
(1975) 11 MAD CK 0022
In the Madras High Court

D. Padmanabhan

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 14-11-1975

Acts Referred:

Industrial Disputes Act, 1947 — Section 2(j), 2(s)

Citation : (1976) 1 MLJ 311

Hon'ble Judges : V. Ramaswami, J

Bench : Division Bench

Judgement

V. Ramaswami, J.—Among the employees of the Public Works Department of the Government of Tamil Nadu, is a section designated as

Work Charged Employees of ""Work Charged Establishment"". The members of the Work Charged Establishment are employed upon the actual

execution of a specific work, or sub-work of a specific project, or upon the supervision of departmental labour, stores and machineries, in

connection with such a work or sub-work. Their pay and allowances are paid from the estimate amount of the concerned work. As such, the

members are classified under Work Charged Establishment, and they are governed by the Tamil Nadu Public Works Department Code.

2. The employees recruited by the Department were originally intended for the duration of the particular work, but in practice, except in very rare

instances, the work charged employees on completion of the specified project or work were employed in another work without any break. These

members of the Work Charged Establishment were paid monthly pay and allowances and not rated as casual labourers. Even when there was no

immediate work, they are kept on the pay rolls and paid on monthly basis on time-scales of pay. But, these persons were not governed by any

statutory rules. They were governed by the provisions in paragraphs 58 to 62 of the Public Works Department Code.

3. The position of these employees was reviewed by the Government time and again. By G.O.Ms. No. 95, P.W. D., dated 9th January, 1971, the

Government directed that the members of the establishment who have been in service for over five years, as on 24th November, 1970, should be

provincialised with effect from the said date. These provincialised work charged employees were also made eligible for time-scales of pay, leave,

joining time, contributory provident fund benefit in lieu of gratuity, house-rent allowance and other benefits, privileges and concessions, which are

available to the members of the regular establishment. Members" who were under the non-provincialised work charged establishment are entitled

to gratuity at the time of their retirement, instead of contributory provident fund.

4. In G.O.Ms. No. 142, P.W.D., dated 3rd February, 1973, time-scales of pay, for as many as 137 categories of work charged establishment

were sanctioned by the Government. By G.O.Ms. No. 1904, P.W.D. dated 10th September, 1971, the Government applied the provisions of the

Tamil Nadu Government Servants Conduct Rules to the members of the Work Charged Establishment (provincialised and non-provincialised) and

also prescribed the procedure to be followed before imposing penalty on the members of the Work Charged Establishment.

5. The Tamil Nadu Public Works Department Employees Association, a registered Trade Union, whose membership was open only to Work

Charged personnel of the Public Works Department, both provincialised and non-provincialised, in their petition dated 3rd February, 1972,

questioned the legality of the application of the Government Servants Conduct Rules and certain provisions of the Civil Services (Classification,

Control and Appeals) Rules to the members of the Work Charged Establishment. In this petition, they also contended that the members of the

Work Charged Establishment are ""workmen"" as defined in the Industrial Disputes Act, 1947, and that the Work Charged Establishment is an

industry, as defined in the same Act. They accordingly prayed for a declaration that the members of the Work Charged Establishment are not

Government Servants, but only workmen, as defined by the Industrial Disputes Act. Pending final decision, they also requested the Government to

stay, with retrospective effect, the operation of G.O.Ms. No. 1904 P.W.D., dated 10th September, 1971.

6. They also filed a petition before the Commissioner of Labour on 21st August, 1972, alleging an industrial dispute and requesting him to take the

dispute on his file, initiate conciliation proceedings and help in solving the dispute amicably. Since the Commissioner had not taken any steps, the

petitioner who is also the General Secretary of the Tamil Nadu Public Works Department Employees Association, has filed these two writ

petitions in his individual capacity. In one of the Writ Petitions, he had prayed for a declaration that he is a workman falling within the definition of

Section 2(s) of the Industrial Disputes Act and in the other, prayed for the issue of a writ of certiorari to quash the Government Order in G.O.Ms.

No. 1904, P.W.D. dated 10th September, 1971.

