

(2015) 05 PAT CK 0066
In the Patna High Court
Case No : C.W.J.C. No. 13426 of 2003

Father Thomas Anthonysamy and Others	APPELLANT
Vs	
State of Bihar and Others	RESPONDENT

Date of Decision : 15-05-2015

Acts Referred:

Bihar Shops and Establishments Act, 1953 — Section 2(13), 2(16), 2(4), 2(6), 26
Constitution of India, 1950 — Article 19(1)(g), 227
Industrial Disputes Act, 1947 — Section 2(j)
Motor Transport Workers Act, 1961 — Section 2

Citation : (2015) 146 FLR 246

Hon'ble Judges : Shivaji Pandey, J

Bench : Single Bench

Advocate : K.M. Joseph, T.J. Lucy and Jeetendra Prasad, for the Appellant;
Kundan Bahadur Singh, S.C. 22 and Madanjeet Kumar, AC to SC 22, Advocates
for the Respondent

Final Decision : Allowed

Judgement

Shivaji Pandey, J—Heard the parties. In the present writ petition, petitioners are challenging the order dated 16.10.2003 passed by the Presiding Officer, Labour Court, Patna in B.S.E. Case No. 1 of 2001 holding that the complaint petition filed by the complainant (respondent No. 3) under the provisions of Bihar Shops and Establishments Act, 1953 (hereinafter referred to as "the BSE Act") is maintainable. By way of filing interlocutory application the petitioners also challenged the order dated 16.4.2013 (Annexure-19) by which the Labour Court has held that termination of service of respondent No. 3 is illegal and directed for reinstatement with 60% back wages.

2. As per the claim of respondent No. 3 he was an employee of educational institution, namely, St. Xavier's School, Patna and posted as field staff, his services was regularised since January, 1979 by the Rector of the institution vide order dated 25.12.1978. The complainant-respondent No. 3 had fallen ill in the year 1998 and was under the treatment of the Doctor. He filed an application for

earned leave for one month vide letter dated 12.5.1998 before the Father Rector of St. Xavier's, School Patna, as he did not recover filed an application before the Father Provincial St. Xavier's School Patna dated 10.7.1998 requesting for Rs. 5,000/- for his treatment as was suggested by the Doctor for further rest of one or two weeks, requested him to allow to get facility of salary for the month of May for his treatment. After recovery from illness he went to join his service in the month of May, 1998 but was informed to have been terminated from service without giving any information in this regard. The complainant-respondent No. 3 claimed of being regular employee could not have been terminated or dismissed from service without following due process of law, arbitrarily dismissed his (respondent No. 3) service claimed that he has been dismissed unceremoniously. After the dismissal from service the complainant preferred Complaint Case 665 of 1999 before the District Consumer Forum, Patna for Redressal of his grievances, later on he filed an application before the Labour Court, Patna under the BSE Act which was registered as B.S.E. Case No. 1 of 2001.

3. The petitioners appeared and filed a show cause claiming that the complainant was employed by the St. Xavier's Patna which is a different and distinct to the St. Xavier's School though the buildings of both the institutions are situated in the common place. The St. Xavier's is not an educational institution but a private residence of religious saints having no concern with the educational institution. Further plea has been taken if complainant-respondent No. 3 claiming to have been employed in the educational institution named as St. Xavier's School then the provisions of the BSE Act would not be applicable, as educational institution does not come under the purview of the BSE Act, so much so the St. Xavier's is a place of private residence of religious saint, will not fall under the provisions of BSE Act, especially domestic helps will not be employed under the aforesaid provisions of law claimed that petition was not maintainable.

4. The complainant-respondent No. 3 filed an amendment petition taking a plea that due to mistake the place of employment has to be shown St. Xavier's School, Patna and prayer has been made that St. Xavier's School, Patna be read as St. Xavier's. The Labour Court vide order dated 6.9.2002 allowed the amendment application. The petitioners filed an application raising a preliminary objection that the complaint petition itself was not maintainable as St. Xavier's School or St. Xavier's is out side the purview of BSE Act, as educational institution is not covered by the BSE Act as well as St. Xavier is a place of stay of seers will not be an establishment under the BSE Act and status to the complainant was a domestic servant is also outside the purview of employee under the BSE Act.

