IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

District : Ahmedabad

Special Civil Application No. of 2020

Gujarat Mazdoor Sabha ...Petitioner

Versus

State of Gujarat ...Respondent

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SYNOPSIS AND LIST OF EVENTS

By preferring present petition under Article 226 of the Constitution of India, the petitioner is challenging the Constitutional validity of the Factories (Gujarat Amendment) Ordinance, 2020 (Gujarat Ordinance No.6 of 2020) promulgated on 03-07-2020). In respectful submission of the petitioner, the questioned notification is absolutely Unconstitutional, illegal, arbitrary and against basic objects of human rights and the Factories Act, 1948 and therefore requires to be struck down.

Hence the petition.

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

District: Ahmedabad

Special Civil Application No. of 2020

In the matter of Articles 13(1),14,16, 19, 21, 23, 39, 41 and 226 read with Articles 213 and 254 of the Constitution of India.

AND

In the matter under sections 2, 85, 106 of the Factories Act, 1948.

AND

In the matter of Constitutional validity of the Factories (Gujarat Amendment) Ordinance, 2020 (Gujarat Ordinance no.6 of 2020).

AND

In the matter of violation of various conventions of International Labour Organization which was ratified by India.

AND

In the matter between:

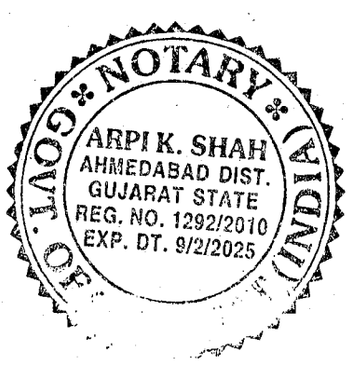
Gujarat Mazdoor Sabha
(A Trade Union registered under the
Indian Trade Unions Act, 1929)
Through its secretary ,
Shri Kalpesh C. Vekaria

...Petitioner

Versus

State of Gujarat
Notice to be served through,
Chief Secretary,
Government of Gujarat
Labour & Employment Department
Sachivalaya,
GANDHINAGAR ...Respondent

To
The Hon'ble Chief Justice and other Hon'ble
Judges of the High Court of Gujarat



Humble petition of the petitioner abovenamed

MOST RESPECTFULLY SHEWETH

1. The Petitioner is a Trade Union registered under the Trade Union Act, 1929, bearing registration No. G-2118 dated 30-12-1980, the petitioner represents thousands of workmen working in numbers factories and various Industrial Establishments throughout the State of Gujarat. All the members of the petitioner Union are citizens of India and as such, entitled to the fundamental rights guaranteed by the Constitution of India. The Petitioner Union also represents the interest of the workmen working in an industrial establishment where number of workmen is 10-20. The petitioner submits that it carries out its activities within the bounds of law and is devoted to the cause of workers of organized and unorganized Sector. The petitioner has represented such workmen in various forums like labour courts, industrial tribunals, and Hon'ble High Court and before the Hon'ble Apex Court for redressal of grievances and enforcement of rights flowing from various labour laws. Respondent is state as per Article 12 of the Constitution of India, 1950.

2. By preferring present petition under Article 226 of the Constitution of India, the petitioner is challenging the Constitutional validity of the Factories (Gujarat

Amendment) Ordinance, 2020 (Gujarat Ordinance No.6 of 2020) promulgated on 03-07-2020, whereby the Government of Gujarat has amended the Factories Act, 1948(Act 63 of 1948). A copy of the said ordinance published in the Gujarat Government Gazette is annexed herewith and marked **ANNEXURE-A**. Hereinafter for the sake of brevity the Factories (Gujarat Amendment) Ordinance, 2020 (Gujarat Ordinance No.6 of 2020) shall be referred to as the 'questioned ordinance' and the Factories Act, 1948(Act 63 of 1948) shall be referred to as the 'Principal Act'. By the questioned ordinance, the definition of 'factory' as defined in section 2(m) of the Principal Act is sought to be amended by substituting "**twenty**" in the place of "**ten**" in sub-clause (i) and "**forty**" in the place "**twenty**" in sub-clause (ii). Further amendment is sought to be made in section 85 and new of section 106B is sought to be inserted in the Principal Act. In respectful submission of the petitioner, the questioned ordinance is absolutely unconstitutional, illegal, and arbitrary, without application of mind and against the basic objects of the Principal Act and therefore requires to be struck down.