7. In his affidavit dated 1st September, 1975, the petitioner has stated that he joined the Public Works Department, in 1961 as maistry and was

asked to work in the construction of the Government General Hospital, Madras, as maistry. He was working in that place upto 1965 and

thereafter he was transferred as a maistry to work in the construction of the M.L.A.'s hostel. After working there for two years, in 1967 he was

transferred as maistry to work in the construction of the Pediatrics Blocks in Halls Road, Egmore. Thereafter he was working, in the construction

of the Neurological Block, Government General Hospital till 1971. After working for sometime again in the Pediatrics Department, he was

transferred to the construction work of the Law College Hostel in 1974. His designation as maistry was changed into one of Works Inspector in

1971. He was transferred to work in the construction of the extension to the City Civil Court Buildings, Madras in 1975. His services were

provincialised on 24th November, 1970, as per G.O.Ms. No. 95, P.W.D., dated 9th January, 1972. It is seen from the Service Register of the

petitioner that right from his employment in 1961, he was paid a monthly salary with yearly increments and he was never rated as a casual

labourer.

8. On these facts, the petitioner contended that the petitioner and these persons, who were employed as Work Charged Employees are not civil

servants, and, therefore, the Fundamental Rules and Civil Service Rules should

not be applied to him. The petitioner also contended. ""The Public

Works Department is an undertaking, which by its activity coupled with the work done by the Work Charged Employees brings about the

production, of material services. Thus it systematically undertakes the construction of roads and buildings, etc., which are put to public use.

Therefore...the Public Works Department in employing the Work Charged Establishment is carrying on an industry."" The petitioner further stated

that the work charged employees fall within the definition of ""workmen"" under the Industrial Disputes Act.

9. The respondent, on the other hand contended that the execution of public works, such as construction of Government buildings, hospitals,

schools and colleges, irrigation works, etc., is not a commercial activity, but is in furtherance of Government functions for the welfare of the general

public. It is also a sovereign function enjoined on the State Government to carry out and look after such public works and the Public Works

Department is only a delegated authority of the government of such works. Therefore, the Public Works Department is not carrying on an

undertaking and is not an industry within the meaning of the Industrial Deputes Act, 1947. The employees of the Work Charged Establishment are

Government Servants and they are not workmen within the purview of the Industrial Disputes Act.

10. At the time of the argument, the Learned Counsel for the petitioner also submitted that even if he is a Civil Servant within the meaning of Article

309 of the constitution, he should still be treated as a workman and the Public Works Department in so far as they carry out the special works

should be treated as an industry within the meaning of the Industrial disputes Act.

11. As the Government themselves are contending that the Work Charged Establishment employees are Civil Servants within the meaning of

Article 309 of the Constitution, it is not necessary for me to go into that question in these writ petitions. Therefore, the only question that remains

for consideration is whether the Public Works Department in respect of their execution of public works, such as the construction of Government

buildings, hospitals, colleges, schools, office buildings, irrigation works, etc., can be said to carry on any business, trade, undertaking, manufacture

or calling, which brings them within the definition of industry" in Section 2(j) of the Industrial Disputes Act.

12. "Industry" is defined in Section 2(j) which reads as follows:

"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.

A number of cases of the Supreme Court have dealt with the meaning of this expression. It is not necessary to consider all of them, except the

decision in *The Management of Safdarjung Hospital, New Delhi Vs. Kuldip Singh Sethi*, and the decision in *The Workmen of Indian Standards*

Institution v. The Management of the Indian Standards Institution C.A. No. 1292 of 1970.

13. The conclusion of the decision in *The Management of Safdarjung Hospital, New Delhi Vs. Kuldip Singh Sethi*, is clearly brought out in the

following passages:

The definition of industry in Section 2(j) of the Industrial Disputes Act, 1947 is in two parts. But it must be read as a whole. So read, it denotes a

collective enterprise in which employers and employees are associated. It does not exist either by employer alone or by employees alone. It exists

only when there is a relationship between employers and employees, the former engaged in business, trade, undertaking, manufacture or calling of

employers and the latter engaged in any calling, service, employment, handicraft or industrial occupation or avocation. But every case of

employment is not necessarily productive of an industry. A workman is to be regarded as one employed in an industry only if he is following one of

the vocations mentioned in relation to the employers namely, any business, trade, undertaking, manufacture or calling of employers. In the

collocation of the terms and their definitions these terms have a definite economic content of a particular type and on the authorities of this Court

have been uniformly accepted as excluding professions and are only concerned with the production, distribution and consumption of wealth and the