5. Petitioners challenged the order allowing the amendment petition before this Court vide C.W.J.C. No. 12111 of 2002 vide order dated 24.1.2003 this Court has refused to interfere with the order whereby amendment petition was allowed but prayer of the petitioners for giving direction to the Labour Court to decide the maintainability of the application was accepted and directed, that the authority

under the BSE Act shall immediately frame the issues on preliminary objection will give proper opportunity of hearing to both sides and dispose of the same.

6. The Labour Court heard the matter and pass the order against the petitioners vide order dated 6.10.2003 (Annexure-9 of the writ petition) where the Court has said that St. Xavier's is establishment as provided under section 2(6) of the BSE Act holding that the institution is of commercial interest and the complainant cannot be termed as a domestic servant. Further held that even if enterprises like any other fields earn profits but is then siphoned off for altruistic object and as a focus of economic production has got business like orientation and operation as discussed and accordingly it was treated to be an establishment and that was challenged before this Court in the present writ petition. As there was no stay the Labour Court heard the case on merit and held that termination of service of respondent No. 3 was completely illegal, de hors to the law and entitled for reinstatement with 60% back wages.

7. Learned Counsel for the petitioners submits that Patna Jesuit Society has been incorporated under the Societies' Registration Act XXV of 1886 having its registered office at St. Xavier's, Fraser Road, Patna. The main object of the Society is to perform the work of Charity, Social, Moral, Spiritual and Corporal. It has also engaged in social activities, Religious activities, Secular and Scientific Knowledge. He has further submitted that one of the object of the Society is to establish the educational institution hostels, chapels etc. The head of the Society is called Provincial. It has further been submitted that the entire world has been divided in religious territories and is called Diocese. The religious order in Catholic Church has been established under the authority of Pope. Father General is the highest functionary is called Jesuit. Patna Provincial is headed by the Father Provincial and House is headed by Rector or Superior. Administrator is In-charge to look after the material requirement of the members of the Jesuit Society. It has further been submitted that member of Jesuit Society have been assigned different nature of work, made In-charge to look after the functions of different educational, institutions including hospitals run under the Patna Jesuit Society. It has further been submitted that head office of the Jesuit Society is St. Xavier's House where all Fathers attached to Jesuit Society used to reside there and they have been provided separate rooms, used to take food at the common place dinning hall. Foods are prepared in the common Kitchen, all the fathers have a common drawing room to entertain the guests. It has further been submitted that respondent No. 3 was the domestic servant as his primary duty was to purchase and bring the grocery from the market, purchase railway and bus ticket, used to perform some duties attached to the material satisfaction of the Fathers who stayed in the house. It has further been submitted that the Father of Jesuit Society used to perform the work of different educational institutions such as K.R. High School, St. Xaviers Higher Secondary School in Bettiah, West Champaran runs under Christ Raja Educational Association Society, St. Michael's School, Digha under the St. Michael's School Society, St. Ignatius School Aurangabad under Sampurna Vikas Samiti Society, St. Xavier's School,

Gandhi Maidan, Patna under Xavier's Patna Society, Patna and St. Xavier's College of Education, Digha under St. Xavier's College Education Society. For day to day mundane work of the Father who resides at St. Xavier's House, they used to engage some workers for the Kitchen, garden and other fringe works. Respondent No. 3 was one of the servant performing certain domestic duties and functions. He further submits that the Society and the persons who reside there are not engaged in trade, commerce and professions but basically they are ascetic people, living and lead life of celibacy. Basically they are engaged in spiritual work but incidentally performed material altruistic work for the benefit of humanity and also to propagate the thought of Jesus. He has further submitted that Sandesh is a magazine which is published by the Society for the purposes of propagation the ideals of Jesus Christ, it has closed circulation not available in market rather it is subscribed by those who are followers of Christian religion or under the influence of thought of Jesus Christ. The primary idea to spread the Christian religious thought having not attached any commercial activities and it has been submitted that dominant purpose of publication of Sandesh is no way connected with the commercial activities and on that strength learned Counsel for the petitioners submits that St. Xavier's where Father resides falls outside the purview of BSE Act. It has further been submitted that it is basically a Charitable Society having no connection even remotely of any commercial activity, run any trade and commerce or engaged in profession but living a ascetic life. But for mundane requirement, servants acts as tools for the material satisfaction of inmates of House. It has been submitted that the complaint petition is hopelessly time barred as section 26(2) of the Act provides that complaint petition has to be filed within 60 days from the date of order of termination but the present case the complaint petition under section 26(2) of the Act has been filed after more than three years and that too without filing application for condonation of delay. So much so the Labour Court has never addressed the issue of condoning the delay as by order dated 16.10.2003 the Court has already decided maintainability of the complaint petition with respect to falling under the provisions of the BSE Act. Once it was held that Society falls under the purview of the BSE Act the next stage for the Labour Court was to consider, whether the complaint petition suffers from the delay as limitation of 60 days has been provided for filing application under the BSE Act but one fact is admitted, the complaint petition suffers from delay as the complaint petition has been filed much after 60 days from the date of order of termination of service then in that circumstances unless the Labour Court has/had condoned the delay for filing the application it could not have been proceeded to deliberate the application on the merit of the case.