3. That before the promulgation of the ordinance; Section 2(m) of the Act stood as under:

"2(m). "factory" means any premises including the precincts thereof—

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,—

but does not include a mine subject to the operation of [the Mines Act, 1952 (35 of 1952)], or [a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place];

[Explanation [I]. —For computing the number of workers for the purposes of this clause all the workers in different groups and relays] in a day shall be taken into account;]

[Explanation II.—For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof;]"

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That by way of Section 3 of Ordinance, sub-clause (i) and sub-clause (ii) of Section 2(m) was amended, Section 3 of the Ordinance is reproduced hereunder for the sake of ready reference:

> *"3. Amendment of Section 2 of LXII of 1948.—In the principal Act, in Section 2, in clause (m), -*
>
> *(i) in sub-clause (i), for words "ten", the words "twenty" shall be substituted;*
>
> *(ii) in sub-clause (ii), for words "twenty", the word "forty" shall be substituted."*

That amended/altered Section after the ordinance is reproduced as under:

> *"2(m). "factory" means any premises including the precincts thereof—*
>
> *(i) whereon **twenty** or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or*
>
> *(ii) whereon **forty** or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,—*

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but does not include a mine subject to the operation of [the Mines Act, 1952 (35 of 1952)], or [a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place];

[Explanation [I]. —For computing the number of workers for the purposes of this clause all the workers in different groups and relays] in a day shall be taken into account;]

[Explanation II.—For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof;]"

4. Similarly, Section 85 of the Factories Act, 1948 was also amended by the ordinance in issue. Section 85 before the ordinance was part of a chapter -IX- Special Provision and the section 85 before the promulgation of the ordinance is reproduced hereunder:

"*85. Power to apply the Act to certain premises.—*

(1) The State Government may, by notification in the Official Gazette, declare that all or any of the provisions of this Act shall apply to any place wherein a manufacturing process is carried on with or without the aid of power or is so ordinarily carried on, notwithstanding that—

*(i) the number of persons employed therein is less than **ten**, if working with the aid of power and less than **twenty** if working without the aid of power, or*

(ii) the persons working therein are not employed by the owner thereof but are working with the permission of, or under agreement with, such owner:

Provided that the manufacturing process is not being carried on by the owner only with the aid of his family.

(2) After a place is so declared, it shall be deemed to be a factory for the purposes of this Act, and the owner shall be deemed to be the occupier, and any person working therein, a worker.

Explanation. —For the purpose of this section, "owner" shall include a lessee or mortgagee with possession of the premises."

That Section 4 of the ordinance proposed substitution of number of workers for the purpose of the non-granting the equal footing at the workers who are engaged by the factory owner or who are working in the factory premises; Section 4 of the ordinance is reproduced hereunder:

"4. Amendment of Section 85 of LXII of 1948. —

In the Principal Act, in section 85, in sub-section (1), in clause (i), for the words "ten" and "twenty", the words "twenty" and "forty" shall be substituted, respectively."

That, <u>after the amendment due to the ordinance, the altered Section 85</u> is reproduced hereunder:

"85. Power to apply the Act to certain premises.—

(1) The State Government may, by notification in the Official Gazette, declare that all or any of the provisions of this Act shall apply to any place wherein a manufacturing process is carried on with or without the aid of power or is so ordinarily carried on, notwithstanding that—

*(i) the number of persons employed therein is less than **<u>twenty</u>**, if working with the aid of power and less than **<u>forty</u>** if working without the aid of power, or*

(ii) the persons working therein are not employed by the owner thereof but are working with the permission of, or under agreement with, such owner:

Provided that the manufacturing process is not being carried on by the owner only with the aid of his family.

(2) After a place is so declared, it shall be deemed to be a factory for the purposes of this Act, and the owner shall be deemed to be the

occupier, and any person working therein, a worker.

Explanation. —For the purpose of this section, "owner" shall include a lessee or mortgagee with possession of the premises."

5. That, the grave irregularity of the ordinance which ultimately makes the Act itself toothless and against the aim, object, and scope of the Factories Act, 1948, is Section 5 of the ordinance. That by Section 5 of the ordinance, new section namely "Compounding of offences" was inserted in the principal Act. Section 5 of the ordinance which comprises the newly created and inserted section as Section 106B is reproduced hereunder for the sake of ready reference:

"5. Insertion of new section 106 in LXII of 1948.— In principal Act, after section 106A, the following section shall be inserted, namely: -

'106B. Compounding of offences: -

The State Government may, by notification in the Official Gazette, specify such offences, which shall be compounded by such officer or authority for such amount as may be specified in the said notification:

Provided that such amount shall not exceed the maximum amount of fine fixed for the offence:

Provided further that where the offence is so compoundable-

(a) before the institution of the prosecution, the offender shall not be liable to prosecution, for such offence;

(b) after the institution of prosecution, the compounding shall amount to acquittal of the offender:

Provided also that no offence shall be compounded if a factory is involved in a hazardous process as specified in Chapter IV and Chapter IV A.'"

