

(2004) 04 GUJ CK 0081
In the Gujarat High Court

Case No : Special Civil Application No's. 8259 of 1996, 2566 of 1997, 2566 of 1997, 4435 of 2001 and 4715 of 2003

Gujarat Forest Producers, Gatherers and Forest Workers Union APPELLANT
Vs

State of Gujarat RESPONDENT

Date of Decision : 12-04-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 16, 166, 21
Consumer Protection Act, 1986 — Section 2, 2(1)
Forest Act, 1927 — Section 4, 5, 8
Industrial Disputes Act, 1947 — Section 2 7A 33(1), 33C(2)
Monopolies and Restrictive Trade Practices Act, 1969 — Section 2
Trade Marks Act, 1999 — Section 2

Citation : (2004) 24 GLH 302 : (2004) 2 GLR 568 : (2004) 3 LLJ 259

Hon'ble Judges : R.K. Abichandani, J;K.R. Vyas, J;J.M. Panchal, J

Bench : Full Bench

Advocate : Girish Patel, Adv, D.S. Vasavada, T.R. Mishra, P.H. Pathak and Mukul Sinha in Spl. C.A. No. 8621 of 1996 and Spl. C.A. No.595 of 2002, Shalin Mehta and Prakash Patel, Member Rashtriya General Workers Union, Bhavnagar, for the Appellant; Kamal B. Trivedi, Addl. AG, Sangeeta Vishen, AGP, Mukul Sinha, for the Respondent

Judgement

R.K. Abichandani, J.—These four petitions raising the following questions referred by two learned Single Judges are listed before us alongwith other cognate matters which are tagged with them.

Questions Referred:

2. In Special Civil Applications No.4715 of 2003 and 4435 of 2001, the learned Single Judge, (H.K. Rathod, J.), by his order dated 4-12-2003, formulated six questions for referring them to the Larger Bench in the following terms;

"(1) Whether the Forest Department and the Irrigation Department of the State can be said to be an industry within the meaning of Section 2(j) of the Industrial Disputes Act, 1947 or not ?

(2) What is the correct law between the two different views/ratios laid down by two different Division Bench of this Court in case of P.W.D. Employees Union and Others Vs. State of Gujarat and Others, wherein the Irrigation Department of the State is held to be an industry for the purpose of I.D. Act and decision of Division Bench of this Court in case of SHANKERJI CHELAJI THAKOR v. STATE OF GUJARAT reported in 2000 [1] GLR 482 and the recent decision in case of STATE OF GUJARAT v. D.B. THAKORE reported in 2003 [2] GLR 420, wherein the Irrigation Department is not held to be an industry for the purpose of I.D. Act, 1947; and therefore, which decision is binding to this Court?

(3) If the party to the proceedings, for the first time, raised the contention that Irrigation Department or Forest Department is not an industry, before this Court without raising the same question before the Labour Court or the Industrial tribunal concerned, whether such question can be said to be a pure question of law or the same can be said to be a mixed question of law and facts;

and

Whether such contention can be permitted to be raised before this Court when it was not raised before the lower court?

(4) Whether the view taken by this Court [Coram: H.K.Rathod, J.] as Single Judge in case of STATE OF GUJARAT v. MANIBEN VIRAJI reported in 2003[2] GLR 368 can be said to be a correct law or not?

(5) The decision making reference made by this Court [Coram : Justice K.M.Mehta, J.] referring the issue to the Division Bench of this Court to decide "whether Forest Department of the State is an industry or not?" may also be taken up and considered for decision by the larger Bench of this Court?

(6) When the case of EXECUTIVE ENGINEER [STATE OF KARNATAKA] v. K.SOMASETTY relied upon by the Division Benches of this Court in last two decisions in case of SHANKERJI CHELAJI THAKOR v. STATE OF GUJARAT reported in 2000[1] GLR 482 and the recent decision in case of STATE OF GUJARAT v. D.B.THAKORE reported in 2003[2] GLR 420, wherein the Irrigation Department is not held to be an industry for the purpose of I.D. Act, 1947; the Apex Court by three Hon"ble Judges Bench in case of GENERAL MANAGER, TELECOM reported in 1998 [78] FLR 143 has taken a view regarding telecommunication department being not an industry, was specifically overruled, in that circumstances, whether above referred last two decisions of the divisions benches of this Court on the issue, is binding decision or not?"

3. In Special Civil Applications Nos.8259 of 1996 and 2566 of 1997, the learned Single Judge had formulated three questions on 3-7-2001 in the following terms for being placed before a Division Bench :

"(1) Which judgement of the Hon"ble Supreme Court namely in the case of Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., (three bench judgement) or a judgement of the Hon"ble Apex Court in the case

of State of Gujarat and others v. Prathamsinh Narsinh Parmar (supra) decided on 31/1/2001 in Civil Appeal No.1684 of 1994 lay down a correct law and binding to this court?

(2) Whether Forest Department of the "State" is an industry or not?

(3) Whether the petitioners or similarly situated employees of the Forest Department are entitled for the benefit of Government Resolution dated 17-10-1988?"

3.1 Though these three questions were initially required to be placed before a Division Bench, in view of the question No.5 framed in the order dated 4-12-2003 made in Special civil Application No.4715 of 2003 and 4435 of 2001, these three questions are also placed before us for consideration by the Hon'ble the Chief Justice.

Brief facts and Pleadings ::

4. In Special Civil Application No. 4715 of 2003, the Petitioner Union has challenged the action of the respondent authority in not making a reference u/s 10(1) of the Industrial Disputes Act, 1947 and prayed for setting aside the order at Annexure "A" made on 30-12-2002, by which the Assistant Labour Commissioner, Nadiad, returned the application, which was made u/s 10(A) in respect of the demand regarding reinstatement of service, on the ground that the Forest Department was not "industry". According to the petitioner, the impugned order of the Assistant Labour Commissioner was not justified, because, the question as to whether a particular Department was an "industry" or not, was required to be decided by leading evidence. In paragraph 6 of the petition, it was contended that the question whether the particular activity falls within the meaning of Section 2(j) of the Act has to be decided by leading appropriate evidence and declining a reference to be made was, therefore, unwarranted and illegal. It was contended that the test laid down in the Bangalore Water Supply case by the Hon'ble the Supreme Court would govern the field and therefore, whether a particular activity was an "industry" or not, was to be decided on the touchstone of the triple test laid down by the Supreme Court, namely, (i) there should be a systematic activity, (ii) there should exist employer & employee relationship, and (iii) the activities should render services to the society at large. According to the petitioner, forest department was selling saplings to the people and deriving revenue therefrom. The budget and finance statement issued by the said department indicated that they derived income from the sale of honey and other forest produce which amounted to an activity of sale. The appropriate government could not, therefore, have rejected the application for making a reference in the matter.

4.1 In Special Civil Application No. 4435 of 2001, the petitioner has challenged the award dated 12th October 2000 made by the Labour Court, Godhra in respect of the demand for reinstatement in the project known as Dev Sinchai Yojna, by which, in lieu of reinstatement, the workman was awarded

compensation of Rs.5,000/-. According to the petitioner, initially he was appointed as a daily wager and thereafter as a clerk in the said Scheme and his services were abruptly terminated on 16-10-1984. It was contended that the activity of construction of dam was undertaken on a permanent basis and therefore, there was no question of closure of work being accepted as a ground for denying the reinstatement and awarding compensation in lieu thereof to the petitioner.

4.2 In Special Civil Application No.8259 of 1996, the petitioners have prayed for extending the benefits of the government resolution dated 17th October 1988 to the members of the petitioners union who were working as watchmen in various 'vidis' under the control of the respondent No.3 in the forest department. According to the petitioners, employees working in horticulture department, agriculture department, Directorate of animal husbandry etc. are given the benefits under the said resolution and there is no justification available to the respondents to adopt different yardstick in case of the daily wagers of the forest department. It is contended that denial of the benefits of the said resolution to these employees was in violation of Article 14 of the Constitution of India.

4.3 In Special Civil Application No.2566 of 1997 also, the petitioners have claimed the benefit of the government resolution dated 17-10-1988 on the ground that it was applicable to the forest department and prayed for a declaration in para 11(A) of the petition that not extending the benefits of the said resolution to the petitioner employees was unjust, arbitrary and violative of articles 14 and 16 of the Constitution.

5. The respondent - authorities in all these matters have contested the claims of the petitions.

5.1 In Special Civil Application No.4715 of 2003, an affidavit-in-reply has been filed on behalf of the respondents Nos. 1 and 3, contending that forest department was not an industry within the meaning of section 2(j) of the said Act. It is stated that, as per Article 48A of the Constitution, a duty is enjoined upon the State to protect and improve the environment and to safeguard the forests and wildlife of the country. It is, therefore, contended that the activity of protecting and improving the environment and safeguarding the forest and wildlife was an essential part of the sovereign function of the State. It is also stated that, under the National Forest Policy of 1988, maintenance of environmental stability through preservation and, where necessary, restoration of the ecological balance, conserving the natural heritage of the country, checking soil erosion and denudation for mitigating floods and droughts, increasing substantially the forest / tree cover in the country through massive afforestation and social forestry programmes, especially on all denuded, degraded and unproductive lands, creating a massive people's movement with the involvement of women, for achieving these objectives and to minimize pressure on existing forests, were the basic objectives spelt out. The principal aim of Forest Policy must be to ensure environmental stability and maintenance of ecological balance

including atmospheric equilibrium which were vital for sustenance of all life forms, human, animal and plant. The derivation of direct economic benefit must be subordinated to this principal aim. It was also pointed out that under Article 51-A(g) of the Constitution it was a fundamental duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and, wild life and to have compassion for living creatures. It is therefore contended that the aspects of environment, ecology, forest and wildlife are required to be dealt with separately and distinctly from welfare activities of the State and the State was under the constitutional obligation to discharge these duties. The activities pertaining to preservation, conservation and protection of the forests did not amount to production and / or distribution of goods or services to satisfy human wants and wishes as ordinarily understood. It is stated in paragraph 9 of the affidavit-in-reply that the activities of raising plantation in forest areas was undertaken with a view to to improve the forests and to cover degraded areas. Such activity in the non-forest areas was ordinarily understood as social forestry. The Department distributed seedlings to public at large to grow trees. It is contended that the plantation activity in the forest area did not amount to producing or distributing goods and/or services to satisfy the human wants and the purpose of raising plantation was to conserve and preserve the forests and increase the green cover. Even the activity of raising plantation outside the forest was undertaken with the objective of increasing green cover outside the forest areas and to restore ecological health of the marginal and degraded lands outside the forest area. Both these functions could not be separated from the overall dominant nature of the work that the State was required to carry out for the fulfillment of its constitutional imperatives. As regards the activity of raising a nursery, it is stated that it was not an independent activity and was inextricably linked with the activity of raising plantations. It is stated that more often than not, the nurseries are temporarily established for a few months in the proximity of the plantation site. It is stated that it would be wrong to assume that nurseries are permanent establishments where the process of plant production is carried out. It is admitted that some nurseries had a permanent nature having regard to the different needs that they cater e.g. neem plantation where the seeds do not remain viable for long period. It is stated that there cannot be comparison of these nurseries with the private nurseries where ornamental and horticultural plants are being raised only with the objectives of preparing seedlings for sale. Such private nurseries carry out an activity analogous to trade as ordinarily understood. The activity of distribution of seedlings to public undertaken by the State was meant for protecting and improving environment and safeguarding the forest and wildlife of the country in consonance with the directive principle enshrined in Article 48A of the Constitution. It is stated that the seedlings were distributed at a subsidized rate and a token price was charged for the seedlings just to ensure the commitment of the person, who took the seedlings, for their proper use. It is denied that the Department derived income from the sale of honey or other forest products. It is finally contended in paragraph 11 of the reply that merely because some activities relating to sale of

some forest produce, seedlings etc. take place and that too by charging subsidized rates, the said fact cannot warrant a finding that the forest department of the State is indulging in trade or business activity or an activity which is analogous to trade, business or an economic venture. This is more so when dominant activity of the forest department is that of discharging functions which fall within the concepts of sovereign functions and / or regal functions.