production and availability of material services. Industry has thus been accepted to mean only trade and business, manufacture, or undertaking

analogous to trade or business for the production of material services. Material services involve an activity carried out through co-operation

between employers and employees to provide the community with the use of something such as electric power, water, transportation, mail

delivery, telephones and the like. In providing these services there may be employment of trained men and even professional men, but the emphasis

is not on what they do but upon the productivity of a service organised as an industry and commercially valuable, in which, something is brought

into existence quite apart from the benefit to particular individuals; and it is the production of this something which is described as the production of

material services. Thus, the services of professional men involving benefits to individuals according to their needs, such as doctors, teachers,

lawyers, solicitors, etc., are easily distinguishable from an activity such as transport service. They are not engaged in an occupation in which

employers and employees co-operate in the production or sale of commodities or arrangement for the production or sale or distribution; and their

services cannot be described as material services and are outside the ambit of industry. It, therefore, follows that before an industrial dispute can

be raised between employers and employees or between employees and employees in relation to the employment or non-employment or the terms

of employment or with the conditions of labour of any person, there must first be established a relationship of employers and employees associating

together, the former following a trade, business, manufacture undertaking or calling of employers in the production of material goods and material

services and the latter following any calling, service, employment, handicraft or industrial occupation or avocation of workmen in aid of the

employer's enterprise. It is not necessary that they must be analogous to trade or business in a commercial sense.

14. "The decision in *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, holding that a Government Hospital was an

industry took an extreme view of the matter and cannot be justified, because :
(a) it was erroneously held that the second part of the definition of

industry" was an extension of the first part, whereas, they are only the two aspects of the occupation of employers and employees in an industry;

(b) it was assumed that economic activity is always related to capital or profit-making and since an enterprise could be an industry without capital

or profit-making it was held that even economic activity was not necessary; and
(c) it was held that since a hospital could be run as a business

proposition and for profit by private individuals or groups of individuals a hospital run by Government without profit must also bear the same

character. This test was wrongly evolved from the observations in *Federated Municipal and Shire Council Employees of Australia v. Melbourne*

Corporation 26 C.T.R. 508, which only indicate that in these activities in which Government take to industrial ventures the motive of profit-making

and absence of capital are irrelevant. The observations, on the contrary show that industrial disputes occur only in operations in which employers

and employees associate to provide what people want and desire, that is, in the production of material goods or services and not the "satisfaction

of material human needs.

15. In the majority judgment in Civil Appeal No. 1290 of 1970 the legal position is summarised thus:

To summarise, an activity can be regarded as an "industry" within the meaning of Section 2(j) only if there is relationship of employer and

employees and the former is engaged in "business, trade, undertaking, manufacture or calling of employers" and the latter, "in any calling, service,

employment, handicraft or industrial occupation or avocation". Though "undertaking" is a word of large import and it means anything undertaken or

any project or enterprise, in the context in which it occurs, it must be read as meaning an undertaking analogous to trade or business: In order that

an activity may be regarded as an undertaking analogous to trade or business, it must be "organised or arranged in a manner in which trade or

business is generally organised or arranged". It must not be casual nor must it be for oneself nor for pleasure, and it must rest on cooperation

between employer and employee who associate together with a view to production, sale or distribution of material goods or material services. It is

entirely irrelevant whether or not there is profit motive or investment of capital in such activity. Even without these two features an activity can be an

undertaking analogous to trade or business. It is also immaterial "that its objects are charitable or that it does not make profits or even where

profits are made, they are not distributed amongst the members", *Management of The Federation of Indian Chambers of Commerce and Industry*

Vs. Their Workman, Shri R. K. Mittal, or that its activity is subsidised by the Government. Again it is not necessary that "the employer must

always be a private individual... The Act, in terms, contemplates case of industrial disputes where the Government or a local authority or a public

utility service may be the employer... Secretary, Madras Gymkhana Club Employees' Union Vs. Management of the Gymkhana Club, . It also

makes no difference that the material services rendered by the undertaking are in public interest. The concept of public interest in a modern welfare

State, where new social values are fast emerging and the old dying out, is indeed so wide and so broad and comprehensive in its spectrum and

range that many activities which admittedly fall within the category of "industry" are clearly designed to subserve public interest. In fact, whenever

any industry is carried on by the Government, it would be in public interest, for the Government Can act only in public interest. Whether an activity

is carried on in public interest or not. can, therefore, never be a criterion for determining its character as an industry.