8. The petitioners have specifically raised the point of limitation on two occasions but the Labour Court instead of deciding the issue raised by the petitioners proceeded with the case on merit. It has further been submitted that in fact respondent No. 3 has not been terminated from service, the real fact is that he remained absent for three years without any information to the Society and it is

a case of abandonment of service.

9. In contra, learned Counsel for the workman has submitted that Jesuit Society is a head office of all the institutions as from there they do have administrative/ financial control of Schools, Hospitals and press or other institutions attached to the Society which run in huge profit and other activities indicates of being involved in trade, commerce and profession. The claim of petitioners that it falls outside the scope of the Act is completely not sustainable. The Labour Court on consideration of the material fact and other evidences available on record, arrived to conclusion that St. Xavier's is an establishment within the meaning of section 2(6) of the BSE Act by positively arriving to a finding that society is engaged in trade and commerce, can not easily be ignored on the mere submission of learned Counsel for the petitioners. While exercising power under Article 227 of the Constitution of India this Court should not be interfered with the finding of fact arrived by the Labour Court. He has further submitted that he used to work under supervision and control of Father Provincial as respondent No. 3 had fallen ill made a prayer for leave on that account which was granted leave but after recovery from illness when he went to join his service he was not allowed to join the duty at St. Xavier's, made submission that he has been terminated from service without any proper enquiry as provided under section 26 of the BSE Act or giving one month notice and compensation made thereunder, the order is completely illegal and not sustainable in law.

10. Basically Counsel for respondent No. 3 submits that it is a head office of all institutions, such School, College, Hospital and press cannot be claimed that St. Xavier's does not fall within the purview of the BSE Act.

11. Before deciding the issue on merit of case it will be prudent to examine the definition of Establishment Act. It will be proper to quote section 2(6) of the BSE Act for the purposes of applicability of the Act:

"2(6). "establishment" means an establishment which carries on any business, trade or profession or any work in connection with, or incidental or ancillary to any business, trade or profession and includes--

(i) administrative or clerical service appertaining to such establishment;

(ii) a shop, restaurant, residential hotel, eating house, theatre or any place of public amusement or entertainment; and

(iii) such other establishment as the State Government may, by notification, declare to be an establishment to which the Act applies; but does not include a motor transport undertaking as defined in clause (g) of section 2 of the Motor Transport Workers Act, 1961 (27 of 1961)."

12. Section 2(6) of the BSE Act provides the definition of establishment, means an establishment which carries business, trade and profession or any work in connection with or incidental and ancillary to the aforesaid includes administrative or clerical service appertaining to such establishment, a shop,

restaurant, residential hotel, eating house, theater or any place of amusement or entertainment.

13. Section 2(13) of the Act has defined "Residential hotel" means any premises used for the reception of guests travellers desirous of dwelling or sleeping therein and includes a club. Section 2(13) has defined "Restaurant" or "eating house" means any premises in which is carried on wholly or principally the business of the supply of meal or refreshments to the public or a class of the public for consumption on the premises. Section 2(16) has defined "Shop means any premises where goods are sold, either by retail or wholesale or where services are rendered to customers and includes an office, store-room, godown, warehouse and work place, whether in the same premises or elsewhere, used in connection with such sales or services, but does not include a restaurant, a residential hotel, eating house, theatre or other place of public amusement or entertainment.