6. The brief facts giving rise to this petition are as under:

6.1 With the object to improve the working conditions of the workers within the factory premises and to ensure welfare of the workers, protection of workers including women and children from exploitation, improve unhygienic working conditions, sanitations, working hours, holidays etc., the law relating to the regulation of labour employed in factories in India is embodied in the Factories Act. Since 1934, the Factories Act has undergone several amendments, but its general framework remained unchanged. The present Principal Act enacted way back in the year 1948 is a benevolent piece of legislation concerning

health of the workers, cleanliness, disposal of effluents, ventilation. Moreover, the Act also makes stringent provisions for safety measures for workers at workplace, restrictions on employment of women and children, safety of buildings and machinery, precautions against fire. The Principal Act further provides measures for regulating working hours, employment of young persons, annual leave with wages etc. and in the cases of violations and breach of such provisions, the Principal Act provides for penalties which include imprisonment and fine. The Act was enacted primarily with object of protecting workers engaged in factories against industrial and occupation hazards by seeking to impose upon owners or occupiers certain obligations for protecting workers and securing for them employment in conditions conducive to their health and safety. The object of the Act was reiterated at the various point of time by the legislature while introducing the bill. That non-compliance of the mandatory obligation provided by various provisions of the Principal Act was along with its scope, which may be compoundable, and it will lose its mandatory nature due to insertion of Section 106B in the principal Act. That after the insertion of Section 106B in the principal Act, the mandatory provisions for

safeguard of workers will be directory and not enforceable due to its altered provisions which will make these offences compoundable. these provisions for the safeguard of the workers which are essentially for the developing industrial era and essential of humane work conditions will be just a right on paper without enforcement. The essential feature under the act which provides basic safeguard and working conditions, which ultimately is a sign of considering the safe humane work conditions, as well as after the struggles of the workers, through which they gained certain labour rights which are nothing but basic human rights will be taken away by way of the questioned ordinance. The reluctant effect of Issuing Notification for the purpose of compounding offences under newly inserted Section 106B would be to permit the factory owner/Management to commit any offence under the Act with Immunity, which is against the Aim and objects of the Principal Act. The Object and reasons for amending Factories Act subsequent to 1948 along with the Table showing important sections of the Principal Act, which may be compoundable are collectively marked and annexed hereto as **Annexure-B Colly.**

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6.2 The rapid development of industries, particularly the power-aided and hazardous industries, necessitated more and more safety measures for protection of workers in the factories. Even prior to enactment of welfare legislations, the English Common Law did evolve the law pertaining to safety measures required to be taken by the factory owner for the protection of workers employed in the factory and any breach thereof or contravention of any principle laid down under common law would result into strict penal action and would also entitle the workers for suitable compensation. In course of time and with advancement of industries the Factories Act enacted in the year 1922 was amended in 1934 and ultimately the present Principal Act was enacted in the year 1948 and amended from time to time. The basic law regulating the conduct of the factory owner (employer) is provided in the Principal Act. The protective and regulatory measures provided in the Principal Act are minimum standards of duty imposed on the factory owners (employers). Several other benevolent legislations have been enacted for the benefit of industrial workers which include Industrial Disputes Act, Payment of Wages Act, Workmen Compensation Act, Minimum Wages Act etc.

6.3 It is humbly submitted that the Principal Act is absolutely in consonance with the ethos of the Constitution of India as reflected in the preamble. The Principal Act aims at achieving the object of socio-economic justice to the workers employed in the factories. The Principal Act is also in consonance with the fundamental rights guaranteed to the citizens in Part-III and the Directive Principles laid down under Article 39 and 41 in Part-IV of the Constitution of India.

6.4 It is submitted that the questioned ordinance proposes to withdraw certain penal provisions contained in the Principal Act for factories running with the aid of power employing more than 20 workers (instead of 10) and for factories running without aid of power employing more than 40 workers instead of 20. Thus, the questioned ordinance adversely affects the rights of 10 to 20 employed in the power aided factories and 20 to 40 workers employed in factories without aid of power. In Gujarat there are large number of power aided factories employing more than 10 and less than 20 workers. Similarly, there are hundreds and thousands of

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factories running without aid of power in Gujarat where the workforce would be more than 20 and less than 40. Thus, amendment is sought to be made by questioned ordinance to withdraw all sorts of protections given to the workers employed to the extent of 40 in the power aided factories and to the extent of 20 in the factories running without the aid of power. There is absolutely no rational logic for withdrawing the basic protection given to the citizens by amending the pre-constitutional statute. In other words, the law of the land in respect of workers' health, safety, hygienic working conditions, working hours etc. would not apply in the factories as stated hereinabove. Thus, the pre-constitutional protections given to the workers which have remained in the statute books for more than 70 years are sought to be withdrawn by the questioned ordinance. In respectful submission of the petitioner, the withdrawal of such protection would result into violation of the Constitution of India in true spirit and letter. In view of the Preamble of the Constitution, the questioned ordinance ought not to have been issued.

