20.03.2020 and 29.03.2020 were issued in larger public interest to prevent the possible spread of the disease.

24. It is submitted that when the authority had declared a lockdown, it is also liable to provide for the consequences of the lockdown. In event, the order dated 29.03.2020 struck down, the very lockdown order will be arbitrary and it is also liable to be struck down. The Government of India has offered Economic Stimulus package to all Small and Medium Industries to enable them to cope with the current financial situation so as to ensure that they can cope with the burden of payment of wages and continue to be viable.

25. The Disaster Management Act, 2005, is a self- contained code and no reliance can be placed on any other law. Further by virtue of Section 72 of Disaster Management Act, 2005, all other enactments are overridden. It is further submitted that order impugned seeks to reinforce the pre-existing right of the worker to get their wages without any reduction. The Payment of Wages Act of 1936 has also been referred to in support of their submission.

26. We have considered the submissions of the learned counsel for the parties and perused the record.

27. It is true that the orders dated 29.03.2020 which was passed in exercise of power under Section 10(2)(l) of the Disaster Management Act, 2005, stood withdrawn by subsequent order dated 17.05.2020 w.e.f. 18.05.2020. The consequence of the subsequent order dated 17.05.2020 is that the obligation cast on the employer to make payment of wages of their workers at their workplace, without any reduction, for the period their establishments are under closure during the lockdown is no longer in operation. However, the issue regarding obligation of the employer as per order dated 29.03.2020 when it remained in force is still to be answered especially when the petitioners challenges the order as ultra vires to Disaster Management Act, 2005, as well as violative of Article 14, 19(1)(g) and Article 21. The petitioners have also prayed that Section 10(2)(l) of Disaster Management Act, 2005, be declared ultra vires to Article 14 and Article 19(1)(g), in event, it is interpreted in conferring authority to the Central Government to direct the employers of the Private establishments to pay wages of their workers during the lockdown period.

28. In the common affidavit filed by Union of India, although authority to issue impugned order dated 29.03.2020 has been sought to be traced under Section 10(1) and Section 10(2)(l) of Disaster

Management Act, 2005, but in counter affidavit, there are no reply to the other grounds raised in the writ petitions to attack the order dated 29.03.2020.

29. We are of the view that all issues raised by the petitioners and the respondents have to be decided together and the piecemeal consideration is not warranted. We thus are of the view that Union of India may file a detail counter affidavit for which the leave they have already prayed for in the common counter affidavit, within a period of four weeks. Rejoinder to which to be filed within a period of one week and all the matter to be listed again in last week of July, 2020.

30. In some of the writ petitions, this Court had already passed an order for not taking any coercive action against the employer. In our order dated 04.06.2020, we have directed: -

“In the meantime, no coercive action, against the employers shall be taken pursuant to notification dated 29.03.2020.” The above order shall continue in all the matters.

31. We have already noticed that in one of the writ petitions, b4S Solutions Private Ltd., the petitioners have prayed for permitting the petitioner to make payment of 50 percent of Basic Pay plus DA to its workers/employees without payment of PF and ESICC pending final disposal of the writ petition.

32. One of the writ petitions i.e. Writ petition filed by the Chamber of Small Industry Associations, one of the prayers sought is “direction to the respondent to strike a balance between the interest of MSMEs and the interest of the employees.”

33. It cannot be disputed that the lockdown measures enforced by the Government of India under the Disaster Management Act, 2005, had equally adverse effect on the employers as well as on employees.

Various Industries, establishments were not allowed to function during the said period and those allowed to function also could not function to their capacity. There can be no denial that lockdown measures which were enforced by the Government of India had serious consequences both on employers and employees. The period of Unlock having begun from 01.06.2020 and even prior to that some of the industries were permitted to function by the Government of India by different guidelines, most of the industries and establishments have re-opened or are re-opening, require the full workforce.

34. As noted above, all industries/establishments are of different nature and of different capacity, including financial capacity. Some of the industries and establishments may bear the financial burden of payment of wages or substantial wages during the lockdown period to its workers and employees. Some of them may not be able to bear the entire burden. A balance has to be struck between these two competitive claims. The workers and employees although were ready to work but due to closure of industries could not work and suffered. For smooth running of industries with the participation of the workforce, it is essential that a via media be found out. The obligatory orders having been issued on 29.03.2020 which has been withdrawn w.e.f. 18.05.2020, in between there

has been only 50 days during which period, the statutory obligation was imposed. Thus, the wages of workers and employees which were required to be paid as per the order dated 29.03.2020 and other consequential notification was during these 50 days.

35. In most of the industries, factories and establishments, the workers are represented by Trade Unions or other Employees associations. The State is also under obligation to ensure that there is smooth running of industrial establishment and the disputes between the employers and employees may be conciliated and sorted out.

36. It cannot be disputed that both Industry and Labourers need each other. No Industry or establishment can survive without employees/labourers and vice versa. We are thus of the opinion that efforts should be made to sort out the differences and disputes between the workers and the employers regarding payment of wages of above 50 days and if any settlement or negotiation can be entered into between them without regard to the order dated 29.03.2020, the said steps may restore congenial work atmosphere.

37. We thus direct following interim measures which can be availed by all the private establishment, industries, factories and workers Trade Unions/ Employees Associations etc. which may be facilitated by the State Authorities: -

i) The private establishment, industries, employers who are willing to enter into negotiation and settlement with the workers/employees regarding payment of wages for 50 days or for any other period as applicable in any particular State during which their industrial establishment was closed down due to lockdown, may initiate a process of negotiation with their employees organization and enter into a settlement with them and if they are unable to settle by themselves submit a request to concerned labour authorities who are entrusted with the obligation under the different statute to conciliate the dispute between the parties who on receiving such request, may call the concerned Employees Trade Union/workers Association/workers to appear on a date for negotiation, conciliation and settlement. In event a settlement is arrived at, that may be acted upon by the employers and workers irrespective of the order dated 29.03.2020 issued by the Government of India, Ministry of Home Affairs.

ii) Those employers' establishments, industries, factories which were working during the lockdown period although not to their capacity can also take steps as indicated in direction No.(i).

iii) The private establishments, industries, factories shall permit the workers/employees to work in their establishment who are willing to work which may be without prejudice to rights of the workers/employees regarding unpaid wages of above 50 days. The private establishments, factories who proceed to take steps as per directions (i) and (ii) shall publicise and communicate about their such steps to workers and employees for their response/participation. The settlement, if any, as indicated above shall be without prejudice to the rights of employers and employees which is pending adjudication in these writ petitions.

iv) The Central Government, all the States/UTs through their Ministry of Labour shall circulate and publicise this order for the benefit of all private establishment, employers, factories and workers/employees.

38. In event, any settlement is entered between the employers and employees in the establishments which are before us, an affidavit giving details shall be filed by next date of hearing.

39. List in last week of July.

.....J. (ASHOK BHUSHAN)J. (SANJAY KISHAN KAUL)
.....J. (M.R.SHAH) NEW DELHI, JUNE 12,2020