14. The ingredients for being establishment the dominant nature of work has to be seen and to test whether the work performed by the establishment falls in the category of carrying on business, trade or profession or any work in connection with or incidental to the business trade or commerce. The main part of meaning of establishment, it appears that, for being establishment under the BSE Act an establishment must carries the business, trade or commerce or profession or the work should be in connection or incidental or ancillary to the business trade or profession. If any of the element is satisfied by the establishment would fall within the provision of BSE Act.

15. Applicability of BSE Act and definition of establishment has been raised and dealt with in the earlier cases by Hon"ble Supreme Court and other Courts, including this Court.

16. Before Hon"ble Supreme Court in the case of Dr. Devendra M. Surti Vs. The State of Gujarat, AIR 1969 SC 63 : (1969) CriLJ 285 : (1968) 17 FLR 370 : (1969) 2 LLJ 116 : (1969) 1 SCR 234 , the question arose about applicability of Bombay Shops and Establishment Act with respect to private dispensary. The Hon"ble Supreme Court has considered the provisions of the Act and held that private dispensary of the doctor does not fall under mischief of Shops and Establishments. The Court has examined number of issues from different angles such as, in the angle of commercial activity, professional activity. The Hon"ble Supreme Court examined the essential feature or attributes of business and trade in context of conventional sense. The Court has held that the doctors dispensary is outside the purview of Shops and Establishments Act and held as follows:

"We are therefore of opinion that the professional establishment of a doctor cannot come within the definition of section 2(4) of the Act unless the activity carried on was also commercial in character."

17. The Court has examined the meaning and attributes of the Commerce and

placed reliance on the judgment of the Privy Council where the meaning and facet of commerce has been critically examined, will be proper to quote the relevant paragraph of the aforesaid judgment which deals with activity to fall under the categories of Commerce in the following manner:

"Commerce is that activity where a capital is laid out on any work and a risk run of profit or loss; it is a commercial venture". It is true that the definition of Lord Campbell is that conventional definition attributed to trade or commerce but it cannot be taken to be wholly valid for the purpose of construing industrial legislation in a modern welfare State. It is clear that the presence of the profit motive or the investment of capital tradition associated to the notion of trade and commerce cannot be given an undue importance in construing the definition of "Commercial Establishment" under section 2(4) of the Act. In our opinion, the correct test of finding whether a professional activity falls within section 2(4) of the Act is whether the activity is systematically and habitually undertaken for production or distribution of goods or for rendering material services to the community or any part of the community with the help of employees in the manner of a trade or business in such an undertaking. It is also necessary in this connection to construe the word "profession" under section 2(4) of the Act. In *Commrs. of Inland Revenue v. Maxse* 1919-1 KB 647, at p. 657 Scrutton, L.J. stated as follow:--

"I am very reluctant finally to propound a comprehensive definition. A set of facts not present to the mind of the judicial propounder and not raised in the case before him, may immediately arise to confound his proposition. But it seems to me as at present advised that a "profession in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time. The word "profession" used to be confined to the three learned professions, the Church, Medicine and Law. It has now, I think, a wider meaning."

The matter was again considered in other case where the question was whether a company doing the work of naval architect could be said to be carrying on a profession in a naval architecture. The case was *William Esplen, Son and Swainston, Ltd. v. Inland Revenue Commrs.* 1919-2 KB 731, where Rowlatt, J. observed as follows:

"....but in any opinion the company is not carrying on the profession of naval architects within the meaning of the section, because for this purpose it is of the essence of a profession that the profits should be dependent mainly upon the personal qualifications of the person by whom it is carried on, and that can only be an individual."

It is therefore clear that a professional activity must be an activity carried on by

an individual by his personal skill and intelligence. There is a fundamental distinction therefore between a professional activity and an activity of a commercial character and unless the profession carried on by the appellant also partakes of the character of a commercial nature, the appellant cannot fall within the ambit of section 2(4) of the Act. In *The National Union of Commercial Employees and Another Vs. M.R. Meher, Industrial Tribunal, Bombay and Others*, AIR 1962 SC 1080 : (1962) 4 FLR 323 : (1962) 1 LLJ 241 : (1962) 3 SCR 157 Supp , it was held by this Court that the work of solicitors is not an industry within the meaning of section 2(j) of the Industrial Disputes Act, 1947 and therefore any dispute raised by the employees of the solicitors against them cannot be made the subject of reference to the Industrial Tribunal."