6.5 The second important amendment sought to be made by the questioned ordinance is insertion of

Section 106B in the Principal Act whereby the State government is authorized to make any or all offences under Principal Act compoundable. Primarily, constitution of offence and providing penalty for committing breach of any provision made under the law is a sanction to seek compliance of the law. The provisions relating to penalties and procedure are made in Chapter-X of the Principal Act. For illustration, Section 92 of the Principal Act provides for two years imprisonment of occupier or manager of the factory and fine of rupees one lakh for contravention of any provision of the Act or any rule made thereunder. Similar provisions are contained in section 94 and 96A. It is submitted that compliance of the provisions made in the Principal Act in respect of health and hygiene of the workers, safety, hazardous processes, welfare, working hours, employment of young persons are mandatory in nature. By inserting section 106B in the Principal Act by the questioned ordinance, the entire Principal Act has been rendered toothless. In ultimate analysis, the employer will become immune from the penal actions for violating the provisions in respect of health and hygiene of the workers, safety, hazardous processes, welfare, working hours, employment of young persons provided in the

Principal Act on payment of certain amount to the government.

6.6 In respectful submission of the petitioner, the amendments sought to be made by the questioned ordinance are against the basic provisions and essential features of the Constitution of India. The questioned ordinance is against the basic human rights of the factory workers and the basic norms in respect of health and hygiene and safety measures of the industrial workers accepted internationally.

6.7 The Republic of India ratified various convention of the International Labour organization. Forced Labour Convention, 1930, Minimum Age (Industry) Convention, 1919, Hours of Work (Industry) Convention, 1919, Weekly Rest (Industry) Convention, 1921, Prevention of Major Industrial Accident Convention, 1993 are amongst those conventions of The ILO which were ratified by the India. The ordinance will also make the offences compoundable and there may be gross violation of the rights guaranteed by the statue as well as secured through struggles and various conventions will be nullify and ineffective. Copy of all conventions ratified

by the India are collectively marked and annexed hereto as **Annexure- C Colly.**

7. In the aforesaid facts and circumstances, the petitioner begs to prefer this petition under Article 226 of the Constitution of India challenging the Constitutional validity of the questioned ordinance Annexure-A on the following amongst other grounds that may be urged at the time of hearing:

G R O U N D S

a) The questioned ordinance is violative of the basic human rights and as well as the fundamental rights guaranteed by the Constitution of India. The questioned ordinance is arbitrary, unauthorized, unconstitutional, unfair, without application of mind and issued with ulterior motive extraneous considerations.

b) The petitioner submits that the Constitution of India was amended by 38th amending by adding Clause-4 in Article 213 which reads as under:

"(4) Notwithstanding anything in this Constitution, the satisfaction of the Governor mentioned in Clause (1) shall be final and shall not be questioned in any court on any ground."

Thus, by 38th amendment of the Constitution, the ordinance promulgated by the Governor under Article 213 was immune from challenge before any court. But, above Clause (4) of Article 213 has been subsequently deleted by 44th amended of the Constitution. Thus, after 44thamendment of the Constitution, Clause (4) has been done away. Therefore, in this situation, now the Constitutional validity of ordinance promulgated by the Governor under Article 213 is open to challenge on any ground on which any legislation can be challenged. In these circumstances, the present petition under Article 226 of the Constitution challenging Constitutional validity of the questioned ordinance is perfectly maintainable.

c) The petitioner further submits that the subject matter of the questioned ordinance is covered by Entry No.24 incorporated in the Concurrent List of the Seventh Schedule of the Constitution. Therefore, any law enacted by state legislation which is inconsistent with the Union legislation would be void to the extent of inconsistency. This provision is indirectly incorporated in Article 213 which provides for the powers of the Governor to promulgate ordinance. It is humbly submitted that Article 213(1)(3) does provide that in case any ordinance

promulgated by the Governor is inconsistent with the Union list, then in that case the Governor's powers are restricted subject to instructions having been issued by the President of India. In the present case it appears that the purported "instruction" of the President has been "obtained" by the state authority. It is humbly submitted that for promulgation of any ordinance by the Governor under Article 213(3) of the Constitution, all the provisions and principles incorporated in Article 254 of the Constitution would necessarily apply on legislative powers of the President to issue instructions to the governor for promulgation of ordinance. The consistent judicial view is that the President's attention must be drawn by providing sufficient material to clearly indicate the inconsistency between the Union legislation and the proposed state legislation. All these principles do apply to the powers of the President while issuing instructions to the governor under Article 213(3) for promulgation of ordinance. It is humbly submitted that in the present case, sufficient and accurate material clearly indicating the inconsistency and the extent of inconsistency between the Union legislation and the questioned ordinance is not placed before the President of India.

d) It is humbly submitted that from the language of Article 213 of the Constitution it is undoubtedly clear that the President must also be satisfied regarding emergent necessity having arisen to take immediate action to promulgate ordinance, more particularly in respect of ordinance making provisions inconsistent with the existing Union legislation and the extent of inconsistency. It is humbly submitted that in the present case His Excellency the President of India has not expressed any satisfaction based on relevant material placed before him that immediate action was very much necessary to amend the existing Factories Act which has remained on statute book for the last 70 years.