5.2 In the affidavit-in-reply filed on behalf of the respondent in Special Civil Application No.4435 of 2001, it is pointed out that "Water" is a State subject at Entry-17 of List II in the Seventh Schedule to the Constitution, which reads, "Water, that is to say, Water supplies, irrigation and canals, drainage embankments, water storage and water power subject to the provisions of Entry-56 of List-I". It is stated that this function of the department is an essential part of the sovereign functions of the State, and therefore, the Department is not an industry within the meaning of the term "industry" as defined in Section 2(j) of the Act. It is pointed out from the National Water Policy, 2002 that the water was considered as a prima natural resource, a basic human need and a precious national asset and planning development and management of water resources was needed to be governed by national perspectives. The basic objectives of the National Water Policy are re-produced in paragraph 3 of the affidavit, which include watershed management through extensive soil conservation, catchment-area treatment, preservation of forests and increasing the forest cover and the construction of check dams. It is contended that the aspects of environment, ecology and forest are required to be dealt with separately and distinctly from welfare activities of the State and the State is duty bound to discharge its constitutional obligations in respect of the said aspects keeping in view the peculiarities of the climatic and geomorphological conditions of the State. The dominant nature of activities in pursuance to meeting the constitutional obligations is primarily to conserve and preserve the environmental and ecological stability, water and improve and ameliorate the environment. The Department was carrying on its activities as per the directives of the approved National Water Policy and keeping in view the dominant nature test, the water resources department of the State did not fall within the ambit of "industry" u/s 2(j) of the Act. The activities of the Department also included flood control management, drought prone area development, water quality, control of erosion of soil, operation and maintenance of irrigation systems, modernization of existing irrigation systems and ground water development. Some of these functions were seasonal in nature and the workforce engaged was maintained as long as there was need of their services which again depended on various conditions, such as, flood, rainfall, scarcity and other natural phenomenon, which is beyond human control. It is stated that with a view to improve working condition of Rojamdars (daily wage labourers), who were mostly project affected persons whose land had gone under submergence and were rendered unemployed, the government framed a policy in respect of their service benefits under the government resolution dated 17th October 1988, which included the

pay in the pay scales of government employees, GPF as was made available to the regular government employees, pension and gratuity schemes, leave encashment, benefits of E.L., Medical Leave and benefits of public holidays. The non-permanent work force was kept for seasonal work and that work force had neither any right to claim for any benefits other than those given by the said resolution dated 17-10-1988. Referring to the decision of the Supreme Court in State of Gujarat and Others Vs. Pratamsingh Narsinh Parmar, , it is submitted in paragraph 14 of the reply that, if a dispute arises as to whether a particular establishment or part of it wherein an appointment has been made is an industry or not, it would be for the person concerned, who claims the same to be an industry, to give positive facts for coming to the conclusion that it constitutes an industry. It is contended that the irrigation department of the government was not an industry having regard to the dominant nature test.

5.3 In the affidavit-in-reply filed on behalf of the respondents No.2 and 3 in Special Civil application No.8259 of 1996, it is contended that the government resolution dated 17-10-1988 was applicable to daily wagers working in the maintenance of buildings etc. under the Road & Building Department, and that the forest department had not resolved to extend the benefits thereunder to its employees engaged in the work of preparing seedlings etc. It is also contended in paragraph 9 of the reply that, for appointment in Class IV cadre, rules have been framed under Article 309 of the Constitution and no appointment can be made unless the regular process of recruitment is followed. It is stated that the government in their forest department, after examining the issue, was of the view that there was no question of any construction and maintenance work therein and that seasonal labour could not be equated with the persons engaged in the Road & Building Department. It is stated that, after considering the decision of the Supreme Court in Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others, , it was decided not to extend the benefits of the said government resolution to the persons engaged in the forest department. Even the finance department issued a circular dated 30th September 1995, as per Annexure "I" to the reply stating that the benefit of the said resolution cannot be given to the daily wagers of other departments. It is stated that it was only incidental that, in the present case, nurseries in question had continued for a long period as there had been need to raise seedlings in those locations. Similar affidavit-in-reply has been filed in Special Civil Application No.2566 of 1997.

Contentions and Citations :

6. It has been contended by the learned Senior Advocate on behalf of the petitioners that the definition of the word "industry" u/s 2(j) of the Act was progressive with its own universe of discourse and objectives. It was argued that the same word need not have the same meaning in different contexts and the word "industry" is required to be read from the widest possible angle in the context of the industrial law. It was submitted that the meaning of the words

used in the statute can change from time to time with the change of conception and understanding of the people. What was excluded from the word "industry" a few decades ago, may not be excluded today in view of the changing conception and understanding of the people, who were concerned with the industrial law. Even the concept of sovereign functions has undergone a change and is to be viewed strictly. It was argued that only the functions relating to defence of the country, law and order and administration of justice would be essential sovereign functions properly so called and all other functions should be treated as non-sovereign. The learned Senior Advocate further argued that all the Departments of the State Government, which were not discharging such essential sovereign functions, would fall within the purview of the definition of the word "industry" u/s 2(j) as regards the services rendered by them. He submitted that these departments discharging non-sovereign functions satisfy the triple test laid down by the Supreme Court in Bangalore Water Supply case. It was contended that if any activity was specifically excluded from the purview of the definition of the word "industry" u/s 2(j), then only can it be said that the said Act was not applicable. It was submitted that forestry was not a sovereign function and in any event, the employees were working on the projects such as nursery or roadside plantation undertaken by the Department, which activity amounted to industry within the meaning of section 2(j). It was contended that only the character of the activity undertaken was to be examined and it was immaterial who conducts it or whether it was conducted for profit or not. It was submitted that the activity of protecting and preserving forest was also a type of service rendered by the Department to the people which was not in exercise of any sovereign function. The augmentation of forest and protection of environment were also services rendered by the State Department to the people. Such work could be entrusted even to a private agency and therefore, it did not involve exercise of any sovereign function. The learned Senior Advocate further argued that the units or the projects of the forest department satisfy the triple test laid down in the Bangalore Water Supply case. The dominant nature test laid down in the said decision suggested that the forest department was not exercising any sovereign function and the entire department would be an industry, because, it satisfied all the tests applicable for applying the statutory definition of "industry", namely, it undertakes an organized activity involving co-operation between the employer and employees on a large scale and the activities were carried on for the purpose of production of goods and services for satisfying the wants of the people.

6.1 In support of his contentions, the learned Senior Counsel relied upon the following decisions :

[a] The decision of the Supreme Court in *The Corporation of the City of Nagpur Vs. Its Employees*, , was cited to point out that it was held in paragraph 14 of the judgement that the conception that unless the public who are benefited by the services pay in cash for the services rendered to them, the services so rendered cannot be industry is based upon an exploded theory. Referring to the earlier

decision of the Court in D.N. Banerji Vs. P.R. Mukherjee and Others, , it was noted that neither the investment of capital or the existence of profit earning motive seemed to be a sine qua non or necessary element in the modern conception of industry. In paragraph 16 of the judgement, the Supreme Court held that, a particular activity of a municipality may be covered by the definition of "industry", and if the financial and administrative departments are solely incharge of that activity, there can be no difficulty in treating those departments also as part of the industry. However, there may be cases where the said two departments may not only be in charge of the particular activity or service covered by the definition of "industry", but also in charge of other activity or activities falling outside the definition of "industry" and in such cases, a working rule may be evolved to advance social justice consistent with the principle of equity. In such cases, the solution to the problem depends upon the answer to the question whether such a department is primarily and predominantly concerned with industrial activity or incidentally connected therewith.

[b] The decision of the Supreme Court in Secretary, Madras Gymkhana Club Employees' Union Vs. Management of the Gymkhana Club, was cited for the proposition that primarily industrial disputes occur when the operation undertaken rests upon co-operation between employers and employees with a view to production and distribution of material goods, in other words, wealth, but they may arise also in cases where the co-operation is to produce material services. In paragraph 25 of the judgement, it was observed that the Act in terms contemplates cases of industrial dispute where the government or local authority or a public utility service may be the employer. (This decision of the Supreme Court was overruled in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, , See paragraph 145 of the judgement).

[c] The seven judge bench decision of the Supreme Court in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, was referred to in detail and the learned counsel relied upon paragraph 32, 37, 53, 60, 76 and 161 of the judgement and also made submissions generally on the basis of the said judgement. The Supreme Court, in paragraph 161 of the judgement, formulated the principles deducible from the discussion in the judgement, which, as stated in paragraph 160 "are decisive, positively and negatively of the identity of the "industry" under the Act". In paragraph 161(i)(a), the Supreme Court has laid down the triple ingredient test, around which the contentions of both the sides have revolved. In paragraph 161(iv), the Supreme Court has indicated the dominant nature test, which has attracted considerable debate between the learned counsel, more particularly on clause (b) thereof, exempting sovereign functions as strictly understood. We, therefore, re-produce paragraphs 161(i)(a) and 161(iv)(a) to (d) of the judgment;

"161. "Industry", as defined in Section 2(j) and explained in D.N. Banerji Vs. P.R. Mukherjee and Others, has a wide import.

[a] Where [i] systematic activity, [ii] organized by co-operation between

employer and employee [the direct and substantial element is chimerical] [iii] for the production and/or distribution of goods and services calculated to satisfy human wants and wishes [not spiritual or religious but inclusive of material things or services geared to celestial bliss i.e. making on a large scale prasad or food] prima facie, there is an industry in that enterprise."

[b] xxxxx

[c] xxxxx

"IV The dominant nature test:

[a] Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not 'workmen' as in the University of Delhi and Another Vs. Ram Nath, or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in the The Corporation of the City of Nagpur Vs. Its Employees, will be the true test. The whole undertaking will be 'industry' although those who are not 'workmen' by definition may not benefit by the status.

