

(1967) 10 DEL CK 0025

In the Delhi High Court

Case No : Civil Writ Appeal No.763-D of 1965

Atma Ram and Another

APPELLANT

Vs

Industrial Tribunal and Others

RESPONDENT

Date of Decision : 31-10-1967

Acts Referred:

Citation : (1967) 3 DLT 688 : (1968) LabIC 2546

Hon'ble Judges : S.N. Shankar, J

Bench : Single Bench

Advocate : R. Dayal, Urmila Kapoor and G.N. Aggarwal, for the Appellant;

Judgement

S.N. Shankar, J.

(1) The petitioners in this case are the trustees of a body known as Delhi Cloth Market Trust Committee (hereinafter called "The Trust"). It appears that the trust has been maintaining a staff consisting of 16Chaukidars,II Sweepers, electricians, I Clerk and 2 Munims. A dispute relating to certain general demands of these employees having arisen, between the management of the Trust and the employees, the same was referred for adjudication to the Industrial Tribunal. Delhi.. In answer to the claim of the employees, it was contended on behalf of the Trust, by way of preliminary objection, that it was not an industry within the meaning of section 2(j) of the Industrial Disputes Act. By an interim award, dated 12th of January, 1965, the Industrial Tribunal, Delhi has held that this contention of the Trust was wrong and that it was an industry falling within the definition of section 2(j) of. the Industrial Disputes Act. The petitioners in this case are the trustees, who constitute the body of the Trust, and have. come up to this court with a prayer that a writ in the nature of certiorari any other appropriate writ, direction or order may hi issued to quash the interim award of the Industrial Tribunal, on the ground that the trust is infact not an "industry" and the Tribunal, Therefore, has no jurisdiction over it.

(2) Placing reliance on Syed Yakoob v. Radhakrishnan, the learned counsel for

the respondents workmen, has urged that this Court is not competent to grant the writ prayed for because the order of the Industrial Tribunal is one passed by it in exercise of a Jurisdiction conferred on it by valid provisions of law and the conclusions recorded therein are based on findings of facts, which it is not open to the petitioner to canvass in these proceedings under Article 226 of the Constitution. The argument loses sight of the fact that the very jurisdiction of the Tribunal in this case depended on the correct determination of the preliminary Jurisdictional issue raised before it and it is not disputed before me that if the petitioners are found to be not an industry within the meaning of section 2(j) of the Industrial Disputes Act, the whole reference before the Tribunal will fall through. My attention has not been drawn to any provision in the Act, which confers any power on the Tribunal to determine conclusively questions relating to its own Jurisdiction. Even though the Tribunal is entitled to decide whether it has jurisdiction or not, but that does not take away the power of supervision of the High Court to see that the Tribunal acts within its own jurisdiction and does not assume jurisdiction by wrongly deciding the jurisdictional issue. The law is well-settled that in a such a case this court is competent to examine the issue raised. Reference in this connection may with advantage, be made to the following passage in *United Beedi Workers' Union, Salem v. 5. Ahmed Hussan and. Sons and others*,

""To contend that if the jurisdictional issue depends on an adjudication on a question of fact, the superior court will be powerless, however, gross, that error might be, is to overlook the distinction that has always existed between a decision of an inferior tribunal on a collateral fact and of the actual matter that is within the ambit of its jurisdiction. This matter is placed beyond doubt in *Lila Vati Bai v. State of Bombay* where Sinha J. (as he then was, referred to the distinction between the jurisdiction of the tribunal to decide a certain fact as one of the issues in the controversy and the collateral fact on which the jurisdiction to determine the controversy arose. A similar question also came up for consideration in the case of *Sir Sobha Singh v. Delhi Administration, Delhi*, where it was held that "if for the purpose of deciding a question which relates to the special jurisdiction, a special Tribunal finds it necessary to decide another matter that matter does not become a matter of special jurisdiction and a decision on it does not bind the parties. A Tribunal of limited jurisdiction may be invested with powers to deal with a subject matter only if certain state of facts exists or it may be entrusted with Jurisdiction also to determine the existence of such facts, In the former case. If the Tribunal wrongly holds or assumes the existence of those facts on which its jurisdiction depends, then that decision or assumption is not final or conclusive. Industrial Tribunals do not possess power to finally and conclusively decide whether or not a particular enterprise is an industry." (3) According to the findings of the Tribunal, the Trust came into being some time in the year 1929 What happened was that, as a result of the shifting of the capital of India from Calcutta to Delhi, a small group of traders secured a piece of open land situated near the main market centre of the city, and also near its main