e) The petitioner further submits that there is absolutely no ground before His Excellency the Governor of Gujarat to come to the conclusion that immediate necessity has arisen to promulgate ordinance for making substantial amendment in the welfare legislation namely the Factories Act which continues to exist on statute book since 1948. It is humbly submitted that satisfaction of the Governor and satisfaction of the President regarding existence of emergent situation necessitating immediate action for promulgation of ordinance are the conditions precedent for exercising powers under Article 213 read

with Article 254(2) of the Constitution of India. The petitioner submits that in view of the decision rendered by the Hon'ble Apex Court in the case reported in AIR-1982-SC-710, the satisfaction of President regarding existence of emergent situation for taking immediate action is a condition precedent for exercising legislative powers and it is justiciable. This decision of the Hon'ble Supreme Court would squarely apply to the powers of the governor under Article 213 also.

f) It is submitted that the text of the proviso to Article 213 clearly provides that the instruction from the President to the Governor to promulgate ordinance under clauses (a), (b) and (c) is a condition precedent. Thus, the instruction contemplated by proviso to Article 213(1) must necessarily originate from the President. Article 213 does not suggest that initial action is to be initiated by the state government or the Governor requesting the President to issue an instruction for promulgating a particular ordinance. The language of the proviso to Article 213 clearly indicates that the President is required to issue instruction to the Governor to promulgate ordinance on the basis of his own judgment and not according to the judgment of State authorities. In the present case from the text of the questioned ordinance,

it clearly appears that the instructions of the President under the proviso to clause (1) of Article 213 of the Constitution of India have been obtained. Thus, the procedure contemplated by proviso to Article 213(1) has not been followed in the present case. It appears from the language of the questioned ordinance that a draft of the ordinance to be promulgated was prepared by the state authorities and thereafter a request was made to the President of India to issue instruction accordingly. This procedure is not contemplated by Article 213 of the Constitution of India.

g) It is further submitted that, as stated hereinabove, the Factories Act right from beginning has been a benevolent piece of legislation aimed at securing protection of industrial workers against health hazards and ensuring betterment of their hygiene, better working conditions, working hours etc. The provisions made in the Principal Act, particularly in Chapter-III (in respect of health), Chapter-IV (in respect of Safety), Chapter-IVA (in relation to hazardous processes), Chapter-V (Welfare), Chapter-VI (Working Hours) – all these provisions mandate minimum standards and measures to be followed strictly by the employers in the factory. Violation of certain safety provisions may lead to

disastrous consequences including loss of life. The employers cannot be permitted to violate the law relating to minimum safety measures and permit the employer to endanger the lives of the workers and therefore, specific provisions are made in the Principal Act for periodical inspection of the factory premises by the Inspectors and ensure strict compliance of the mandatory provisions in respect of health, safety and welfare of the workers while they are at work in the factory. For any breach of the provision committed by the employer, the Inspector is empowered to initiate legal action including criminal prosecution of the employer. The ordinance in question is nothing but an attack on the rights of the progressiveness of the Industrial state and their workmen's humane work conditions. The said ordinance is nothing, but a regressive action and it will have far fetching ill effects in the lives of the workers and society at large.

h) It is submitted that all the aforesaid provisions have remained in the statute book for over 70 years. There is no immediate necessity to take immediate action to withdraw the protections provided to the workmen under existing law in respect of health, safety, and welfare of the workers. It is unthinkable that immediate action

would be necessary to withdraw the basic human requirements of health, safety and welfare of hundreds and thousands of workers employed in the factories who stand excluded by the questioned ordinance. No emergent situation as contemplated by the provisions of the Constitution has arisen to promulgate the questioned ordinance when in all probability the session of assembly is likely to be convened in near future. The Fourteenth Gujarat Assembly held its last day motion of 6th Session on 31st March, 2020 and the Hon'ble Governor under Article 174(2)(a) prorogued the session by notification on 7th April, 2020. It is also stated that there is no urgent situation which warranted the enforcement or necessity of the present ordinance. Therefore, there is absolutely no emergency situation necessitating the Governor to issue the ordinance withdrawing basic human rights of the workmen provided in the Principal Act of 1948 and which have remained in existence for more than 70 years.

i) That, the questioned ordinance has changed the numbers of workmen in the definition of factory u/s 2(m) of the Factories Act, 1948; that the Union Government introduced The Code on Social Security, 2019 (Bill No. 375 of 2019) before the Parliament of India, the said bill

also defines "factory" u/s 2(32), whereby the factory was defines as the place where on ten or more employees are working in any part of which a manufacturing process is being carried on with the aid of power and twenty or more employees are working in any part of manufacturing process is being carried on without the aid of power. That Section 2(32) of the Bill proposed for the Code on Social Security. 2019 are reproduced as under for the ready-reference:

" 2 (32) "factory" means any premises including the precincts thereof—

(a) whereon ten or more employees are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(b) whereon twenty or more employees are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on, but does not include a mine, or a mobile unit belonging to the Armed Forces of the Union, railways running shed or a hotel, restaurant or eating place.