[b] Notwithstanding the previous clauses, sovereign functions, strictly understood, [alone] qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies.

[c] Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within S. 2(j).

[d] Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby."

[d] The decision of the Supreme Court in Des Raj and Ors Vs. State of Punjab and Ors, , was cited to point out that the Irrigation Department of the Punjab & Haryana State was held to be falling within the ambit of "industry" u/s 2(j) of the Act. The Supreme Court, after referring to the ratio of the five judge bench decision in D.N. Banerji Vs. P.R. Mukherjee and Others, and the decision in State of Bombay v. Hospital Mazdoor Sabha, reported in AIR 1960 SC 10, and taking into consideration the facts found from the administrative report by the High Court, held in paragraph 13 of the judgement that the main function of the Irrigation Department, when subjected to the Dominant Nature test, clearly come within the ambit of industry. The extract of the Administrative Report is reproduced in paragraph 9 of the judgement. It was stated in the report that the irrigation department was involved in construction of multipurpose, major, medium and minor irrigation projects, maintenance of net-work of channels, regulation of canal supplies, enforcement of water laws etc. and levying of crop-wise water supply rates on the irrigators for recovery through the State Revenue department. The canal water supplies are also being made available for the

industrial development in areas where no other source for water supplies existed. In paragraph 14 of the judgement, it was made clear that, in the event of the definition of "industry" being changed either by enforcement of the new definition of "industry" or by any other legislative change, it would always be open to the aggrieved Irrigation Department to raise the issue again and the present decision would not stand in the way of such an attempt in view of the altered situation.

[e] The decision of the Supreme Court in *General Manager, Telecom v. S.Srinivasa Rao*, reported in AIR 1998 SC 656 was cited for the proposition that the Telecom Department of the Union of India was engaged in commercial activity and was not discharging any sovereign functions of the State and therefore, it was an industry u/s 2(j). It appears from paragraph 6 of the judgement that it was not disputed before the Supreme Court that the Telecommunication Department of the Union of India was an "industry". In paragraph 7 of the judgement, the Supreme Court held that the earlier decision in *Bombay Telephone Canteen Employees' Association, Prabhadevi Telephone Exchange Vs. Union of India* and another, was in direct conflict with the seven judge bench decision in *Bangalore Water Supply case (supra)*. It was held that the said decision and the decision in *Sub-Divisional Inspector of Post, Vaikam, and others Vs. Theyyam Joseph, etc.,*, in which it was held that the functions of department were part of sovereign functions of the State and it was, therefore, not an industry within the meaning of Section 2(j), cannot be treated as laying down the correct law.

[f] The decision of the Supreme Court in *All India Radio v. Santosh Kumar*, reported in AIR 1998 SC 941, was cited for the proposition that the functions carried on by All India Radio and Doordarshan cannot be said to be confined to sovereign functions as they carry on commercial activity for profit by getting commercial advertisements telecast or broadcast through their various kendras and stations by charging fees. It was held that All India Radio as well as Doordarshan were "industries" within the meaning of section 2(j) of the Act.

[g] The decision of the Supreme Court in *Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc.,*, was cited to point out that the dichotomy of sovereign and non-sovereign functions of the State did not really exist and whether a particular function of the State is or is not a sovereign function, depends on the nature of the power and manner of its exercise. It was held that the Schemes in question cannot be regarded as a part of inalienable or inescapable functions of the State for the reason that the scheme was intended even to fulfil the recreational and educational aspirations of the people. In paragraph 16 of the judgement, the Supreme Court held that there was no doubt that such a work could well be undertaken by an agency which was not required to be even an instrumentality of the State. The learned counsel pointed out that initially, the Supreme court was concerned with the question as to whether the entire forest department of the State was an industry, but since the arguments

were then confined to the two Schemes, namely, Panchgaon Parvati Scheme, which was framed by the government on the basis of a policy decision, as noted in paragraph 15 of the judgement, and the social forestry work undertaken in Ahmednagar, as noted in paragraph 18 of the judgement, it was held that there was no threshold bar in knocking the door of the Industrial Courts by the respondents making a grievance about adoption of unfair labour practice by the appellants.

[h] The decision of the Supreme Court in *Agricultural Produce Market Committee Vs. Shri Ashok Harikuni and Another Etc.*, , was cited to point out that it was held by the Supreme Court that, whether a particular power relates to sovereign functions depends on the nature of the power and the manner of its exercise. It was held that neither all governmental functions could be construed to be sovereign nor could all statutory services be termed either sovereign or be excluded from the purview of the Central Act. In paragraph 32 of the judgement, the Supreme Court held that: "Sovereign function in the new sense may have very wide ramification but essentially sovereign functions are primary inalienable functions which only the State could exercise." It was held that, broadly, it was taxation, eminent domain and police power which covered the field. It may cover its legislative functions, administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon. It was held that, in view of the Preamble, Objects and Reasons and the Scheme of the Agricultural Produce Marketing (Regulation) Act, 1996, the predominant object clearly being regulation and control of trading of agricultural produce, the Marketing Committee including its functionaries cannot be said to be performing functions which are sovereign in character, and most of its functions could be undertaken even by private persons and therefore, the Committee would fall within the definition of "industry" u/s 2(j) of the Act.

[i] The decision of the Supreme Court in *State of Gujarat and Others Vs. Pratamsingh Narsinh Parmar*, , was referred to by the learned Senior Advocate for the limited purpose of contending that it was not decided by the Supreme Court therein that the forest department was not an "industry". It was submitted that the Supreme Court had set aside the decision of the High Court on the ground that there was no assertion of facts by the petitioner for establishing that the undertaking in which he had been appointed was an "industry".

[j] The decision of the Supreme Court in *Parmanand Vs. Nagar Palika and Others*, , was cited to point out that it was held that the High Court was not justified in holding that Nagar Palika was not an "industry" for the purposes of the Act. The Court was concerned with the question as to whether the Engineering Department of the Nagar Palika was engaged in an activity which could be termed to be an "industry".

[k] The decision of the Supreme Court in *Mangulu Sahu Ramahari Sahu Vs. The Sales Tax Officer, Ganjam*, was cited for the proposition that, as the law stood, it was not possible to say that famine relief work was a sovereign function of the

State as it had been traditionally understood. It is the work which can be and is being undertaken by private individuals. There is nothing peculiar about it so that it might be predicted that the State alone can legitimately undertake the work.

[l] The decision of the Supreme Court in Lucknow Development Authority Vs. M.K. Gupta, , was cited to point out that, in paragraph 4 of the judgement, the Supreme Court held that the term "service" has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc. The concept of service thus is very wide. How it should be understood and what it means depends in the context in which it has been used in an enactment. The Supreme Court held : "The government or semi-government body or a local authority is as much amenable to the Act as any other private body rendering similar service. Truly speaking it would be a service to the society if such bodies instead of claiming exclusion subject themselves to the Act and let their acts and omissions scrutinised as public accountability is necessary for healthy growth of society." It was held that the entire purpose of widening the definition of service in Section 2(o) of the Consumer Protection Act was to include in it not only day to day buying and selling activity undertaken by a common man but even to such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the consumer.

[m] The decision of the Supreme Court in Common Cause, A Registered Society Vs. Union of India and Others, , was cited for the proposition that all executive actions of the Government of India have to be expressed in the name of the President; but this would not make that order an order passed by the president personally, and that being so, the order carries with it no immunity.

[n] The decision of the Calcutta High Court in Union of India v. Central Government Industrial Tribunal, reported in 1986 LAB. I.C. 1269, was cited to point out that it was held therein that Engineering Store Depot, which was a defence establishment of public utility service, and whose functions related primarily to the holding and handling of stores required for defence purposes, was held to be a defense establishment of public utility service of industry according to Schedule I, Item 8 read with Section 2(n)(vi) of the said Act.

[o] The Supreme Court in The Workmen of the Indian Standards Institution v. The Management of the Indian Standards Institution, reported in (1976) 1 LLJ 33, was referred to point out that it was held that it makes no difference that the material service rendered by the undertaking are in public interest. The concept of public interest in a modern welfare State, where social values are fast emerging and old dying out, is indeed so wide and so broad and comprehensive is its spectrum and range that many activities which admittedly fall within the category of "industry" and clearly designed to subserve public interest. Whether an activity is carried on in public interest or not can, therefore, be never a criterion for determining its character as an industry.

7. The learned advocate on record appearing for the petitioners in Special Civil Application Nos. 8259 of 1996 and 2566 of 1997 supplementing the contentions of the learned Senior Advocate submitted that none of the activities of the forest department can be said to be undertaken in exercise of the sovereign functions of the State. It was submitted that all the activities undertaken by the forest department satisfy the triple test laid down in Bangalore Water Supply case (supra). It was submitted that the government has set up a Corporation in the name of Gujarat State Forest Department Corporation Ltd. which is a government company and the activities of the corporation are clearly industrial activities. The learned counsel relied upon the budget estimates of the forest department to point out that it indulged in various activities which would be industry within the meaning of section 2(j) of the Act. The counsel further argued that the resolution dated 17th October 1988 was applicable to all the workmen of the forest department including those who were working in nurseries and roadside plantations in the social forestry project undertaken by the department. It was strongly contended that if the benefits of the resolution were not applied to all the daily wagers of the forest department, such a course would violate the fundamental rights of the daily wagers who have been working in the forest department. It was submitted that the benefit of the resolution had been extended to the employees of the other departments and there was therefore no reason why the benefits should not be given to all the employees of the forest department. The learned counsel placed on the record of Special Civil Application No. 8259 of 1996 with list dated 7.4.2004 copy of affidavit-in-reply filed in Special Civil Application No. 600 of 1995, and government resolutions including resolution dated 29.10.1988 on the basis of which he argued that since the benefit of the government resolution dated 17.10.88 was extended to 15 daily wagers of Bahuchraji Temple which was under the administration of the government similar benefit should be extended to all the daily wagers of the forest department and there was no justification for denying them similar treatment. The learned counsel argued that the Dolatbhai Parmar Committee was formed not only for the Public Works Department or the Roads & Buildings Division, but it was constituted in respect of all the departments of the government. It was also contended that the 2(p) settlement was reached on 1-10-1988 on the basis of which the employees of the forest department were also entitled to the benefit of the resolution. It was further argued that all the nurseries were of identical nature and there was no reason to discriminate between the daily wagers working in the nurseries of the forest department and those working under the State Government in the Directorate of Parks & Gardens. 7.1 The learned counsel relied upon the following decisions in support of his contentions :

[a] The decision of the Supreme Court in Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others, , was cited to point out that it was held by the Supreme Court that the classification of employees into regularly recruited employees and casual employees for the

purpose of paying less than the minimum pay payable to employees in the corresponding regular cadres particularly in the lowest rungs of the department where the pay scales are the lowest is not tenable, and there was no justification for doing so. It was held in paragraph 7 of the judgement that: "If a person does not have the feeling that he belongs to an organization engaged in production he will not put forward his best effort to produce more. That sense of belonging arises only when he feels that he will not be turned out of employment the next day at the whim of the management." The Supreme Court held that non-regularisation of temporary employees or casual labour for a long period was not a wise policy, and directed the respondents to prepare a scheme on a rational basis for absorbing as far as possible the casual labourers who had been continuously working for more than one year in the Posts and Telegraph Department.

