

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

FRIDAY, THE 09TH DAY OF APRIL 2021 / 19TH CHAITHRA, 1943

WP(C).No.25092 OF 2020(J)

PETITIONER :-

TREASA JOSFINE, AGED 25 YEARS
D/O.BRUNO KUNJUMON, THYTHOPPI HOUSE,
SAKTHIKULANGARA P.O., KOLLAM - 691 581.

BY ADVS.
SRI.P.R.MILTON
SRI.GEORGE VARGHESE (MANACHIRACKEL)

RESPONDENTS :-

- 1 STATE OF KERALA
REPRESENTED BY THE CHIEF SECRETARY,
INDUSTRIES (H) DEPARTMENT,
THIRUVANANTHAPURAM - 695 001.
- 2 THE MANAGING DIRECTOR
THE KERALA MINERALS AND METALS LTD.,
SANKARAMANGALAM, CHAVARA,
PIN - 691 583, KOLLAM.
- ADDL. 3 UNION OF INDIA,
REPRESENTED BY IT'S SECRETARY,
DEPARTMENT OF LABOUR, RAFI MARG,
NEW DELHI - 110 011.

(ADDL.R3 IMPEADED AS PER ORDER DATED 20-11-2020
IN IA 1/2020 IN WP(C) 25092/2020).

R1 BY SR.GOVERNMENT PLEADER SRI.BIJOY CHANDRAN
R2 BY ADV. SMT.LATHA ANAND
R3 BY SRI.P.VIJAYAKUMAR, ASGI

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
18-03-2021, THE COURT ON 09-04-2021 DELIVERED THE FOLLOWING:

JUDGMENT

'CR'

Dated this the 9th day of April, 2021

The prayers in this writ petition are as follows :-

- “(i) Issue a writ of mandamus or any other appropriate writ, order or direction to call for the records relating to Exhibit P7 notification dated 24.10.2020 for the post of safety officer and quash the same as illegal and unconstitutional.
- (ii) Issue a writ of mandamus or any other appropriate writ, order or direction to declare that section 66(1)(b) of the Factories Act, 1948 is unconstitutional as violative of Article 14, 15 and 16 of the Constitution.
- (iii) Issue a writ of mandamus or any other appropriate writ, order or direction to the second respondent to issue a fresh notification to the post of safety officer, incorporating the qualified Women Candidates.”

2. Heard the learned counsel for the petitioner, the learned Government Pleader, the learned Standing Counsel appearing for the 2nd respondent and the learned Assistant Solicitor General of India appearing for the 3rd respondent.

3. It is submitted that the petitioner is an engineering graduate in Safety and Fire Engineering. The 2nd respondent, a public sector undertaking under the State of Kerala, has engaged the petitioner as Graduate Engineer Trainee (Safety) and the petitioner had worked as such for the period from 19.11.2018 to 18.11.2019 and from 26.11.2019 to 25.5.2020. It is submitted that there is a

permanent post of Safety Officer available in the company. By Ext.P7, a notification was published inviting applications for the said post. However, it is stated in the notification that only male candidates need apply for the post. The petitioner has approached this Court challenging the said provision in the notification on the ground that it is discriminatory and that the right of the petitioner for being considered for appointment as Safety Officer is violated due to the said provision. The petitioner further contends that any provision as contained in Section 66(1)(b) of the Factories Act, 1948 to the extent it denies the right of the petitioner to participate in the selection for appointment as Safety Officer is violative of the valuable rights guaranteed to the petitioner under Articles 14, 15 and 16 of the Constitution of India and is, therefore, liable to be set aside.

4. A counter affidavit has been placed on record by the 2nd respondent. It is stated that the post of Safety Officer is a statutory post and the provisions of the Factories Act have to be complied with while issuing notification for filling up the said post. It is submitted that as per Section 66(1)(b) of the Factories Act, 1948, women employees shall not be required or permitted to work except between 6 a.m. and 7 p.m. It is submitted that Graduate Engineer Trainee (Safety) is required to work only from 9 a.m. to 5 p.m. However, it is submitted that Safety Officer is a round the clock post and that the