railway station, with a view to build a new big market. The land, thus secured, was divided into plots and on these plots, a large number of shops and residential flats were constructed by pooling common resources of the persons, who had acquired the land and also of others, who came forward to join hands with them thereafter (hereinafter collectively called the shareholders". A spacious and fort-like market-cum-residential area was thus brought into being by them with lanes and gangways properly paved and set up. This building is what is now commonly known as Delhi Cloth Market. The market had three big gates, and the whole area was bound by high walls of buildings, which formed part of the market itself. Each separate building in the market was conveyed with its appertaining proprietary rights in favor of individual shareholders, but there remained certain parts of the property, by way of corners and triangulars and other small common portions, including rooms above the gates, the common corridors and stair-cases etc. which could not be owned and possessed individually by the co-sharers. These portions were a sort of left-over's of this property and the same were therefore retained by the shareholders as their common property. With a view to look after this common property, the shareholders formed themselves into a trust in the year 1929 and appointed a committee to manage the same. It is this committee of the Trust, which has filed this petition through its trustees. All the members of the Trust have their property in the market. The committee, the award says, derives income from the rents received by it by the letting out of the common portions over of the joint property, as described above, and also earned from the amount of the reserves (which, however, durable) and incurs expenses for the management of the of this income.

(4) On the basis of evidence adduced before it, the Tribunal has also found that there are about 120 shareholders of this market property, who have selected 14 persons to constitute the members of the Trust and to be in charge of the management. All these shareholders have their shops within the precincts of the Cloth market though a large number of them have let out their shops to tenants. In addition to about 350 to 400 shops in the Cloth market, there are also residential-flats over these shops, which have, however, been let out by the owners. The three gates of the market are used by the general public till 7.30 P. M. when they are closed. The trust has employed Chowkidars to look after the security of the entire enclosure. Goods taken out of the market are allowed to pass out of its gates by the Chowkidars posted there, on the basis of gate passes having the seal of the Trust. Gate pass Books have been printed by the Trust and are supplied against payment of Re 1.00 each to persons occupying the shops in the Market on no profit no loss basis. The Chowkidars have also to deal with disturbances of peace, if any, that take place within the enclosures of the Cloth Market. In case of theft or burglary in any shop involving the breaking open of a lock, the police holds the Chowkidars responsible and they are taken to the Thana for interrogation. One Chowkidar is posted for night " duty in every one of the eight bazaars of the market. At 7.30 P.M. when the market is closed, each

day, the chowkidars check locks of every individual shop. The eleven sweepers, employed by the Trust, sweep the streets of the market, while the two electricians look after the electric installations in the market, including the shops and residential buildings. In every case in which the lane pavement or road is to be broken up for installing water connections or water pipes, the Trust committee charges a fee Rs. 10.00 per item. The Trust supplies sub meters for the premises in the Market enclosure and takes a security deposit of Rs. 25.00 from the concerned occupant and charges a sum of Re. 0-40 P. per month as rent of the sub-meter. The electricity consumed in the entire market is supplied by the D. E S. U. in the name of the Trust which, in turn, collects consumption charges from each consumer in accordance with the reading of the sub-meter installed in the particular premises occupied by him. This arrangement, again, is on no profit no loss basis

(5) Placing reliance on the decisions in Ahmedabad Textile Industry's Research Association v. State of Bombay and others", and Slate of Bombay v. Hospital Mazdoor Sabha, the learned Tribunal came to the conclusion that as the Trust did not merely look after the property in the common pool of the shareholders or the property actually owned by the individual members, but was also rendering material, services in one form or the other through its employees to what was described by the award "as the entire business community, which was doing business in the precincts of the market", and in the words of the learned Tribunal itself, "the fact that the activities of the Trust are carried on in a systematic manner from day-to day like those of a business undertaking" bring it within the definition of an industry.

(6) To me it appears that the Tribunal did not approach the problem from correct angle. The activity and its nature is indeed a very relevant and important consideration to be taken into account for determining whether it can be considered to be an industry and it is equally true that the activity to be an industry has to be distinctly systematic and not casual, but that alone does not settle the question.

(7) INDUSTRY" as defined in section 2(j) of the Industrial Disputes Act, reads as under:-

"2. In this Act, unless there is anything repugnant in the subject or context, - *
* (j) "industry" means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen." This definition, very obviously, consists of two parts in the sense that the first part defines the term with reference to the occupation of the employee in respect of certain activities, while the second part deals with it from the angle of the employer. If the activity can be considered to be an industry under the first part, the second part of the definition would embrace all the different kinds of activities of the workmen that are mentioned therein. What has essentially to be seen and examined is the real nature of the activity of the employer and whether from that point of view, the

activity in question is an industry or not. While dealing with this aspect of the question in the Secretary, Madras Gymkhana Club Employees Union v. Management of the: Gymkhana Club", decided on 3rd October, 1967, their Lordships of the Supreme Court, after taking note of the various criteria evolved in the facts of the previous cases, for the determination of this vexed question on pages 1103-1104 of the blue print, observed as under:-