[b] The decision of the Supreme Court in *Des Raj and Ors Vs. State of Punjab and Ors*, , was cited to point out that, in paragraph 9 of the judgement, the Supreme Court had considered the report showing various activities of the Irrigation Department and had come to a finding that the functions of the Irrigation Department, subject to dominant nature, clearly came within the ambit of "industry".

[c] The decision of the Punjab & Haryana High Court in *Divisional Forest Officer, Social Forestry Project Vs. Presiding Officer, Industrial Tribunal and Another*, was cited for the proposition that even the government department discharging sovereign function can be considered to be an "industry", if there are units which are severable.

[d] The decision of the Supreme Court in *Krishi Utpadan Mandi Samiti v. Arvind Chaubey*, (2002) 9 SCC 549 , was cited to point out that the Supreme Court had observed in respect of a workman who was continued in service for more than sixteen years that, it was too late in the day for the appellant - *Krishi Utpadan Mandli Samiti* to contend that he should be treated as a temporary peon. The *Mandali Samiti* was directed to comply with the order of the labour court as confirmed by the High Court.

[e] The decision in *State of Gujarat v. Sendhaji S.Thakor*, reported in (1999) 1 GLR 513, was referred for pointing out that, as mentioned in paragraph 42 of the judgement, the question of challenge on the ground of violation of the equality clause under Articles 14 and 16 of the Constitution against resolution dated October 17, 1988 was kept open and the matter was remanded to the learned Single Judge who was to decide all the question on their own merits. In this decision, the Supreme court, in paragraph 32 of the judgement, observed that, reading of the said circular would makes it abundantly clear that its application is limited to the employees who were working for maintenance and reparation of construction work, and that it had nothing to do with the employees working in other departments including forest department if they were not concerned with the maintenance and reparation of the construction work. This Court held that

the said circular had nothing to do with the employees working in other departments including forest department if they were not concerned with the maintenance and reparation of the construction work. Since the employees concerned were not working in the maintenance or reparation department, the provision of the said circular cannot apply to them.

8. The learned advocate on record appearing in Special Civil Applications No.4715 of 2003 and 6430 of 2003 supplementing the contentions of the learned Senior Advocate contended that the forest department was rendering services which satisfied the human wants. It was submitted that the forest department was an industry as it supplied bamboos to the pulp and paper mills and wood to other industries. It also provided fuel wood. Moreover, herbal plants, medicines, honey and other forest produce were manufactured and marketed. It also carried research activities which were industrial activities. It was submitted that the plantation watchmen who were workmen of the forest department, were therefore employed in industry and the provisions of the said Act were attracted in their case. It was submitted that dominant function of the department was to conserve, protect and improve the forest department and take care of wildlife which all were services rendered to the community. It was submitted that, in number of cases, the department never raised the contention that it was not an industry and in fact, 183 plantation workmen were made permanent.

9. The learned counsel appearing in the Special Civil Application No. 4435 of 2001, submitted that the irrigation department was an industry, as held by the Supreme Court. It was submitted that the Division Bench of this Court in its decision in S.C.Thakor v. State of Gujarat reported in (2000)1 GLR 482 and the decision in State of Gujarat v. Deenaji Bidhaji Thakor reported in (2003)2 GLR 420, did not refer to Bangalore Water Supply case (supra) and were therefore not binding. It was further contended that the minimum wages were made applicable to the employees and if one labour law is made applicable, there is no reason why all other laws should not apply. It was submitted that several High Courts have held that the irrigation department is an industry. It was further argued that only the functions which cannot be done by a private individual can be sovereign functions.

9.1 The learned counsel relied upon the following decisions in support of his contentions :

[a] The decision of the Supreme Court in Patel Ishwerbhai Prahladbhai and Others Vs. Taluka Development Officer and Others, , was cited to point out that, where certain tube-well operators were working in the District and Taluka Panchayats, they were held to be in the scheduled employment as contemplated by section 2(g), and would be entitled to minimum wages and other benefits under the Act, such as, payment for overtime work, when minimum wages had been fixed in respect of tubewell operators generally even though they were government servants and that benefit was not extended to the operators concerned. (See paragraph 7).

[b] The decision of the Supreme Court in *The Corporation of the City of Nagpur Vs. Its Employees*, , was relied upon in support of the proposition that the definition of "industry" u/s 2(j) of the Act was very comprehensive.

[c] The decision of the Supreme Court in *Executive Engineer (State of Karnataka) Vs. K. Somasetty and others*, , was cited to point out that, though it was held that, it was a well settled legal position that Irrigation Department and Telecommunication Department were not an industry within the meaning of the definition under the Act, the Supreme Court had not taken note of its earlier decisions particularly, *Des Raj* (supra) and the decision in *Soma Setty* (supra) would be no longer good law in view of the subsequent decision of the Supreme Court.

[d] The learned counsel referred to the decision of the Madhya Pradesh High Court in *Madhya Pradesh Irrigation Karamchari Sangh v. State of Madhya Pradesh*, reported in 1972 I LLJ 374, holding that Chambal Hydel Irrigation Project of the Government of Madhya Pradesh was an industry u/s 2(j); the decision of the Bombay High Court in *Executive Engineer, Yavatmal Medium Project Division v. Anant, Son of Yadao Murate*, reported in 1999 I LLJ 155, holding that the Projects in question undertaken by the Irrigation Department of the State of Maharashtra fall within the definition of industry u/s 2(j) of the Act; decision of the Madhya Pradesh High Court in *S.K. Sarawagi and Co. Pvt. Ltd. Vs. Dock Labour Board and Another*, , holding that Central Public Works Department is an industry; decision of the Calcutta High Court in *State of West Bengal and Others Vs. Nani Gopal Jana and Others*, , holding that even in departments of the Government discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2(j) which defines industry under the Industrial Disputes Act; decision of the Rajasthan High Court in *State of Rajasthan v. Ram Chandra*, reported in 2003 LAB I.C. 8, holding that the Scheme of the forest department for creation of a park was not a part of inalienable sovereign function and such department of forest can be treated as industry; decision of the Rajasthan High Court in *Head Mistress (Ms. P. D'Souza), Fatimadevi English High School and Others Vs. Nymphia Pereira (Smt.) and Others*, , holding that the activities undertaken by the forest department in the State of Rajasthan cannot be regarded as a part of sovereign function of the State and the Department of Forest in the State of Rajasthan was an industry within the meaning of section 2(j) of the Act; the decision of the Allahabad High Court in *Zonal Chief Engineer, Uttar Pradesh Jal Nigam, Gorakhpur v. Presiding Officer, Labour Court, Gorakhpur*, reported in 2001(4) LLN 1190, holding that Uttar Pradesh Jal Nigam was an industry within the meaning of Section 2(j), and the decision of the Karnataka High Court in *Tungabhadra Board, Tungabhadra Dam, Hospet, Bellary District v. Easu and another*, reported in 1999 VI LLJ 1051, holding that Irrigation Department of the Government was an industry.

10. The learned counsel appearing in Special Civil Applications No.8621 of 1996

and Special Civil Application No. 595 of 2002, who addressed us on the questions referred, submitted that the forest department satisfies the triple test laid down by the Supreme Court in Bangalore Water Supply case. He argued that the word "commodity" was applicable to both goods and services. The Commodity has use or utility value and exchange value in absence of which it would not partake form of commodity. Use value does not depend upon the exchange value but upon needs of a kind or thing. Exchange value is dependedant up labour consumed on producing the commodity. It was argued that all services rendered by the government would necessarily fall within the wider definition of industry, save and except such functions as are excluded because of their being sovereign functions. All other activities will necessarily be industry. He submitted that all activities both sovereign as well as non-sovereign will be satisfying the triple test and it is because of the exception indicated by the Supreme Court that sovereign functions will be taken out of the ambit of the definition of industry. It was submitted that even from the affidavit-in-reply filed by the department, it is evident that services were provided by the forest department. The activities of the forest department were not excluded by any law from the purview of the definition of industry though some of the employees who may be governed by the Rules framed under Article 309 of the Constitution will not be governed by the Act in respect of the matters covered under the Rules. It was submitted that, for the production and distribution activity, no investment of capital was necessary, nor was any profit motive required. It was not necessary for services to be marketed or even paid for in cash, for considering whether the activity that produce, that service is an industry. It was argued that if any Department puts a plea of sovereignty, the onus will be on the Department.

10.1 In support of his contentions, the learned counsel relied upon the following decisions :

[a] The decision of the Supreme Court in Agricultural Produce Market Committee Vs. Shri Ashok Harikuni and Another Etc., , was cited to point out that the Supreme court has held in paragraph 21 of the judgement that, what was approved to be "sovereign" was defence of the country, raising armed forces, making peace or war, foreign affairs, power to acquire. The Supreme Court held that, every governmental function need not be "sovereign" and the State activities are multifarious, from the primal sovereign power, which exclusively inalienably could be exercised by the sovereign alone, which is not subject to challenge in any civil court, to all the welfare activities, which would be undertaken by any private person. It was held that the Court should examine the statute to sever one from the other by comprehensively examining various provisions of that statute.

[b] The decision of the State of Gujarat and Others Vs. Pratamsingh Narsinh Parmar, , was referred to for pointing out that, in paragraph 5 of the judgement, all that was said by the Supreme Court was to the effect that it would be for the person concerned who claims the activity to be an industry, to give positive facts

for coming to the conclusion that it constitutes "an industry", and the Supreme Court not finding any assertion of such facts, set aside the decision of the High Court that forest department was an industry. According to the learned counsel, it cannot be said from this decision that the Court held that the forest department was not an industry.

[c] The decision of the Supreme Court in His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, , was cited to point out that it was held in paragraph 1036 of the judgement that the directive principles are necessary for the upliftment and growth of the industry in the country.

11. The learned counsel, who argued as an intervener, contended that the Irrigation Department was an "industry" and he relied upon paragraphs 3, 9 and 30 of the decision of the Supreme Court in Des Raj's case (supra). He submitted that the decision of this Court rendered in P.W.D. Employees' Union v. State of Gujarat, reported in 28(2) GLR 1070, was confirmed by the Supreme Court in Shah Babu Lal v. Mela Ram, (2002) 10 SCC 147 , and it was held that Public Works Department was an industry. It was submitted that any service that benefits community at large is service in the context of industry and preservation or conservation of forest is an industry. The learned counsel submitted that, in Soma Setty's case (supra), the earlier decision of the Supreme Court in Des Raj (supra) was not considered and it was therefore per incuriam. Moreover, Somasetty case did not by itself lay down any ratio or statement of law that irrigation department was not industry.