person engaged as Safety Officer will have to work even during night time, if required. It is stated that the company had, vide letter dated 22.7.2020, sought the opinion of the Director of Factories and Boilers, Kerala about the possibility of including women candidates in the recruitment process for selection to the post of Safety Officer by Ext.R2(a) letter. However, the Director had clarified that women cannot be engaged in factories beyond 7 p.m. and that therefore, permission cannot be accorded for considering women for the appointment. It is, therefore, contended that there is no illegality in excluding women from applying for the post of Safety Officer. It is stated that Section 66(1)(b) is a social welfare measure intended to safeguard the security and health of employees and cannot be held to be discriminatory or violative of the petitioner's rights. It is further contended that the vires of Section 66(1)(b) had been considered by a Division Bench of this Court in **Leela v. State of Kerala** [2004 (5) SLR 28] and it was held that the provision is only a protective measure intended for the welfare of women and that it does not deny opportunity or livelihood to women employees. It is submitted that there is every power in the Government to regulate working hours of employees to meet the concerns of welfare of the employees and the larger public interest and that therefore, the provision is perfectly legal and valid. It is submitted that the respondents have not denied

opportunity to the petitioner and were only obeying the statutory mandate of the Factories Act. It is further contended that no provision in an enactment can be struck down as being arbitrary or unreasonable and that the issue stands covered against the petitioner. Several decisions of the Apex Court are also relied on in support of the said contention.

5. A reply statement has been placed on record by the petitioner.

6. A statement has been filed by the 1st respondent as well, wherein, it is stated that the Labour Department has informed that draft ordinance for amendment of the Factories Act, 1948 enabling women employees to work night shifts was approved by the Council of Ministers on 5.8.2020 and the Labour Department has issued a letter to the Secretary, Ministry of Home, Government of India for approval of the Hon'ble President of India for the said amendment. It is submitted that the amendment has not been brought into effect and that therefore, going by the present situation, the restriction for women to be engaged in factories after 7 p.m. and before 6 a.m. continues in force.

7. I have considered the contentions advanced. The issue is simply whether the provisions contained in Section 66(1)(b) of the Factories Act, 1948 would stand in the way of the 2nd respondent

considering the application of the petitioner for appointment as Safety Officer. Section 66 reads as follows :-

“66. Further restrictions on employment of women.- (1) The provisions of this Chapter shall, in their application to women in factories, be supplemented by the following further restrictions, namely:-

(a) no exemption from the provisions of section 54 may be granted in respect of any woman;

(b) no woman shall be required or allowed to work in any factory except between the hours of 6 A.M. and 7 P.M.:

Provided that the State Government may, by notification in the Official Gazette, in respect of any factory or group or class or description of factories, vary the limits laid down in clause (b), but so that no such variation shall authorize the employment of any woman between the hours of 10 P.M. and 5 A.M.;

(c) there shall be no change of shifts except after a weekly holiday or any other holiday.

(2) The State Government may make rules providing for the exemption from the restrictions set out in sub-section (1), to such extent and subject to such conditions as it may prescribe, of women working in fish-curing or fish-canning factories, where the employment of women beyond the hours specified in the said restrictions is necessary to prevent damage to, or deterioration in, any raw material.

(3) The rules made under sub-section (2) shall remain in force for not more than three years at a time.”

8. A Division Bench of this Court in **Hindustan Latex Ltd. v. Maniamma** [1994 (2) KLT 111] considered the issue and held that the provisions of Section 66(1)(b) can only be a protection against

exploitation of a woman worker by requiring her to work during night hours without her consent. Construing the provisions of Article 15, the Division Bench held that what is meant by special provision for women provided in clause (3) thereof is only a special provision in favour of women. Relying on the decisions of the Apex Court as well as other High Courts, it was held that a provision which has the protection under Article 15(3) cannot be struck down merely because it may amount to discrimination solely on the ground of sex. It was held that only such special provisions in favour of women can be made under Article 15(3), which are reasonable and do not obliterate or render illusory the constitutional guarantee enshrined under Article 16(2). It was further held that in a case where the woman herself seeks a consideration of her appointment which would involve waiving of the special privilege which is being granted to her under Section 66(1)(b), the State cannot rely on the said apparently beneficial provision to deny an appointment which the petitioner would otherwise be eligible for.