Explanation I.—For computing the number of employees for the purposes of this clause, all the employees in (different groups and relays) a day shall be taken into account;

Explanation II.—For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed as factory if no manufacturing process is being carried on in such premises or part thereof;"

That, the proposed Bill which was introduced by the Union legislature which also shows the legislative intent for securing the workmen's interest as well as the Principal Act of 1948 and its predecessor Act of 1922 and 1934 also kept the numbers of workmen in the factory proper and reasonable for the protection of the workmen. The questioned ordinance do not have any logic, reason or rational behind the alteration/amendment to oust the protection available to the workmen since more than 70 to 100 years. Hence ,it can be said that the ordinance in question is against the legislative intent and thus void.

j) In respectful submission of the petitioner, the conditions precedent for exercising powers by the Governor of Gujarat as well as by the President of India under Article 213 of the Constitution have not been complied with and therefore the questioned ordinance is unconstitutional and void and consequently, inoperative.

k) The petitioner submits that the Right to Life contemplated under Article 21 of the Constitution of India includes "finer graces of human civilization". The Supreme Court in the case of *P.Nalla Thampi Vs Union of India, AIR-1985-SC-1133* virtually rendered this fundamental right a repository of various human rights which includes the right to live with human dignity, right to livelihood, right to health and sanitation, right to safety and healthy environment. Thus, the right to life flowing from Article 21 of the Constitution is available to all the citizens including the workers employed in the factories covered and excluded under the questioned ordinance. The right to safe and healthy environment of working conditions would include safe building of the factory, clean sanitary facility and safety of the plant and machinery. Thus, the measures in respect of health, sanitation, safety etc. provided in the Principal Act are in consonance with the spirit of Article 21 of the Constitution of India. The questioned ordinance seeks to withdraw these measures available to hundreds and thousands of workers employed in the factories. It is humbly submitted that it is the mandate of Article 21 to the legislation to enact the law consistent with the basic human rights of the workers employed in the factories

which include safety, health, sanitation etc. This basic human right is sought to be withdrawn by the questioned ordinance despite mandate of Article 21 of the Constitution. The questioned ordinance is therefore violative of Article 21 of the Constitution of India and therefore, void, and inoperative.

l) The petitioner submits that the questioned ordinance is manifestly arbitrary, unjust, and improper. A piece of legislation resulting into withdrawal of the basic human rights conferred upon citizens in consonance with Article 21 is manifestly arbitrary. In any view of the matter, by the questioned ordinance the basic protection mandated by a statute is sought to be withdrawn as emergent measure and therefore, the questioned ordinance is manifestly arbitrary and discriminatory. To make this submission good in respect of constitutionality of the questioned ordinance on the ground of manifested arbitrariness, the petitioner would rely upon the observations of the Hon'ble Supreme Court in the matter of triple Talaq [Shayara Bano v. Union of India (2017) 9 SCC 1].

m) The petitioner submits that every provision of a statute and more particularly benevolent legislation regulating

conduct of the employer in respect of health, safety and welfare of workers is in the interest of public at large. For enforcement of the provisions relating to the safety and health of the workers, strict measures have been provided under the Principal Act constituting offences and prescribing penalty for the breach thereof by the erring employers. All the offences under the Factories Act are of very serious nature which are now sought to be made compoundable by exercising powers conferred upon state executive. The petitioner submits that according to the basic jurisprudence, the provision of law must provide provision for sanction for enforcement and implementation and seek effective compliance of law. The Factories Act, 1948 does provide proper sanction by constituting various offences and by prescribing penalty by way of imprisonment as well as fine. A breach of provision of the Factories Act by the employer is necessarily a wrong against the society which in turn is a wrong against the State. Therefore, as per the basic jurisprudence, the offence against State is not expected to be made compoundable.

n) It is submitted that Section 320 of the Code of Criminal Procedure (CrPC) does provide for compounding of offences. However, no offence against society or against

State at large is made compoundable. The offences enshrined in the table provided under Section 320 of the CrPC also provides as to who can compound the offence. That, usually the person who is affected by the offence or the complainant can compound the case. In the present case, all the offences committed by the employer under the Factories Act can be made compoundable by recovering certain amount from the owner of the factory, (the wrong doer). The limit of the amount prescribed for compounding offences is coextensive with the highest fine provided. Therefore, in ultimate analysis, if the employer is ready to pay certain amount to the State, he can never be imprisoned/prosecuted for committing serious offence under the Factories Act. In other words, he can commit any offence on payment of certain amount to the State. It is also stated that due to non-enforceability of the rights the workers cannot raise any complain with regard to inhumane work conditions and even if the inhumane and regressive work conditions will be legitimize due to absent of prosecution as provided under newly added Section 106B. Thus, the questioned ordinance would render the Principal Factories Act toothless and ineffective. In this view of the matter, the questioned ordinance is manifestly arbitrary, unfair, unjust and discriminatory.