11.1 The learned counsel relied upon the following decisions in support of his contentions :

[a] The decision of the Supreme Court in The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others, was cited to point out that, in paragraphs 13 and 14 of the judgement, the Supreme court has, while considering the provisions of section 2(j) of the Act, held that the absence of investment of any capital would not make a material difference to the applicability of section 2(j), and observed that it sounds incongruous and self-contradictory to suggest that activities undertaken by the Government in the interest of socio-economic progress of the country as beneficial measures should be exempted from the operation of the Act which in substance is a very important beneficial measure itself.

[b] The decision of the Supreme Court in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, , was cited and a reference was made in paragraphs 77, 80, 87 and 88 of the judgement, in which the Court considered the ambit of the provisions of section 2(j) of the Act.

[c] The decision of the Supreme Court in Executive Engineer v. Madhukar Purshottam Kolharkar, (2000) 2 LLJ 1410SC was cited to point out that Central Public Works Department was held to be an industry u/s 2(j) of the Act.

[d] The decision of the Supreme Court in *Shah Babu Lal v. Mela Ram*, (2002) 10 SCC 146 was cited to point out that the Supreme court held that the Public Works Department was an industry following the decision in *Bangalore Water Supply case* (supra).

[e] The decision of the Supreme Court in *Parmanand Vs. Nagar Palika and Others*, was cited to point out that the Engineering Department of the Municipality was an industry and inclusion of Municipalities in the Constitution by itself would not change this position.

[f] The decision of the Supreme Court in *Babu Parasu Kaikadi (Dead) by Lrs. Vs. Babu (Dead) through Lrs.*, was cited for the proposition that the later decision which does not notice earlier binding precedent of a coordinate Bench was rendered per incuriam. It was held that the Supreme Court is bound to follow the earlier judgement which is precisely on the point in preference to the later judgement which was rendered without adequate argument at the Bar and also without reference to the mandatory provisions of the Act.

[g] The decision of the Supreme Court in *Mehboob Dawood Shaikh Vs. State of Maharashtra*, was cited for the proposition that the judgement should be understood in the light of the facts of that case and no more should be read into it than what it actually said.

[h] The decision of this Court in *P.W.D. Employees' Union v. State*, reported in 28(2) GLR 1070, was cited to point out that it was held that the construction of dams and allied activities in connection therewith was a welfare activity or economic adventure undertaken by the government as contradistinguished from sovereign functions *stricto sensu*. Merely because the employer of the petitioners is the State Government, it cannot be said that they would be beyond Industrial Disputes Act, and not entitled to the benefits of the Act. The Court following the decision of the Supreme Court in *Bangalore Water Supply case* (supra), held that the petitioners who were working in the P.W.D. (Irrigation) of the state Government were entitled to the benefits of the said Act since the activities undertaken by the Irrigation Department are "industry" within the definition of the term "industry" in section 2(j) of the Act and they cannot be said to be in discharge of sovereign functions. (paragraph 19 of the judgement).

[i] The decision of the Supreme Court in *M.C. Mehta Vs. Kamal Nath and Others*, was cited to point out that the Supreme Court held in paragraphs 8 and 9 of the judgement that, Article 48-A and Article 51-A(g) have to be considered in light of the Article 21 of the Constitution and the Court in the matter of enforcement of right under Article 21, can award damages for victims who have suffered by such violation.

12. We have allowed the party-in-person intervener, who said that he was a trade union leader, to make his submissions. The intervener said that he was a member of Rashtriya General Workers Union, Bhavnagar and submitted that he only wanted to refer to the decisions of the Supreme Court, namely, *Krishena*

Kumar and Others Vs. Union of India and others, [paragraphs 17 to 19 and 30]; State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, ; Government of India v. Workmen of State Trading Corporation [(1998) SCC 329] [paragraph 4]; Uptron India Ltd. v. Shammi Bhan [(1998) SCC 1601] [Paragraphs 22 and 23]; Ashwani Kumar v. U.P.S.C., reported in (2004) SCC 95 [paragraphs 10, 11, 12 and 13]; U.P. Drugs & Pharmaceuticals Co. Ltd. v. Ramanuj Yadav and Ors., reported in (2004) SCC 46 and State Bank of India, Madras Vs. Central Government Industrial Tribunal, Madras and others, [para 8 to 13]. His only oral submission made before us was in the context of the provisions of Article 141 of the Constitution, that the pronouncement of law by a Bench of the Supreme Court was binding on the Bench of the same or smaller number of Judges. He further submitted that the decision neither expressed nor founded on reasons or on consideration of the issues, cannot be deemed as law declared under Article 141 of the Constitution.

13. The learned Additional Advocate General appearing for the respondents authorities submitted that the functions of the Department of Forest & Environment as a whole, were in the nature of sovereign functions of the State i.e. constitutional functions and therefore, the said department cannot fall within the four corners of the definition of the term "industry" u/s 2(j) of the Act. It was submitted that, under Article 48A of the Constitution, the State was enjoined with a duty to protect and improve environment and to safeguard the forests and wildlife. It was the duty of the State to maintain ecological balance and hygienic environment and to take adequate measures to promote, protect and improve the environment. He relied upon paragraphs 14, 17 and 43 of the decision of the Supreme Court in T.N. Godavarman Thirumalpad (through K.M. Chinnappa) Vs. Union of India (UOI) and Others, , in support of this proposition. He further argued that the State was a trustee on the basis of the public trust doctrine and had a constitutional duty to protect natural resources like forests, and that, it would be wholly unjustified to make them a subject of private ownership. He relied upon the paragraphs 24, 25, 32 to 34 of the decision of the Supreme Court in M.C. Mehta Vs. Kamal Nath and Others, . He also submitted that the State or local regulations for the protection of the natural environment or the ecology of an area were within the scope of the police power. He then argued that the executive power of the State was vested in the governor and it was co-extensive with the legislative powers of the State, and that the Governor under Article 166(3) made Rules of Business and the matters which were to be transacted by the department were enumerated in such Rules. He pointed out the matters which were allocated to the Forest and Environment Department from the Rules of Business. He also submitted that the department of forest had three main areas of functioning, viz. (i) territorial forest, (ii) wildlife, and (iii) social forestry. The idea behind social forestry was to increase the green cover outside the territorial forest area, which was neither recreational nor educational nor employment oriented. As regards nurseries, it was submitted that the purpose underlying their maintenance was to attend to the objective of development of

forest and green cover, and not fulfillment of any educational and recreational aspirations of the people. It was submitted that, under the National Forest Policy, 1988, the principal aim was to ensure environmental stability and maintenance of ecological balance including atmospheric equilibrium which are vital for sustenance of all like forms, human, animal and plant. He referred to various legislative enactments having bearing on the prohibition and restriction as regards owning and using forest and the statutory rules thereunder, and as many as sixteen different statutory rules framed under Article 309 applicable to class III and IV employees of the Forest and Environment Department. The learned counsel referred to the decision of the Supreme Court in Bangalore Water Supply & Sewerage Board (supra), particularly paragraphs 18, 73 and 74 in support of his submission that the services which were governed by separate rules and constitutional provisions, such as, Articles 310 and 311, should, strictly speaking, be excluded from the sphere of industry by necessary implication. He referred to the decision of the Hospital Mazdoor Sabha (supra), more particularly paragraph 14 of the judgment, for the proposition that the activities of the government which can properly be described as regal or sovereign activities were outside the scope of section 2(j). The learned Additional Advocate General heavily relied upon the decision of the Supreme Court in State of Gujarat and Others Vs. Pratamsingh Narsinh Parmar, , in which, it was held that, ordinarily a Department of the government cannot be held to be an industry and rather it was a part of the sovereign functions. It was submitted that the activities of the forest department did not satisfy the third test of the triple test indicated in Bangalore Water Supply's case. He pointed out that the meaning of the word "service" from the provisions of Section 2(z) of the Trade Marks Act, 1999, Section 2(1)(o) of the Consumers Protection Act, 1986, Section 2(r) of the Monopolies & Restrictive trade Practice Act, 1969. He submitted that the services contemplated u/s 2(j) of the Act were required to be material in nature and analogous to trade and/or business and relied upon paragraph 12 and 17 of the decision of the Supreme Court in Hospital Mazdoor case (supra). He argued that all the activities of the department of forest and environment are so inter - integrated and interdependent that there was a functional integrity between them and none of the activities of the said department is severable. It was submitted that even if any of the activities of the department of forest were severable, it was required to be shown by leading evidence and the same could not be decided by filing affidavits and relied upon paragraph 16 of the decision of the Supreme Court in Workmen of The Straw Board Manufacturing Co. Ltd. Vs. Straw Board Manufacturing Co. Ltd., . It was submitted that on the strength of the budget publication, no conclusion could be reached as regards the severability of various activities of the Department of Forest and Environment. As regards the government resolution dated 17-10-1988, it was argued that the resolution was not applicable to the department of forests and environment. He relied upon paragraph 32 of the decision of the Gujarat High Court in State of Gujarat v. Sendhaji Thakore, reported in 1999(1) GLR 513 in support of his contention. He also referred to the decision of the learned Single Judge rendered on 22-3-2001

in Special Civil Application No.3325 of 2000 and other cognate matters in which it was held that the resolution dated 17-10-1988 was not applicable as it was subsequently cancelled by resolution dated 22-12-1999. It was argued that the resolution dated 17.10.1988 was applicable equally to a particular class of daily wagers who were engaged in the work of maintenance & repairs of constructions and there was no discrimination amongst those who were similarly situated. REASONING :

14. There was a virtual tug of war in the arguments over the question whether the forest and irrigation departments of the State are its industrial activities, the petitioners' counsel and the intervening counsel contending that all non-sovereign social welfare activities of the State should be considered to be industrial activities of the State and the government counsel emphasizing that the constitutional functions of the State of undertaking social welfare activities under the directive principles of State policy would not amount to industrial activities.

14.1 The word "industry" as defined in Section 2(j) of the Act reads as under :

"Section 2(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".

14.2 In Bangalore Water Supply Case (supra), the Supreme Court in paragraph 161 of the judgement, indicated the following triple test for finding out whether an enterprise was prima facie an "industry" within the meaning of section 2(j) :

"(i) the activity of the enterprise is systematic, (ii) the activity is organized by co-operation between the employees and the employer, and (iii) the organized activity is for the purpose of production and / or distribution of goods and services calculated to satisfy human wants.

14.3 The Supreme Court has, however, cautioned that although Section 2(j) uses words of widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself. An "undertaking" contemplated in the definition of "industry" must suffer a contextual and associational shrinkage as explained in Banerji and in this judgement; so also, service, calling and the like.

15. The modern State has multifarious activities. Apart from the legislative and judicial functions of the State, executive powers of the Union and the States conferred on the President and the Governors, are essential for implementing the legislative provisions. In the matters on which no legislation exists, the executive power can be exercised in the field in which there is power to legislate. The constitutional provisions indicate the mode of exercise of the executive powers of the Union and the States. The socio-economic welfare measures can be achieved by suitable legislation prompted by the directive principles of State policy contained in part IV of the Constitution or by executive or administrative decisions, even in the absence of an enactment on the subject. The wide range

of governmental functions covers purely administrative functions concerned with the management of the State organization as per the constitutional and legislative norms, as also, establishing agencies bodies or units, which undertake the work of production and / or distribution of goods and services. Every governmental function of the State which is not a primary inalienable constitutional function need not necessarily be an industrial activity.