9. A learned Single Judge of this Court in **Omana Oomen v. F.A.C.T. Ltd.** [1990 (1) KLT 614] had considered a challenge against denial of appointment to women employees on the ground that they have to work in night shifts. Considering the factual aspects, where other women had been appointed to the same post earlier and where

male employees were working in day shifts, it was held that Section 66(1)(b), which is a protective provision, cannot be relied on to deny appointment to the petitioners only on the ground that they are women. It was held that the company could have moved the Government for a permission as provided in the proviso to Section 66(1)(b), which was not done. It was, therefore, held that since it is possible for the company to accommodate male technicians exclusively in day shifts as asserted by the petitioners, the denial of employment to the petitioners on the ground that they would have to work night shifts was not sustainable.

10. In **Leela v. State of Kerala** [2004 (5) SLR 28], a Division Bench of this Court was considering a challenge to Section 66(1)(b) of the Factories Act. The petitioner therein had challenged the promotion given to a junior hand as Supervisor (Binding), on the ground that she could not be required to work between 7 p.m. and 6 a.m. as provided under Section 66(1)(b). The Division Bench considered the issue and held that Section 66(1)(b) is a beneficial provision and does not provide a bar against employment of women. It was held that the provision under challenge is a special provision which enjoys the protection of Article 15(3) and does not embody a principle of discrimination on sex but is calculated to save women from the hazards of working during night in factories. It was held

that the proviso to Section 66(1)(b) is only an enabling provision and exemptions granted in certain industries cannot apply across the board. It was further held that the provision was calculated to ensure the women shall be able to take care of their families and that children do not suffer. The decision of the Andhra Pradesh High Court in **K.S.Triveni & Ors. v. Union of India & Ors.** [2002 Lab.I.C. 1714] and that the Madras High Court in **Vasantha R. v. Union of India & Ors.** [2001-II-LLJ 843] as well as of this Court in **Rajamma v. State of Kerala & Ors.** [1983 KLT 457] were considered and it was held that in the case on hand, there was no discrimination based on sex. The contentions were, therefore, rejected and it was held that the provision of Section 66(1)(b) embodies a special provision in favour of women and does not suffer from the vice of discrimination.

11. The Madras High Court in **Vasantha R. v. Union of India & Ors.** [2001-II-LLJ 843] had considered a similar challenge to Section 66(1)(b). It was held that the provision which denies an opportunity for women to work during night hours where they are desirous of doing so, for betterment of their employment prospects would be violative of the provisions of Articles 14, 15 and 16 of the Constitution and had struck down the said provision as being discriminatory.

12. The Andhra Pradesh High Court had also occasion to consider a similar challenge and it was held that the provision could not stand in the way of a woman being employed during night hours unless there is a compulsion on the part of the employer on the woman to carry out her duties in a factory during the night time.

13. This Court, in **Sanuja v. Kerala State Beverages Corporation Ltd.** [2017 (1) KLT 44] had considered a challenge to Rule 7(37) of the Abkari Shops (Disposal in Auction) Rules, 2002 which provided that women cannot be engaged to work in foreign liquor shops. After consideration of the case law on the point as also the changed circumstances, this Court held that the restriction against women being employed in liquor outlets would violate the provisions of Articles 14, 15, 16 and 19 of the Constitution. The provisions were, therefore, held to be discriminatory and violative of the provisions of Articles 14 and 15.

14. Having considered the contentions advanced, I find that the basic contention urged by the respondent is that the provisions of Section 66(1)(b) are beneficial in nature and are intended to protect women from exploitation. In the factual situation involved, we have to consider the fact that Factories Act, 1948 was enacted at a time when requiring a woman to work in an establishment of any nature, more so in a factory, during night time could only be seen as

exploitative and violative of her rights. Apparently, the World has moved forward and women who were relegated to the roles of home makers during the times when the enactment had been framed have taken up much more demanding roles in society as well as in economic spheres. We have reached a stage where the contributions made by women in the spheres of economic development cannot be ignored by any industry. Women are being engaged to work during all hours in several industries including Health Care, Aviation and Information Technology. Women have been engaged in several professions requiring round the clock labour and have proved themselves quite capable of facing the challenges of such engagement. The Apex Court in **Secretary, Ministry of Defence v. Babita Puniya and others** [(2020) 7 SCC 469] has declared that an absolute bar on women seeking command appointment violates the guarantee of equality under Article 14 of the Constitution. It was held that submissions based on stereotypes premised on assumptions about socially ascribed roles result in gender discrimination against women and violate their fundamental rights. In the present scenario, to say that a graduate engineer in safety engineering cannot be considered for appointment as Safety Officer in a public sector undertaking because of an offending provision under Section 66(1)(b) of the Factories Act, according to me, is completely untenable and

unacceptable. This is evident from the fact that the State of Kerala has approved an amendment to the Rules which permits the engagement of women on condition that all safety precautions and facilities for such engagement are arranged by the employer.