16. Even in the dissenting judgment, the same conclusion is reached as regards the legal position. In the words of the learned Judge, the ratio of the

decisions of the Supreme Court is:

Even where a trade, business, undertaking, manufacture or calling of employers results in production of material goods or rendering of material

services, such an undertaking engaged in trade, business, manufacture or calling of employers will not be an industry if it is run on charitable

principles or is run by Government or local body as part of its duty. In other words, whenever an undertaking is engaged in activity which is not

done with a view to exploit it in a trading or commercial sense but for public interest and without any profit motive or in the form of social service

or in the form of activity intended to benefit the general public it will not be an industry.

If we apply this test, certainly it could not be said that the Public Works Department in respect of the construction of Government buildings, such

as hospitals colleges, schools and Court buildings, is engaged in an activity with a view to exploiting it in a trade or commercial sense.

17. The Learned Counsel for the petitioner relied on the decision of the Supreme Court in The Corporation of the City of Nagpur Vs. Its

Employees, . Dealing with the question whether the Public Works Department of the Corporation of the City of Nagpur is an industry, the

Supreme Court observed:

(xii) Public Works Department: This department is in charge of construction and maintenance of public works such as roads, drains, building,

markets, public latrines, etc. For the convenience of the public, this department is divided into zones and every zone has its office. The outdoor

staff in the Public Works Department consists of Assistant Engineers, Overseers, Sub-overseers, time-keepers, mates carpenters, masons,

blacksmiths and coolies. The other staff, consisting of clerks and peons, performs indoor duties (See the evidence of witness 5 for part 1) This

department performs both administrative and executive functions. The services rendered are such that they can equally be done by private

individuals and they come under the definition of "industry", satisfying both the positive and negative tests laid down by us in this regard. We,

therefore hold, that this department is an industry.

18. At the time when this decision was rendered the decision in *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, ,

was holding the field. One of the tests for determination whether an activity was an undertaking or not within the meaning of Section 2(j) was an

enquiry into whether an activity of a like nature would be an undertaking if it is carried on by a private citizen or a group of private citizens. The

decision in *The Management of Safdarjung Hospital, New Delhi Vs. Kuldeep Singh Sethi*, , disapproved of this test. In the latest judgment in *Civil*

Appeal No. 1129 of 1970, this position was noticed by the majority judgment and in the words of the learned Judges:

There was also one other ground on which the decision in *The Management of Safdarjung Hospital, New Delhi Vs. Kuldeep Singh Sethi*, ,

disapproved of the view taken in *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, and that ground was that the

decision in *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, proceeded on an erroneous basis that an activity,

in order to be an undertaking analogous to trade or business, need not be an economic activity and applied a wrong test, "can such activity be

carried on by private individuals or group of individuals?" It would, therefore, seem that, in view of the decision in *The Management of Safdarjung*

Hospital, New Delhi Vs. Kuldeep Singh Sethi, , this latest test applied in *The*

State of Bombay and Others Vs. The Hospital Mazdoor Sabha

and Others, must be rejected as irrelevant and it must be held that an activity, in order to be recognized as an undertaking analogous to trade or

business must be an economic activity in the sense that it is productive of material goods or material services.

19. In view of the decisions in The Management of Safdarjung Hospital, New Delhi Vs. Kuldip Singh Sethi, and Civil Appeal No. 1297 of 1970,

it is not open to the Learned Counsel for the petitioner now to rely on the decision in The Corporation of the City of Nagpur Vs. Its Employees, .

20. I am, therefore, of opinion that the Public Works Department is not an industry in respect of its activities relating to construction of Government

buildings, such as hospitals, colleges, schools and Court buildings. The writ petitioner was not employed in any other work of the Public Works

Department and, therefore, it is not necessary for me to consider in general, whether the Public Works Department is carrying on any industry in

respect of any other activity.

21. The Government, as an employer, therefore, was entitled to regulate the conditions of service of the petitioner and persons similarly situated.

The impugned Government Order is, therefore, not liable to be quashed.

22. In the result, both the writ petitions are liable to be dismissed and accordingly they are dismissed. But, there will be no order as to costs.