o) The petitioner further submits that as far as the victim on account of breach of the provisions of the Factories Act by the erring employer is concerned, he does not come into picture in the process of compounding of offence committed by the employer. It is also submitted that the concepts of the principal Act are result of evolving common law system, whereas the regressive ordinance will violate the fundamental rights of the workmen as they will not have any say due to non-prosecution and no *locus standi* of the workmen in the process of compounding. The workers as well as their unions will be powerless against every injustice. It is also stated that abusing workmen by not providing humane and safe work environment will amount to endanger the important lives of the Indian citizens and that to for the sake of saving economic and penal interest of wrong doers.

p) It is further alternatively submitted that to constitute offence, prescribe punishment and to make offence being compoundable or non-compoundable is necessarily an essential legislative function. Therefore, a substantial and valid law is required to be enacted either by Union parliament or by the State legislature in respect of

offence being made either compoundable or non-compoundable. In the instant case, by inserting Section 106B to the Principal Act, the questioned ordinance makes provision that the State Government may by notification in the Official Gazette, specify such offences which shall be compounded by such officer or authority or such amount as may be specified in the said notification. Thus, the newly added section 106B by itself does not make any offence compoundable but it authorizes the executive with all discretion to make the offences under the Factories Act compoundable. The newly added section 106B further provides that the officer or authority empowered by the government shall compound the offence on payment of such amount as may be specified in the notification. Thus, section 106B by itself does not make offences under the Factories Act compoundable but leaves it to the discretion of the state authority to determine as to which offence to be made compoundable and non-compoundable and also leaves to the discretion of the state authority to determine the amount for compounding the offences. Thus, the essential legislative power of the Union Parliament and State legislature to make the offence punishable or non-punishable is delegated to the executive. It is humbly submitted that the essential legislative power to

prescribe any offence and to make it compoundable or non-compoundable being a substantially policy matter, cannot be delegated to the executive. The Constitution of India does not authorize the legislature to delegate its essential legislative power to the executive. On the basic principle of interpretation of Constitution and the law evolved so far, it is clearly demonstrated that the policy matters cannot be delegated to the executive. What can be delegated is only the ancillary or procedural powers which are known as fill in the gaps. It is submitted that the newly inserted section 106B delegates essential legislative power of the Union parliament to amend the central law to the State executive.

q) It is submitted that Article 254 of the Constitution of India on certain conditions empowers State legislature to make law consistent with the Union legislature. But Article 254 or any other Article including Article 213 of the Constitution of India does not empower State legislature to authorize the executive to make law by bringing notification which would be inconsistent with the Union law. In this view of the matter, the questioned ordinance and more particularly newly inserted section 160B to the Principal Act, is void on account of excessive

delegation of essential legislative powers and also violative of Article 254 of the Constitution of India.

r) The petitioner submits that newly inserted section 106B to the Principal Act does not specify any particular authority or officer or any particular rank of officer who would be empowered to compound offences under the Factories Act. Therefore, the powers contemplated by section 106B can be conferred upon any officer of any rank or class including Class-1, Class-2 or class-3 or any other person. Thus, the state authority would have uncontrolled powers to compound any offence and determine amount payable by the factory owner for compounding the offence. By conferring such vast powers on executive without prescribing qualification, eligibility and rank of officers, section 106B in ultimate analysis confers arbitrary powers on executive with further powers to use statutory powers arbitrarily without any guidelines. Therefore, the questioned ordinance is absolutely arbitrary, violative of Article 14, unconstitutional as per the doctrine of delegation of essential legislative powers.

s) Those, Section 85 of the Principal Act before amendment was declared constitutionally sound, time and again by

this Hon'ble Court as well as the Hon'ble Apex Court. The Scope of Section 85 contemplates a case where the person working in the place are not employed by the owner of the place but they are working with the permission of, or under the agreement with the owner of the place. To such a case Government may make the factories Act applicable by means of a notification and after the place is so declared by notification, then in that event, the place shall be deemed to be a factory , the owner shall be deemed to be the occupier, and any person working therein, a worker. if one may so, you have in section 85(2), an artificial definition of the expression 'factory', of the expression "occupier" and of the expression "worker". it is evident, therefore, that there may be a factory provided condition of section 85 are satisfied, in which case there would be completed by section 85(2). The amendment in the section as well as the insertion of Section 106B will make this section meaningless. The workers who are not directly engaged by the occupier (the principal employer in cases where the contractual workers are engaged) will have no rights or protection whatsoever.

t) The alteration in Section may not have practical implications as the change in section 85 is redundant and

superfluous. That before the ordinance the State Government was empowered to issue notification and to declare any place as factory, where manufacturing process was carried out by not less than ten person with the aid of power and twenty without the aid of power. The said numbers of persons engaged are changed with not less than twenty with the aid of power and not less than forty without the aid of power for the purpose of issuance of notification for declaring any place as factory. The alteration in the section is nothing but non-application of mind and which also shows that the whole ordinance was passed in haste and without looking to the socio-economic- humane- ethical dimensions.