18. A question raised before Karnataka High Court in the case of *National Institute of Engineering (Society) v. Labour Inspector* 1975 Lab. I.C. 1134, the question was whether hostel attached to the Engineering College will fall under the provisions of Karnataka Shops and Commercial Establishments Act examining the definition of sections of Shops and Establishment and other cognates definition, the Court arrived to a conclusion that the hostel attached to the Engineering College would not fall under the provisions of Shops and Establishments Act as the Court found that there was no element of commercial activity nor a trade or business are attached with that establishment neither a shop or a commercial establishment as the members of the general public are not entertained and entitled to purchase the foodstuffs from the hostel or stay therein nor it can be said to be place of entertainment rather it confined only for the benefit of student of Engineering College. On account of that the Court has arrived to a conclusion that hostel does not fall under the mischief of Karnataka Shops and Commercial Establishments Act.

19. Before this Court in Ranchi Bench a question was raised about the applicability of Bihar Shops and Establishments Act with respect to Beldih Club in the case of *Beldih Club Vs. The Presiding Officer, Labour Court and Others*, (1990) 38 BLJR 808 : (1991) 1 PLJR 81 , has held that the Club does not fall under the Shops and Establishments Act. While discussing the nature and activity of Club in the context of provisions of Shops and Establishments Act has examined the provisions of section 2(6) of the BSE Act. While examining the definition of establishment made a comparative discussion with definition of section 2(j) of the Industrial Disputes Act and held that definition of industry under section 2(j) of the Industrial Disputes Act is of wider amplitude than the establishment defined under the BSE Act. In paragraph Nos. 59 and 60 the Court has compared the applicability of industry vis-a-vis establishment. It will be apt to quote paragraph Nos. 59, 60, 61 and 62 of the aforesaid judgment:

"59. In terms of the aforementioned definition, any systematic activity carried out by employment of workmen even to render service to some person or to fulfill some persons wants or wishes may bring the activity within the purview of the word "industry".

60. However, the definition of an establishment or a commercial establishment under the Shops and Establishments Act of different States stand completely on a different footing. In terms of the definition of word "establishment" as contained in section 2(6) of the said Act, a systematic activity for rendering service by an organization by itself, may not be an establishment unless a business, trade or profession is carried on therein.

61. It may be mentioned here that in some of the States the word "profession" has not been included in the definition of commercial establishment.

The Supreme Court, in the case of V. Sasidharan Vs. Peter and Karunakar and Others, AIR 1984 SC 1700 : (1984) 49 FLR 342 : (1984) 2 LLJ 385 : (1984) 2 SCALE 201 : (1984) 4 SCC 230 : (1985) 1 SCR 601 : (1985) 17 UJ 54 , while construing the words of "Commercial Establishment" in Kerala Shops and Commercial Establishments Act, 1960, held as follows:

"An argument was strongly pressed upon us on the basis of the decision of this Court in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, AIR 1978 SC 969 : AIR 1978 SC 548 : (1978) 36 FLR 266 : (1978) 2 LLJ 73 : (1978) 1 LLJ 349 : (1978) 2 SCC 213 : (1978) 3 SCR 207 . The High Court has rightly observed that the question which arose in that case was entirely different, namely, the sweep of the meaning of the word "industry". The ratio of that decision is that the term industry covers any activity which is systematically or habitually undertaken for the production or distribution of goods or for rendering material services to the community at large with the help of employees. The question which arises in this appeal is basically different, namely, whether a lawyers' office or the office of a firm of lawyers is a commercial establishment. Considerations which were germane to the determination of the question in the Bangalore Water Supply case are foreign to the decision of the question before us.

In Indian Chambers of Commerce and Industry (1974) LLJ 271 : AIR 1974 SC 1627 case, the question was whether the Federation of Indian Chambers of Commerce & Industry is a commercial establishment within the meaning of the Delhi Shops and Commercial Establishment Act, 1954. This Court pointed out that the definition of "commercial establishment" in that Act is so wide that the activities of a registered society or a charitable trust would also fall within the purview of that definition."

62. From a plain reading of section 2(6) of the said Act, it is relevant that the definition of the word "establishment" is not so wide, so as to bring it within its purview, an activity which is not a commercial one."