"THIS proves that what must be established is the existence of an industry viewed from the angle of what the employer is doing and if the definition from the angle of the employer's occupation is satisfied, all who render service and fall within the definition of workmen come within the fold of industry irrespective of what they do. There is then no need to establish a partnership as such in the production of material goods or material services. Each person doing his appointed task in an organisation will be a part of the industry whether he attends to a loom or merely polishes door handles. The fact of employment as envisaged in the second part is enough, provided there is an industry and the employee is a workman. The learned professions are not industry not because there is absence of such partnership but because viewed from the angle of the employer's occupation, they do not satisfy the test. A solicitor earns his livelihood by his-own efforts, if his work requires him to take help from menials and others employees, who carry out certain assigned duties, the character of the "solicitor's, work is not altered.. What matters is not the nexus between the employees and the product of the employer's occupation. If his work cannot be described as an industry his workmen are not industrial workmen and the disputes arising between them are not industrial disputes. The cardinal test is thus to find out whether there is an industry according to the definition of the word in the first part. The second part will then show what will be included from the angle of employees." In Order, Therefore, to determine whether a particular activity is an industry, it is necessary to see whether it is a business, a trade or an undertaking a manufacture or a calling of employers, resulting in material goods or material services.

(8) The learned counsel for the workmen maintained that the activities of the Trust, though not trade and business were positively an undertaking involving rendering of systematic and organized services to the occupants of the various premises in the Market, which involved a cooperative effort of the employer. The trust on the one hand and the employees, the workmen on the other. She maintained that the absence of a profit motive was irrelevant in considering whether an enterprise was an industry and that the expression has to be construed in a wider manner.

(9) Reliance is strongly placed on the State of Bombay and others v. The Hospital Mazdoor Sabha and others", where their Lordships held as under :-- .

""***an activity systematically or habitually undertaken for the production or distribution of goods or for the rendering of material services to the community at large or a part of such community with the help of employees is an

undertaking. Such an activity generally involves the co-operation of the employer and the employees and "its object is the satisfaction of material human needs. It must be organized or arranged in a manner in which trade or business is generally organized or arranged. It must not be casual nor must it be for one self nor for pleasure. Thus the manner in which the activity in question is organized or arranged, the condition of the co-operation between employer and the employee necessary for its success and its object to render material service to the community can be regarded as some of the features which are distinctive or activities to which S. 2(j) applies." (10) A reference to the subsequent decisions of the Supreme Court, however, very clearly shows that this working principle was never intended to be the sole and the final test for determination whether a particular activity was an industry, as indeed the opening words of this paragraph themselves show.

(11) In the case of *The University of Delhi v. Ram Nath*, the respondent was employed as a bus driver under Miranda House, a college affiliated to Delhi University, whose predominant activity was the imparting of education. On being discharged by his employer, he raised an industrial dispute and applied to the Tribunal for the award of retrenchment benefits. The employer resisted the petition and contended that he was not an Industry. The contention was rejected by the Tribunal and the matter eventually came up before the Supreme Court with special leave. While dealing with the question, their Lordships, held that the appellants before them could not be regarded as carrying on an Industry within the meaning of section 2(j) of the Industrial Disputes Act and observed:-

""In the main scheme of imparting education the subordinate staff with function like those of the respondents play such a minor subsidiary and insignificant part that it would not be reasonable to allow the work of this subordinate staff to lend its industrial colour to the principal activity of the University which is imparting education." (12) This aspect of the matter also came up before the Lordships of the Supreme Court in the *Madras Gymkhana Club Employees Union case* {supra}" where after a full consideration, their Lordships held-

""Therefore the word "undertaking" must be defined as "any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade"." (13) It is, Therefore, not possible to accede to the submission that mere rendering of services involving a co-operative effort of the employer and the employee even if they were organized and systematic, was enough to imprint on the activity the character of an industry.

(14) Applying the above principles, let us, Therefore, see if viewed from the angle of the Trust, it is engaged in any business or work or project as an enterprise analogous to business and trade. The reply to my mind is clearly in the negative.

(15) The members of the Trust are persons selected by the shareholders or the

owners of the Cloth Market property. They are all persons who themselves own different parts of the property in the Market as found by the learned Tribunal itself and all that has happened is that instead of all the shareholders-owners Managing their properties individually. they have selected 14 persons out of themselves to do so, who are answerable to them. There is no element of business or trade involved in it and the provision.) of section 2(j) of the Industrial Disputes Act are hardly attracted to such a situation.

(16) The argument that the Trust is rendering services to the business community, which is doing business within the precincts of the Market, is also not tenable. It is finding of the learned Tribunal itself that while some of the owners have their own Shops in the Market, the occupants of the other shops are no other but the tenants inducted by these owners. There is nothing to show that the services of Chowkidars or the sweepers have been extended or are being extended to the occupants as an enterprise involving any element of trade or business. It is certainly open to the owners of the Market to devise such ways and means as they may consider proper and expedient to secure the safety and preservation of their property. This will not convert the dominant purpose of their activities.