u) That the ordinance may nullify the rights of the workmen under Chapter-VI- Working Hours of Adults. The Rights and provisions are made in the Chapter VI of the Principal Act qua weekly hours, weekly holidays, Compensatory holidays, Daily hours, interval for rest, Spread-over, night shifts, prohibitions of overlapping shifts, extra wages for overtime, Restriction on double employment, notice of period, Register of adult workers, Hours of work to correspond with notice under Section 61 and register under Section 62 and further restriction on employment of women. The non-grant of overtime as

per Section 59 of the Principal Act would also amounts to violation of Minimum Wages Act, 1948.

v) That, there will be no punitive action and prosecution on the factory owner under the newly amended Principal Act, non-application of specified working hours by the Principal Act as well as the International Labour Standards on working hours by the International Labour Organization, especially under the Hours of Work (Industry) Convention, 1919 on which India also rectified. The said violation of rights such as no limits as to daily hours of work, non-payment of overtime would amount to forced labour which itself is in violation of Article 23 of the Constitution of India, 1950.

w) It is respectfully submitted that tragic events of Industrial accidents are not new and by which many people who are working as well as who are living in nearby the establishment also dies. It is stated that the safety and welfare is not only for the workmen but non-compliance with the provisions may make the workmen less effective, tired, exhausted and weak and due to the insufficiency and ignorance as to not being afraid of the prosecution, factories will be more prone to accidents,

which will not just affects the lives or workmen but also the people at large.

x) The cumulative effect of ordinance and consequential issuance of Notification under Section 106B would result in taking away basic protection of the workmen in respect of health, safety, sanitation, etc. Ultimately workmen employed in the factory would be forced labour which is prohibited under Article 23 of the Constitution of India, 1950; which is an essential feature of the Constitution of India.

y) The Republic of India ratified various convention of the International Labour organization. Forced Labour Convention, 1930, Minimum Age (Industry) Convention, 1919, Hours of Work (Industry) Convention, 1919, Weekly Rest (Industry) Convention, 1921, Prevention of Major Industrial Accident Convention, 1993 are amongst those conventions of The ILO which were ratified by the India. The ordinance will also make the offences compoundable and there may be gross violation of the rights guaranteed by the statue as well as secured through struggles and various conventions will be nullify and ineffective. That when a nation internationally shows his intention towards bringing and changing laws for the

nation subsequently makes laws which are totally in contraventions of those conventions would defeat the purpose of ratifying such conventions; hence the said ordinance may be set-aside.

z) Other grounds that may be urged at the time of hearing.

8. In the aforesaid facts and circumstances, the petitioner prays that the Hon'ble Court be pleased to issue a writ of Mandamus or any other appropriate writ or order:

a) To Hold and declare that the questioned ordinance Annexure-A, the Factories (Gujarat Amendment) Ordinance, 2020 (Gujarat Ordinance No.6 of 2020) promulgated by the Governor of Gujarat on 1-7-2020 and published in the Gujarat Government Gazette is absolutely unconstitutional, arbitrary, discriminatory and consequently strike down the same as being ultra-vires the Constitution of India.

b) To quash and set aside all the actions taken pursuant to the Factories (Gujarat Amendment) Ordinance, 2020 (Gujarat Ordinance No.6 of 2020) promulgated by the Governor of Gujarat on 1-7-

2020; and hold and declare such actions as unconstitutional, arbitrary, unjust, unfair and illegal and held to be void ab initio.

c) Pending admission and final disposal of the petition, the Hon'ble court be pleased to stay the implementation and operation of the questioned ordinance Annexure-A, the Factories (Gujarat Amendment) Ordinance, 2020 (Gujarat Ordinance No.6 of 2020) promulgated by the Governor of Gujarat on 1-7-2020.

d) In the alternative, Respondent State of Gujarat may please be restrain from issuing any notification in exercise of power under newly inserted Section 106B of the Factories (Gujarat Amendment) Ordinance, 2020 (Gujarat Ordinance No.6 of 2020) promulgated by the Governor of Gujarat on 1-7-2020.

e) Any other relief deemed fit to meet the ends of justice may be granted.

9. The petitioner submits that the petitioner has a strong prima-facie case and balance of convenience is in the favor of the petitioner. Refusal to grant interim relief

would cause irreparable loss to the large number of workers employed in the factories in Gujarat whereas granting of interim relief is not likely to cause any loss to the respondents.

10. The petitioner has not filed any other petition on the subject matter of this petition before this Hon'ble Court or any other court including Hon'ble Supreme Court of India.

11. The petitioner has no other equally efficacious remedy available under ordinary law, except by way of this writ petition under Article 226 of the Constitution of India.

12. The petitioner craves leave to add, alter, and amend the memo of petition, if and when necessary to do so.

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

PLACE : AHMEDABAD

DATE : 28/07/2020

(AMRISH N. PATEL

HARSH K. RAVAL)

ADVOCATES FOR THE PETITIONER

ARPI K. SHAH
AHMEDABAD DIST
GUJARAT STATE
REG. NO. 1292/2010
EXP. DT. 9/2/2025
GUJARAT (INDIA)