20. The Court has ultimately arrived to a conclusion that Club is not involved in trade and business as provided under section 2(6) of the BSE Act, not having applied the provisions of Shops and Establishments Act.

21. In the case of Hotel Mazdoor Sabha and Another Vs. N.J. Alvares and

Another, AIR 1965 Bom 13 : (1964) 66 BOMLR 332 : (1965) ILR (Bom) 87 , where the Court posed to question of applicability of Bombay Shops and establishment Act in respect of Canteen run by employer for the benefit of worker the Court refused to apply the provisions of Bombay Shops and Establishment Act holding that staff of Canteens, where employer makes arrangements for supply of meals or refreshments without intending to carry on business thereof cannot be held to be restaurant or eating house within the meaning of the Act. Whenever an employer makes merely arrangements for supply of meals or refreshment to its employees and does not carry on wholly or principally the business of supply of meals or refreshments, the premises would not be restaurant or eating house within the meaning of the Act. And after examining the fact it was held that Bombay Shops and Establishments Act is not applicable to the Canteen.

22. This Court in the case of Bihar State Marketing Board Vs. Chief Inspecting Officer and Others, (1986) 34 BLJR 100 , has held that Marketing Board does not come under the purview of Act.

23. The Hon''ble Supreme Court in the case of Ruth Soren Vs. Managing Committee, East I.S.S.D.A. and Others, (2001) 88 FLR 354 : (2000) 3 JT 283 Supp : (2001) 1 LLJ 165 : (2000) 7 SCALE 718 : (2001) SCC(L&S) 337 : (2000) 5 SCR 179 Supp : (2000) AIRSCW 4264 : (2000) 8 Supreme 127 , has held provisions of Shops and Establishment does not apply as School does not carry any business or profession or any work connected thereto, establishment of educational is not engaged in business and trade, it is equally to say, that teaching institution is out side the category. After discussion held that School or College may fall within the definition of "industry" but under the Industrial Disputes Act outside the purview of Shops and Establishments Act. It will be appropriate to quote paragraph Nos. 2, 3 and 5 of the aforesaid judgment:

"2. Two contentions were put forth before the appellate court, firstly that Respondent 1 is not an establishment for the purposes of the Act and, therefore, the application filed by the appellant is incompetent and secondly that Respondent 1 terminated her services after giving salary for a period of three months as provided in the relevant rules and, therefore, was not liable to be interfered with by the Labour Court even if it were to be held that Respondent 1 is an establishment. The High Court, after adverting to several decisions, in particular to Unni Krishnan, J.P. v. State of A.P., took the view that an establishment running an educational institution or imparting education does not carry on a business, trade or profession and came to the conclusion that the Labour Court, therefore, had no jurisdiction to interfere with the order of Respondent 1 and allowed the appeal on the first contention after noticing that it was not necessary to deal with the second submission.

3. For the conclusion the High Court reached, the High Court wholly depended on the observations made by this Court in Unni Krishnan case. In that case, at para 66, Mohan, J., while concurring with the majority view, started the discussion by

stating that in the cases before them, depending upon the statute, either "occupation" or "business" has come to be defined and it cannot be contended that establishment of an educational institution could be "business". Nor again, could that be called trade since no trading activities are carried on. Equally it is not a profession and it is one thing to say that teaching is a profession but, it is a totally different thing to urge that establishment of the category of occupation provided no recognition is sought from the State or affiliation from the University is asked on the basis that it is a fundamental right. However, while analysing the decision in *Bangalore Water Supply & Sewerage Board v. A. Rajappa*, the learned Judge concluded that while considering as to what would constitute an industry under the Industrial Disputes Act, the observations made therein is that an educational institution is an industry and nothing could stand in the way of that conclusion and certainly that is very different from claiming a fundamental right under Article 19(1)(g) of the Constitution. To a similar effect *B.P. Jeevan Reddy, J.* also stated that the context in which the observations were made in *Bangalore Water Supply & Sewerage Board v. A. Rajappa*, would have no application in the present case. A Bench of seven-Judge of this Court examined this question and held that we have to look at educational activity from the angle of the Act, and so viewed the ingredients of industry are fulfilled and education is, therefore, an "industry" and nothing could stand in the way of that conclusion. The basis upon which this conclusion is reached is that an educational institution renders service and, therefore, falls within the concept of an industry, as was noticed by Isaacs, J. in an Australian case, *Federated Municipal & Shire Council Employees' Union of Australia v. Melbourne Corpn.*