16. It was, however, urged on behalf of the petitioners that all governmental functions are either sovereign and non-sovereign and every non-sovereign activity will be producing goods or services to satisfy human wants. It was argued that the activity of protecting and preserving forest and all the activities of the irrigation department amounted to rendering services to the people and satisfied their wants and desires to have an agreeable environment and adequate supply of forest produce in a regulated manner as well as the irrigation facilities.

16.1 The triple ingredients spelt out by the Supreme Court in Bangalore Water Supply case (see paragraphs 37 to 40 and 161 of the judgement) are to be cumulatively read with the emphasis on the purpose of the activity being, the production and / or distribution of goods and services calculated to satisfy human wants and wishes. The definition of industry postulates activity that is carried on by co-operation of the employer and the workmen. Workman as defined in section 2(s) means any person employed in an industry to do the work of the nature specified therein. Such co-operative effort between the employer and workmen is for the production or distribution of goods and services. The word "undertaking" in the first part of the definition, and industrial occupation or avocation in the second part, obviously mean much more than what is ordinarily understood by trade or business as held in Banerji (supra) approvingly cited in paragraph 53 of the judgement in Bangalore Water Supply. Thus, "industries" will cover branches of work that can be said to be analogous to carrying out of a trade or business. The "limitation role" of Banerji was noticed in paragraph 60 of the judgement in Bangalore Water Supply by observing that the expression "analogous to trade or business" cuts down "undertaking" a word of fantastic sweep. In paragraph 65 of the judgement, the Court warned against the literal latitude of the words in the definition in the following terms :

"Even here, we may warn ourselves that the literal latitude of the words in the definition cannot be allowed grotesquely inflationary play but must be read down to accord with the broad industrial sense of the nation's economic community of which labour is an integral part. To bend beyond credible limits is to break with facts, unless language leaves no option. Forensic inflation of the sense of words shall not lead to an adaptational breakdown outraging the good sense of even radical realists. After all, the Act has been drawn on an industrial canvas to solve the problems of industry, not of chemistry. A functional focus and social control decideratum must be in the mind's eye of the Judge." The Court held that if the nature of the activity is para-trade or quasi-business, it is of no moment that it is undertaken in the private sector, joint sector or labour sector, it is "industry".

17. The fact that Central or State Governments can undertake industrial activities is envisaged by the Act itself which defines in Section 2(g)(i) "employer" in relation to an industry carried on by or under the authority of any department of the Central Government or a State Government, the authority prescribed in this behalf or when no authority is prescribed, the Head of the Department. An industry may be carried on "by" the government department itself or "by authorizing" some entity to carry it on. When an undertaking or a unit of a government department carries on any activity, which is an industry, through a unit or an undertaking which is severable from the other activities, the unit carrying on the industrial activity will be deemed to be a separate industrial establishment or undertaking. If the predominant activity or each of the predominant activities carried on by or under the authority of the government department is an industry and the other activities of the department are not severable from the predominant activity, the entire undertaking or as the case may be, unit thereof shall be deemed to be an industrial undertaking by virtue of the definition of "industrial establishment or undertaking" in section 2(ka).

18. Therefore, the government, in its socio-economic activities undertaken for the welfare of the people may indulge in industrial activities by setting up undertakings or units for the production or distribution of material goods or services. Every governmental activity, however, need not be undertaken for production or distribution of goods and services which are essentially economic activities in nature. For example, in exercise of its power, to hold property, it may have to engage a big task force to safeguard the government properties with no yield of any goods or services from such activities. The government may set up its units for the purpose of administration of the affairs of the government in which no question of production or distribution of goods or services is involved. Many of the activities of the government, which are not in exercise of its primary inalienable functions, may not produce any goods or services in the economic sense and would therefore not be industry just because the activity does not fall in the slot of sovereign or regal functions. The triple ingredients test stands on its own without reference to the type of employer who undertakes the activity. The question of considering whether any exception applies would arise only when the activity satisfies the triple ingredient test and is identified as "industry" within the meaning of section 2(j).

19. An activity systematically undertaken with co-operation between employer and employees, but which is not undertaken for the production and/or distribution of goods and services calculated to satisfy human wants and wishes will not satisfy the third ingredient of the triple test laid down by the Supreme Court in Bangalore Water Supply and such undertaking will not be "industry" irrespective of who the employer is and there would be no need to invoke any of the exceptions indicated in the guidelines laid down in paragraph 161 of that judgement.

20. The science of economics deals with, at micro level, consumption production

and exchange which are basic human activities. The production of goods and services is calculated to satisfy human wants which cover all possible human needs and desires. A good or service when consumed satisfies a want, giving the consumer satisfaction or utility.

20.1 Goods are objects which give direct satisfaction to consumers and they may be single use goods that are used up completely when consumed, such as, food, petrol, ink, electricity; intermediate goods that are re-usable but last only a short time, such as, clothes, tyres, pens, batteries; and durable goods that are re-usable over a long time and are usually expensive, such as, cars, furniture etc.

20.2 In economics, a service is the non-material equivalent of a good. Service provision is an economic activity that does not result in ownership and this is what differentiates it from providing physical ownership of goods. It is claimed to be a process that creates benefits by facilitating either a change in customers, or change in their physical possessions, or a change in their intangible assets. By providing some level of skill, ingenuity and experience providers of the service participate in an economy without the restrictions of carrying stock (inventory) or the need to concern themselves with bulky raw materials. Examples of economic services are construction, data processing, imparting education, consulting, health provision, hair-dressing, banks, building societies, electrician, plumbing etc.

20.3 Material services produced for satisfying the wants and desires of consumers are thus not objects but are intangible sources of consumer satisfaction. Services that are personal or professional usually involve direct contact with one provider e.g. doctor, dentist, solicitor. Trade services, however, usually involve an organization e.g. bus service, cinema houses, insurance service.

20.4 Production as understood in economics is providing of goods and services and has three main aspects, namely, inputs, process and output, which is also called product. The production processes for the output of goods in the primary economic sector would be extraction i.e. taking food, raw materials and energy from the land and the illustrations of such activity involved in extraction can be found in hunting, fishing, farming and mining. The output of goods in the secondary economic sector would be by construction and manufacturing. Construction will be the forming of structures from extracted material, such as, building of roads, railways, docks, ships, houses etc. Manufacturing would be processing of raw materials into finished goods, such as, making of clothes, cars, TVs, drinks. The output of services comes third in order in the economic sector called tertiary sector.

20.5 The production processes involved, when the type of output is services, can be classified as distribution services, commercial services and direct services. Distribution (trade) is undertaken by moving goods to consumers in the form, quantities, locations and at the times desired, by undertaking activities such as,

wholesaling, retailing, export and import. Commercial services facilitate efficient production and distribution of goods and the activities involved are transport, banking, communications, advertising etc. Direct services satisfy consumer wants directly e.g. the activities of healthcare, education, entertainment etc.

21. The government as an economic agent has a role of regulator of economy and its area of choice is as to how much and in what direction to intervene, keeping in view the optimum welfare of the society. In mixed economics, the micro economic role of government is to regulate private markets and produce output through public sector, to influence allocation of resources. Under Article 39(b) of the Constitution, the State is required to direct its policy towards securing that ownership and control of material resources of the community are so distributed as best to subserve the common good. Under Article 46 of the Constitution, the State shall, inter alia, promote with special care the economic interests of the weaker section of the people.

21.1 The executive power of the Union and of each State extends to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose as provided in Article 298 of the Constitution. The State Government, therefore, is empowered to undertake the activities in the nature of any business, trade or manufacture or activities analogous thereto that satisfy the triple ingredients enumerated by the Supreme Court in paragraph 161(I)(a) of the judgement in Bangalore Water Supply case. Therefore, when the activity of production or distribution of goods or services to satisfy human wants is carried on in exercise of its executive powers by the State or under the authority of the State Department, only the unit or undertaking that carries on such economic activity will be industry within the meaning of section 2(j). This is far from the generalization attempted on behalf of the petitioners that all non-sovereign activities of the State should be treated as industrial activities. The department or its unit or undertaking should be productive of goods and services to satisfy the third element of the triple test, otherwise, it will not be an industry, irrespective of the nature of activity being of non-sovereign or social welfare character.

22. The contention that all welfare activities undertaken by the government will be "industry" within the meaning of section 2(j) was sought to be canvassed on the basis of the guideline contained in paragraph 161 of the judgement in Bangalore Water Supply at clause (IV)(b) under the head "the dominant nature test" which has been re-produced hereinabove, as per which, notwithstanding the previous clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by the government or statutory bodies. This would mean that when the activity of the government satisfies the triple test and is industry u/s 2(j), only the sovereign functions i.e. primary inalienable constitutional functions will be exempted. Such exemption will not apply to the welfare activities or economic adventures undertaken by the State and which satisfy the triple ingredient test and are

industries u/s 2(j). By no stretch of imagination can this clause be read to mean that all welfare activities or economic adventures undertaken by the government or statutory bodies, ipso facto, fall in the definition of "industry" even if they do not satisfy the third ingredient of "production/distribution of goods and services calculated to satisfy human wants or wishes". We, therefore, cannot accept the extreme proposition canvassed on behalf of the petitioners that all non-sovereign functions of the State, including welfare activities, by themselves constitute "industry". We hold that, to qualify to be an "industry", any governmental activity must necessarily satisfy all the three ingredients including the important ingredient reflecting the purpose of the activity namely, "for the production and / or distribution of goods and services calculated to satisfy human wants and wishes" as is understood in the economic sense indicated above in the context of which the guideline is obviously laid down. In Bangalore Water Supply, the Supreme Court took note of the fact that the words in the definition of "industry", "cannot be allowed grotesquely inflationary play but must be read down to accord with the broad industrial sense of the nation's economic community of which labour is an integral part". (See paragraph 65 of the judgement).

23. Referring to Article 6 of the International Labour Organization Convention No.98 concerning the Application of the Principles of the right to organize and to bargain collectively, in which it was stated that "the convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as precluding their rights or status in any way", the Supreme Court held in paragraph 68 of the judgement : "Thus, it is well recognized that public servants in the key sectors of administration stand out of the industrial sector." Quoting from "Freedom of Association", Second Edition, 1976, which is a digest of Decisions of the Freedom of Association Committee of the Governing Body of the I.L.O., the Supreme Court in paragraph 69 of the judgement noted the distinction between civil servants employed in various capacity in government ministries or comparable bodies on the one hand and other persons employed by the government, by public undertakings or by independent public corporations. In paragraph 73 of the judgement, the Court reiterated that even in absence of legislative provision expressly or by necessary implication, excluding the operation of the Industrial Disputes Act, 1947: "It may indubitably be assumed that the key aspects of public administration like public justice stand out of the circle of industry. Even here, as has been brought out from the excerpts of I.L.O. documents, it is not every employee who is excluded but only certain categories primarily engaged and supportively employed in the discharge of the essential functions of constitutional government. In a limited way, this head of exclusion has been recognized throughout". It will be noticed that in Bangalore Water Supply, the Supreme Court was not concerned with those categories of employees who particularly come under Departments charged with the responsibility for essential constitutional functions of the government. (See paragraph 74). It was, however, stated that if there are

industrial units, severable from the essential functions and possess an entity of their own. It may be plausible to hold that the employees of those units are workmen and those undertakings are industries.