15. True, a Division Bench of this Court considered the issue and held that Section 66(1)(b) is only a protective provision. If that be so, it can be operated and exercised only as a protection and cannot be an excuse for denying engagement to a woman who does not require such protection any more. The decision in **Hindustan Latex Ltd.'s case** cited supra and the subsequent laying down of the law by the Apex Court would make it abundantly clear that a woman who is fully qualified cannot be denied of her right to be considered for employment only on the basis of her gender. It is the bounden duty of the respondents who are Government and Government functionaries to take all appropriate steps to see that a woman is able to carry out the duties assigned to her at all hours, safely and conveniently. If that be so, there would be no reason for denying appointment to a qualified hand only on the ground that she is a woman and because the nature of the employment would require her to work during night hours. I am, therefore, of the opinion that the embargo contained in Ext.P7 that 'only male candidates can apply' is violative of the provisions of Articles 14, 15 and 16 of the Constitution

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-: 13 :-

of India. The said provision in Ext.P7 notification is, therefore, set aside. I reiterate the finding of the Division Bench that the provisions of Section 66(1)(b) are only protective in nature. I make it clear that such protective provisions cannot stand in the way of a woman being considered for employment for which she is otherwise eligible.

There will, accordingly, be a direction to the 2nd respondent to consider the application submitted by the petitioner for appointment to the post of Safety Officer, notwithstanding the provisions of Section 66(1)(b) of the Factories Act, 1948. Appropriate action shall be taken without further delay.

This writ petition is ordered accordingly.

**Sd/-
ANU SIVARAMAN
JUDGE**

Jvt/30.3.2021

APPENDIX

PETITIONER'S EXHIBITS:

- EXHIBIT P1 TRUE COPY OF THE DEGREE CERTIFICATE OF THE FACULTY OF ENGINEERING, ISSUED BY THE COCHIN UNIVERSITY OF SCIENCE AND TECHNOLOGY REGISTER NO.16143048.
- EXHIBIT P2 TRUE COPY OF THE CALL LETTER DATED 26/9/2018 ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER DATED 26/9/2018.
- EXHIBIT P3 TRUE COPY OF THE OFFER ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER NO.TP/PD/R44 (A) /18 DATED 22/10/2018.
- EXHIBIT P4 TRUE COPY OF THE PERSONNEL ORDER ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER NO.TSP/PD/RS-93/18 DATED 19/11/2018.
- EXHIBIT P5 TRUE COPY OF THE REENGAGEMENT LETTER ISSUED BY THE 2ND RESPONDENT COMPANY TO THE PETITIONER NO.TSP/PD/RS-93/19 DATED 19/11/2019.
- EXHIBIT P6 TRUE COPY OF THE EXPERIENCE CERTIFICATE ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER DATED 10/11/2020.
- EXHIBIT P7 TRUE COPY OF THE NOTIFICATION DATED 24/10/2020 ISSUED BY THE 2ND RESPONDENT.

RESPONDENT'S EXHIBITS:

- EXHIBIT R2 (a) TRUE COPY OF THE LETTER DATED 22.07.2020 ISSUED BY KMML TO THE DIRECTOR OF FACTORIES AND BOILERS, KERALA.
- EXHIBIT R2 (b) TRUE COPY OF THE REPLY LETTER RECEIVED FROM THE DIRECTOR OF FACTORIES AND BOILERS, KERALA DATED 24.08.2020.
- EXHIBIT R1 (a) TRUE COPY OF LETTER No.LBRD-b2/118/2020/LBRD DATED 28.10.2020 (ALONG WITH THE PROPOSED AMENDMENT ORDINANCE) .

//TRUE COPY//

P.A. TO JUDGE