5. In *Corpn. of City of Nagpur v. Employees* 1960 (1) LLJ 523 at p. (540), this Court held the Education Department of the Corporation to be an industry. The reason given is that imparting education amounts to service and can be done by a private person also. In *University of Delhi v. Ram Nath*, this Court held that imparting education is not an industry as the work of the University cannot be assimilated to the position of trade, calling, business or service and hence cannot be an industry. The majority view in *Bangalore Water Supply & Sewerage Board v. A. Rajappa*, a decision of seven-Judge Bench, is that in the case of an educational institution, the nature of activity is "exhypothesi" and imparting education being service to community is an industry. Various other activities of the institution such as printing press, transport department, clerical, etc. can be severed from teaching activities and these operations either cumulatively or separately form an industry. Even so, the question for consideration is whether educational institution falls within the definition of "establishment" carrying business, trade or profession or incidental activities thereto. "Establishment" as defined under the Act, is not as wide as "industry" as defined under the Industrial Disputes Act. Hence reliance on *Bangalore Water Supply & Sewerage Board v. A. Rajappa*, for the appellant is not of any help."

24. In this case, the issue of applicability of BSE Act not with respect to Educational Institution, Hospital and Press, but question for consideration, the

St. Xavier's House, residential place of Fathers will be establishment under the BSE Act.

25. In view of the judgment discussed above and the yardstick framed therein, let us examine whether St. Xavier's will come under the provisions of Shops and Establishment Act or not. From the evidence it appears that Jesuit Society has been incorporated in the Societies Registration Act, to look after the interest of the different education institutions through Father's of different hierarchy lives in the Xavier's House. They do have a separate room, there is common drawing and dining room. There is common Kitchen, they lived together and different Fathers have been assigned different nature of jobs to be performed by them. It has also come in the evidence that respondent No. 3 used to purchase Vegetables for Kitchen, railway ticket and bus ticket and he was also performing the work of post office and Bank. St. Xavier's also published its magazine from Prabhat Prakashan, Digha, Patna at the cost of Rs. 8. It has also come in the evidence of respondent No. 3 that in the Xavier's House 15-20 Father's used to stay, there having separate rooms, Fathers attend their respective guests in the common drawing room. The Principal of St. Xavier's School, Father Rector, Father K.M. Joseph, Advocate, treasurers, St. Xavier's reside under one roof. Father Rector is the in-charge of the Xavier's House. Father Minister or Brother Minister are in-charge of the servant and cook, sweeper, darwans and mali. It has also come that different Fathers look after different institutions such as Holy Mission Patna, St. Xavier's School, St. Michael, Press. So in nutshell the Father's who used to look after different Christians organization stayed in the Xavier's House and in the Xavier's House they do have a separate residential rooms but common Kitchen, common dining room and these are the persons who used to help the Father and respondent No. 3 is among they used to perform the day to day menial work of different nature. They used to function as a servant in the St. Xavier's performing different nature of job. It appears that in the kitchen foods are cooked for only Fathers who reside there in that House. It also does not appear that any people other than those persons are stayed in the Xavier's House. Emphasis has been given that petitioners are getting benefit of GPF which has been explained by petitioners that they are getting this benefit under the scheme of Jesuit Society not under the Employees Provident Fund.

26. On consideration of the above material this Court feels that the Xavier's House is not engaged in trade, commerce and profession but place of stay of 15-20 Fathers so long they perform different nature of functions for different Christian's organizations. Respondent No. 3 was engaged in menial work for material satisfaction of Christian Father.

27. In that view of the matter, this Court feels that petitioners will not come under the purview of Shops and Establishments Act and in such view of the matter the view taken by the Labour Court that Xavier's House is covered under the definition of "establishment" under the Shops and Establishments Act is misconstrued and misdirected the provisions of BSE Act is not applicable and the

application filed by respondent No. 3 is not maintainable. In view of the aforesaid finding the complaint petition was not maintainable, in such situation this Court is not required to deal with the merit of the case. Accordingly this writ petition is allowed.