
(1975) 11 MAD CK 0015
In the Madras High Court

D. Padmanabhan

APPELLANT

Vs

The State of Tamilnadu

RESPONDENT

Date of Decision : 14-11-1975

Acts Referred:

Constitution of India, 1950 — Article 309
Industrial Disputes Act, 1947 — Section 2

Citation : (1976) 2 LLJ 83 : (1976) 89 LW 313

Hon'ble Judges : V. Ramaswami, J

Bench : Single Bench

Judgement

V. Ramaswami, J.—Among the employees of the Public Works Department of the Government of Tamil Nadu, is a section designed 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 5 to 62 of the Public Works Department Code.

3. The position of these employees reviewed by the Government time and again. By G.O. Ms. No. 95, P.W.D., dated 9-1-1971, 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 3-2-1973, 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 10-9-1971, 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 Work's Department, both provincialised and non-provincialised, in their petition dated 3rd of 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 servant, 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 10-9-1971.

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 has 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 10-9-1971.

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 Paediatrics Blocks in Halls Road, Egmore. Thereafter he was working in the construction of the Neurological Block, Government General Hospital till 1971. After working for some time again in the Paediatrics 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 24-11-1970, as per G.O.Ms. No. 95, P.W.D., dated 9-1-1972. 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 those persons, who were employed as Work Charged Employees are not civil servants, and, therefore, the Fundamental Rules and Civil Services Rules should

not be applied to him. The petitioner also contended: ""The Public Works Department in 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 Disputes 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 denned 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 *Safdarjang Hospital v. K.S. Sethi*, (supra) and the decision in Civil Appeal No. 1297 of 1970, *The Workmen of Indian Standards*

Institution v. The Management of the Indian Standards Institution, (supra).

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

following passage:

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

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

only when there is a relationship between employers and employees, the former engaged in business, trade, undertaking, manufacture of 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 avocations mentioned in relation to the employers, namely, any business, trade, undertaking, manufacture or calling of employers. In the

collection of the terms and their definitions those terms have definite economic content of a particular type and on the authorities in 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 goods or wealth and material services. Material services involve any activity carried

on through cooperation 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 man involving benefit 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 cooperate 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 there must be profit motive, but the enterprise 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 or 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 those

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 to

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, under taking, 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 accrue, 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 co-operation

between employer and employees 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 cases 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 old dying out, is indeed so wide and so broad and comprehensive is its spectrum and range

that may be 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 on the legal position. In the words of the learned Judge, the ratio of the

decision of the Supreme Court judgments 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 Engineer, 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 party 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 under-taking 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 *Safdarjang Hospital case*, 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 *Safdarjang Hospital case*, (supra) disapproved of the view taken in the *Hospital*

Mazdoor Sabha case, and that ground was that the decision in the *Hospital Mazdoor Sabha case* 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, namely, "can

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

Hospital case, this latest test applied in the *Hospital Mazdoor Sabha case* 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 Safdarjang Hospital case 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.