23.1 The High Court of Australia in the *Queen v. Holmes* [1977] 140 CLR 63, dealing with the question relating to clerical and administrative employees of the Commissioner for Motor Transport of the state of New South Wales, held that, "The clerical and administrative work of such employees in the Commissioner's employment is not in its nature industrial, however, much in some other employment, clerks and administrative officers may be, in industry either directly or indirectly. Further, the functions of the Commissioner are clearly governmental and non-industrial., it cannot properly be said that those functions are incidental to the transport industry in any relevant sense". The functions of the Department, as noted by Gibbs J., were performed under a number of statutes of the State of New South Wales, such as, registering private motor vehicles, licencing of those who drive them under the Motor Traffic Act, 1909, licensing persons who teach the driving of motor vehicles under Motor Vehicles Driving Instructions Act, 1961, licencing public motor vehicles etc. under the State Transport (Co-ordination) Act, 1931, licensing of Commercial Aircraft under the Air Transport Act, 1964. The other functions of the Commissioner for Motor Transport, which is a body corporate constituted under a statute, are promotion of traffic safety and collection of taxes. The Court noted that : "the Department itself does not provide transport services, it does not operate buses, trains or other public vehicles. The work of the employees concerned is the clerical and administrative work involved in the performance of the functions of the Department." Gibbs, J., after referring to the dictum of Dixon CJ, in *Exparte Professional Engineers Association* [(1959) (107) CLR 208], that, it would not be inconsistent (with the decision in that case) for the Commissioner to exclude officers "not in fact concerned with anything but bare administrative service to the State unconnected with any kind of construction work or with any other matter which might be regarded as providing a sufficient connection with operations that might be described as industrial within the meaning of section 51(xxxv)", quoted Latham CJ in *R.V. Commonwealth Court of Conciliation and Arbitration, Exparte Victoria* (1942) 66 CLR 488 as under : "No one would say that, in the ordinary sense of the word "industry", the public servant in one of the ordinary governmental departments was engaged in industry. Officers in the Lands Department and the Titles office and the Attorney General's Department, policemen controlled by the Chief secretary, are all doing useful and necessary work as employees of the State, but it would be misuse of words to describe them or their employer as engaged in "industry"".

The Court held, by majority, that the task of licensing, registration and formulating rules for governance and safety of traffic, cannot properly be described as industrial. The court examined the character of the activities of the employer and the functions which the employees were called upon to discharge and held that the duties performed by clerks and administrative officers

employed in the department of motor transport were only incidental to transportation in a remote and indirect way, and that, their duties were not in their nature industrial because, they stood "outside the whole world of productive industry and organized business". The question whether one activity is incidental to or ancillary to another, is one of degree. For example, the duties of traffic police and of magistrate sitting in the traffic court might in one sense be said to be ancillary to transportation, but nevertheless "it could confidently be said that their activities are not directly connected with transportation".

23.2. Government cannot be regarded as merely a closed category of indispensable and regal functions. The description "governmental" is wider than executive or administrative. Executive or administrative functions are at the heart of the government. They are not industrial activities; but a governmental industry is a well known entity. That does not mean that the management of such an industry is itself an industrial activity; it is, on the contrary, an administrative function. In *The Queen v. Coldham; Ex parte Australian Social Welfare Union* [(1983) 153 CLR 297], the High Court of Australia held that it was unnecessary to consider whether or not disputes between the State or State authority and the employees engaged in the administrative services of the State are capable of falling within the constitutional conception "industrial dispute" within the meaning of section 51(xxxv) of the Australian Constitution. It was held that : "It has been generally accepted that the power conferred by Section 51(xxxv) is inapplicable to the administrative services of the State". (paragraph 31 of the judgement). 23.2 The State as an employer stands in a unique position with its aim of serving its public rather than of private gain. The State, within constitutional constraints, exercises sovereign power over those whom it employs. This is evident from the pleasure doctrine in relation to the tenure of office as incorporated in Article 310 of the Constitution subject of course to the constitutional safeguards provided under Article 311, Article 14 and 16 of the Constitution.

23.3 The predominant aspect of employment by government in a State, particularly in public service is not the existence of an industry assuming one to be identifiable, or a particular profession, trade or calling. Rather, it is the governmental nature of employment. The employment relationship between the State and its employees is not the same as the relationship between a private employer and its employees. The difference was summarized by Kitto J. in *Attorney General for N.S.W. v. Perpetual Trustee Company* (1952) 85 CLR 237 , in the following terms, as quoted by Dawson J. in *Re Australian Education Union and Australian Nursing Federation and others* AIR (1995) 128 610 : (1995) 69 ALJR 451 : "It is true that the word "servant" is commonly used in such expressions as "public servant", "civil servant" and "servant of the Crown"; but the very qualifying words themselves point to the essential difference. They lift the word "servant" into a new and very different context; they emphasize that the services which flow from the relationship are of a public character, and are not owed to any individual for the advancement of his own concerns. In so far as

the Executive may be entitled to insist upon their performance, it is for that reason only that the Executive is the organ of the State invested with that function. As Lord Esher MR said in *Dunn v. The Queen* [(1896) 1 QB 116] "All service under the Crown itself is public service all public service under the Crown is for the public benefit"; and the Court of Appeal held in that case that it was the public policy of the country - "the public interest" as Lord Herschell said [(1896) 1QB 116] that made it necessary to import into contracts of employment in the service of the Crown (in the absence of statutory provision to the contrary) a term entitling the Crown to determine the employment at its pleasure. The service of the Crown and private service, despite their points of resemblance, belong, therefore, to different fields of law. The Crown has its own peculiar rights, powers and responsibilities in connection with the conduct of the public affairs of the State; and it is, I think, a mistake to try to force the relationships into which the Crown enters with its subjects for the conduct of those affairs into categories established in the domain of private law, which, by their nature and their history, are appropriate only to relationships between subjects."

23.5 It is open to the Parliament to make law which governs the State's relations with its employees. Articles 309 to 311 of the Constitution of India, the enactments dealing with the defence forces and other legislation dealing with employment under statutory bodies may, expressly or by necessary implication, exclude the operation of the Industrial Disputes Act, 1947, as held by the Supreme Court in *Bangalore Water Supply (supra)* [paragraph 73 of the judgement]. In paragraph 18 of the judgement, the Court noted that the services which are governed by separate rules and constitutional provisions, such as, Articles 310 and 311 should, strictly speaking, be excluded from the sphere of industry by necessary implication. In paragraph 19, it was observed: "If express rules under other enactments govern the relationship between the State as an employer and its servants as employees, it may be contended, on the strength of such provisions, that a particular set of employees are outside the scope of the Industrial Disputes Act for that reason". A Division Bench of this Court, to which one of us was a party, in *State of Gujarat vs. Saurashtra Mazdoor Sangh* [Special Civil Application NO.8280 of 1997, decided on 14-7-2003], while considering the ambit of the jurisdiction of the Industrial Tribunal in the context of the rules made under Article 309 of the Constitution, held in paragraph 8 of the judgement as under:- "If the rules framed under Article 309 of the Constitution are ignored and the Tribunal is authorized to change them in the above manner, then a startling unconstitutional situation will arise by enabling the Industrial Tribunal to virtually exercise the power under Article 309 by changing the pay-fixation done under the rules made by the Governor or the President and by subjecting the power to regulate service conditions conferred by Article 309 on the Legislature and / or the President or the Governor, to Section 33(1) of the Industrial Disputes Act, which requires express permission in writing of the authority including Industrial Tribunal, before which any proceeding is pending, for altering

service conditions under Article 309 to the prejudice of the workmen. Moreover, even for punishing such government employees for misconduct as per the Discipline & Conduct Rules that may have been framed under Article 309 of the Constitution, express permission of the Tribunal will be required. It is clear from the provisions of Part XIV of the Constitution and the provisions of the Industrial Disputes Act that the Tribunal has no jurisdiction to adjudicate an industrial dispute in a manner that would be in conflict with the operation of the rules framed under Article 309 of the Constitution and it will have no jurisdiction u/s 7A of the Industrial Disputes Act to affect the service conditions of the employees which are regulated by the rules made under Article 309 of the Constitution irrespective of definition of "workman" or "employer" under the Industrial Disputes Act. The Industrial Tribunal can decide disputes relating to matters under schedule 2 or 3 only within the framework of the rules made under Article 309 of the Constitution and not de hors the rules even when the dispute referred to it may be between workman and his employer, as defined under the Act. The Tribunal, therefore, has acted beyond its jurisdiction in substituting the pay-scale of Rs.290-480 of the employees of the Government Press, Rajkot, which was prescribed under the Gujarat Civil Services (R.O.P.) Rules, 1975 by the higher pay-scale of Rs.360-560."

24. When the activity of the government is an industry by virtue of its satisfying the triple ingredients test and is undertaken for the purpose of production and / or distribution of goods and services to satisfy the wants and desires of the consumers including the community wants, it is obvious that the State acts in the economic field. The constitutional functions of the government which are inalienable and primary in nature, would be an exception in the sense that even if the triple ingredients test is satisfied, the governmental activity which amounts to a sovereign function i.e. primary inalienable function, will qualify for exemption as declared in paragraph 161(IV)(b) of the judgement in Bangalore Water Supply. Even welfare activities or economic adventures undertaken by the State through its ruling organs are not exempted and would be within the purview of the definition of "industry" if, and only if, such activity satisfies the triple ingredients test.

25. There has been a considerable debate over the nature and extent of the sovereign power of the State. Internal sovereignty is the aggregate of the powers of internal control possessed by the ruling organs of a politically organized society by virtue of which it is paramount over all action within (See Jurisprudence by Dean Roscoe Pound Volume 2 Part 3, p.317). The Separate organs through which the sovereign acts may be held legally to certain spheres or modes of action on the basis of what has been called the mandate theory. When their acts are within the mandate given by the sovereign, mandated acts would be those of the sovereign. But when they acted outside of the authority conferred by the mandate, beyond the limits which it fixed, they acted as private individuals only and their acts were not those of the sovereign. The sovereign organs of the government set up or recognized by the Constitution are subject to

the control of the Constitution, as the supreme law of the land, in the sense that the courts will deny legal effect to what is done contrary to the constitutional prohibition or beyond the powers defined and limited in the fundamental law - the grund norm.