(17) The learned counsel for the petitioners has also drawn my attention to *Palace Administration Board v. State of Kerala*, where the question as to the activity of the activities of the palace Administration Board, a body corporate, constituted under a Royal proclamation to look after the estate and properties of the Royal family and also to manage the palace fund for the benefit of the Junior members of the Royal family, came up for consideration and it was held as follows :-

work of looking after the properties of the estate and administration the palace funds for the benefit of the junior members of the royal family would be one which might normally be treated as that done by the owner of properties fetching a surplus income. If the work of management done by the owner of an immovable property fetching some surplus income cannot be treated as industry, it cannot become one merely because there are a number of properties yielding a substantial income. Now the position would be different if the board undertakes a business venture such as starting an industry with the-surplus income of the estate or the fund. In such a case the dispute between the board and the employees of that industry would certainly be an industrial dispute within the scope of the Act. If the owner of an item of immovable property invests surplus income in erecting building which he gives on lease, he cannot be treated as carrying on an undertaking. To hold otherwise would mean that any person who utilizes his saving for constructing a building which he may not require immediately for his occupation and which he, Therefore, lets out would be deemed to be carrying on an industry thereafter. However wide a connotation is given for the expression "undertaking" such a result would not follow." (18) In the case of *Ahmedabad Textile Industry's Research Association (supra)*", relied

upon by the learned Tribunal, the appellant-association before the Supreme Court was founded with the object to establish a Textile Research Institute for the purpose of carrying on research and other scientific work in connection with a textile trade or industry and other trades and industries/allied , therewith necessary thereto. The research to be conducted was for the purpose of investigation into manufacture and improvement of materials used in the textile industry, utilisation of the products of the industry, improvement of machinery and appliances used by the industry, improvement of various processes of manufacture with a view to secure greater efficiency, rationalisation and reduction of costs, research into the conditions of work, time and motion studies, fatigue and rest pauses, standardisation of methods of work, conditioning of factories and diseases and accidents arising out of employment in a textile mill. In order to carry out these objects, the appellants association was to establish, equip and maintain laboratories, workshops or factories, etc.. After taking note of these facts and the various aspects of the industries, their Lordships found :-

It will thus be seen that though the object of the association was research that research was directed with the idea of helping the member mills to improve methods of production in order to secure greater efficiency, rationalisation and reduction of costs The basis, Therefore, of the research carried on be the appellant was to help the textile industry and particularly the members mills in making larger profits and this was to be done primarily by the employment of technical personnel on payment of remuneration." The conclusion that the association was an industry was based on the finding that the undertaking as a whole was in the nature of a business and trade organized with the object of discovering ways and means by which the member-mills could obtain .larger profits in connection with their industries.

(19) In view of the above discussion. I have no hesitation in holding that the petitioners with their present .activities, are not an industry within the meaning of section 2(j) of the Industrial Disputes Act.

(20) The learned counsel for the workman then contended that there had been previous disputes between the management and the Trust, which had been referred for adjudication to the Industrial Tribunal, where the petitioners never raised any objection as to its Jurisdiction, with the result that the contention now raised should be treated as barred on the principles of res-judicata. The learned Tribunal had noticed one such case of industrial dispute No. 18. of 1950 relating to termination of services of one to the employees of the Trust, Shri Suchet Singh. At the hearing before me, the learned counsel has cited other instances and has filed an affidavit of Shri Badri Narain Tewari, dated 25th October, 1967, in support thereof. It is conceded that the-question as to whether the petitioners are or are not an industry, was never specifically raised before any Tribunal and was never heard or decided. But it is urged that the failure to raise this objection operates as an estoppel and debars the petitioners from raising this contention at the present stage. I, however, find little substance in this contention. The

principles of estoppel can hardly be invoked in a case like this.

(21) Where there is no representation, no acting on it, no change of position as a result thereof, the doctrine of estoppel is not attracted. Admissions which may have been made under a mistake as to the true legal character of the venture, cannot operate to create an estoppel or acquiescence nor can they "be invoked for the purpose of conferring jurisdiction on the Industrial Tribunal, -when such a Jurisdiction does not vest in it, neither consent nor acquiescence of a party can operate to vest jurisdiction" in a Tribunal, where, infact, none otherwise exists.

(22) Forth reasons aforesaid the petitioners with their present activities are held not to be an industry within the meaning of section 2(j) of the Industrial Disputes Act. In the result, the award of the Industrial Tribunal, Delhi in reference No. 102 of 1982 is hereby quashed, but, in that circumstance of the case, the parties are left to bear their own costs.