25.1 Sovereignty is a juristic conception. Sovereign would denote the ruling body of a political organized society - those who wield the supreme power, taken collectively. In the present context of constitutional democracy, the sovereign is that particular organ or system of organs which exercises its governmental functions. In a most complex organization of a federal democracy, there is an organization of exercise of the power of the politically organized society and those who act as officials do so as agencies of a system of organs of power.

25.2 The functions of the modern welfare State are not confined to what is called primary and inalienable sovereign functions, but extend to the whole range of socio economic and welfare activities undertaken pursuant to the directive principles as well as the contracts undertaken by the State. The executive power of the Union and of each State extends to carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose as provided by Article 298 of the Constitution, as noted above. The executive power of each State, shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament as provided under Article 298(b).

25.3 The executive power of the State is the residue of all powers other than its legislative and judicial powers. The executive power of the State vests in the Governor and is to be exercised by him through officers subordinate to him in accordance with the Constitution, as provided by Article 154. Such executive power of the State extends to the matters with respect to which the Legislature of the State has power to make laws, as indicated by Article 162.

25.4 The Governor in exercise of his functions acts on the aid and advise of the Council of Ministers under Article 163. The conduct of business of the government of a State is to be done in accordance with Article 166, which contemplates under clause (3) thereof, that the Governor shall make rules for the more convenient transaction of the business of the State and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under the constitution required to act in his discretion. Thus, various Departments of the State Government are constituted on the basis of the rules of business framed by the Governor for the purpose of transaction of the business of the government of the State for discharge of the executive powers of the State which extend to all matters with respect to which the Legislature of the State has power to make laws. Departments of the Government are thus by themselves not created for production, supply or distribution of goods or services as industrial establishments or undertakings, but are brought into existence as a convenient

mode of discharge of governmental functions. This is why ordinarily the entire department of the State Government would not be an "industry". The Supreme Court in *State of Gujarat and Others Vs. Pratamsingh Narsinh Parmar*, held in paragraph 5 of the judgement that: "Ordinarily, a Department of the Government cannot be held to be an industry and rather it is a part of the sovereign function". The exercise of sovereign functions usually manifests itself in the form of an act of administration, an exception to this is purely a fiscal or economic activity of the State in the sphere of the private law.

25.5 A Department of the Government though by itself is not industrial establishment or undertaking, may however, carry on by itself or under its authority an industry as defined by section 2(j) and the authority prescribed in that behalf or where no authority is prescribed, the head of that department will be "employer" in relation to such industry. The departments are usually in charge of bare administrative functions which have nothing to do with production or distribution of goods or services.

25.6 When executive functions are exercised in the name of the Governor by the Ministers / officers of a department set up under the rules of business, they have constitutional moorings. The departments are entrusted with a variety of subjects on which there may be laws enacted providing for various administrative functions e.g. licensing laws, registration laws, town planning laws, acquisition laws, which create a host of administrative authorities with attendant staff whose functions may be neither sovereign *stricto sensu* nor aimed at producing goods or services for satisfying wants of the consumers and their activities are neither para-trade nor quasi-business in nature. The departments of the government may, however, either by law or by executive directions under Article 298 of the Constitution create entity or unit of its own for carrying on trade or business or to undertake any activity for production and/or distribution of goods and services in the economic sense relevant to the context of industrial activities for satisfying consumer wants and wishes. It would, therefore, be absolutely necessary for the Court to examine the nature of the activity carried on by the department of the government in context of the functions for which it is created under the rules of business framed for convenient transaction of the business of the government and allocation of such business by the President under Article 77(3) or the Governor under Article 166(3), as the case may be. It would, therefore, be hazardous to jump to the conclusion that the entire Department of the government is an industry, merely on the basis of the nature of the activities of just one of the units or undertakings of the Department which unit or undertaking may have been set up for production and / or distribution of goods and services to satisfy human wants and needs.

26. Turning now to the Forest Department of the State of Gujarat, it is clear from the Gujarat Government Rules of Business, 1990 (as amended upto 15-12-1988, which were framed by the Governor in exercise of the powers conferred by clauses (2) and (3) of Article 166 of the Constitution of India), that it appears at

Srl.No.6 of Part I of the First Schedule created under Rule 4 of the said Rules under the name: "Forest & Environment Department". There are following seventeen subjects allotted to the Forest & Environment Department under the Rules of Business.

"[6] Subjects allotted to the Forest and Environment Department

1. Forest [See also entry No.8 under WR & WSD]
2. Protection of Wild Life.
3. National Parks.
4. Botanical Survey of India.
5. Zoological Survey of India.
6. Forest Ecology.
7. Marin Parks.
8. Marine Ecology System and Pollution of Environment.
9. Statutory actions for prevention of pollution [See also entry No. 15 under L & ED].
10. Industrial Pollution [See also entry No. 15 under L & ED].
11. Air and Water Pollution [See also entry No. 15 under L & ED].
12. Environment aspects of new human settlement [See also entry No. 15 under L & ED].
13. Ecology.
14. [i] All matters pertaining to appointments, postings, transfers, promotions, conduct, grant of leave, pension etc. in respect of Officers of the Indian Forests Service.
[ii] All matters pertaining to appointments, postings, transfers, promotions, conduct, grant of leave, pension etc. in respect of all Gazetted Officers [Other than those covered under entry No. 45 in the subjects allotted to the GAD] and Non-Gazetted Government Servants under the administrative control of the department.
[iii] all matters pertaining to grant of pension in respect of Class-I and II Officers of the Secretariat cadre under the administrative control of the Department, and
[iv] all matters pertaining to grant of leave to impose penalties as specified at serial numbers 1 and 2 of rule 6 of the Gujarat Civil Services [Discipline and Appeal] Rules, 1971 and to institute disciplinary proceedings for imposing penalties as specified at serial numbers 3 to 8 of the said rule 6 in respect of class-II Officers of the Secretariat cadre under the administrative control of the

Department [See also entry No. 45 under G.A.D.].

15. Works, Lands and buildings vested in, or in the possession of Government for the purpose of the State and assigned to Forest and Environment Department.

16. Inquiries and statistics for the purpose of any of the matters in this list.

17. Fees in respect of any of the matters in this list but not including fees taken in any court."

26.1 Every activity of the government in the Forest & Environment Department must necessarily fall in one or the other of the above subjects allocated to the department or be ancillary thereto. The subjects by themselves do not fully convey the nature of functions to be exercised by the said executive department of the government. All executive actions on any of these subjects will however have to conform to the constitutional provisions, the laws relating to these subjects and the administrative policies and guidelines laid down for the exercise of such functions. To brand the entire Forest and Environment Department which will have multifarious administrative functions under various laws on the subjects allocated to it as industry, merely on the basis of an isolated activity that may properly be industrial in nature due to its purpose being production and/or distribution of some goods or services for the consumers, will amount to dwarfing a gigantic governmental organization into a mere unit of economic activity. Therefore, it is essential to identify the nature of activity in which the employees are engaged in relation to the subjects allocated under the Rules of Business and only if it is found that the activity is undertaken by the government, in the unit of the employees concerned, for production and / or distribution of goods and / or services for satisfying wants of the consumers, such unit alone and not the whole Department can be described as industry.

26.2 To illustrate the above proposition, we may try to briefly undertake the exercise in the context of the subject of "Forest" at Srl.No.1. The Indian Forests Act, 1927 is the law relating to the forests, the transit of forest produce and the duty leviable on timber and other forest produce. Chapter II of that Act relates to reserved forests and empowers the State Government to constitute reserve forests in the manner provided thereunder. Section 4 provides for issuance of notification constituting reserved forest, section 5 provides for ban on accrual of forest rights after the issue of notification and provides that no fresh clearings for cultivation or for any other purpose shall be made in such land except in accordance with the rules. The powers of Settlement Officer are u/s 8 who is authorized to survey, demarcate and make a map. In all these activities, staff has to be engaged; but, can it be said that these activities would, by any stretch of imagination, constitute an undertaking of the forest department for production or distribution of goods or services to the consumers. There would be innumerable such activities, which are in no sense economic activities aimed at production or distribution of goods or services. Labelling of the entire department which has seventeen such subjects allocated to it and most of the activities in

relation to which may have nothing to do with any production or distribution of goods and services for the consumers - the third ingredient which is the very heart of definition of industry - is totally unwarranted in the very nature of the governmental functioning by establishment of various departments as per the constitutional provisions, and the allocation of business to them for investing executive powers, which correspond to the legislative powers, in order to discharge myriad administrative functions. Once the constitutional scheme of allocation of business and the actual subjects allocated do not, in the context of laws existing on such subjects or the executive instructions issued thereon, warrant a sweeping approach of treating the entire department as an industry, necessarily an exercise has to be undertaken to find out the nature of the activity and relate it to the subject allotted and find out whether the unit is for production or distribution of such goods and services. If a unit of the department, be it forest or any other, undertakes the activity of production or distribution of goods and services, and if such work is undertaken under any scheme or project, the provisions thereof will throw light on the nature of work to be done thereunder. Thus, if in the forest department, a unit or entity is set up e.g. for making furniture for satisfying the consumer wants or a unit for sale of forest produce, or a unit solely concerned with rearing of plants in nurseries for supply to the consumers, then notwithstanding that the government itself may also be one of the consumers of such goods and services, production and distribution of which is undertaken by its own unit, such separate entities will, prima facie, be "industry" notwithstanding the fact that the whole Department of Forest and Environment is not an industry by itself and has various other functions, distinct from industrial, which may be sovereign functions that are primary and inalienable constitutional functions or even socio-economic and welfare activities which are not undertaken for production or distribution of goods and services, besides other bare administrative functions.

26.3 We, therefore, hold that the entire Forest Department of the State Government, having regard to the subjects allotted to it, under the Rules of Business of Government of Gujarat, as now existing, is not "industry" u/s 2(j) of the Act. Whether any activity undertaken by the forest department or by any unit or undertaking thereof is "industry" or not, is required to be examined on the basis of the nature of work done by such unit or undertaking and only if the work undertaken amounts to an activity for production or distribution of goods and service for satisfying wants and desires of the consumers, in the sense in which the concepts are understood in the field of industrial economy, satisfying the third ingredient of the triple test propounded by the Supreme Court in Bangalore Water supply case (supra) that such unit or undertaking can be called industry and its workmen will be covered by the Industrial Disputes Act, 1947. As held by the Supreme Court in Prathamsingh Parmar (supra), in absence of indicating the nature of duty discharged by the employee as well as the job i.e. the nature of work of the establishment in which he is recruited, the forest department could not be held to be industry. The decision in Chief Conservator of Forests v.

Jagannath Maruti Kondhara was considered and distinguished by the Supreme Court on the above ground and when that has been done by the Supreme court, there was no warrant for the manner in which the Question No.1 is framed in Special Civil Application No.8259 of 1996 and 2566 of 1997 by the learned Single Judge. Even if it may have appeared to the learned Single Judge that there was a conflict between the two judgements of the Supreme Court, the question for the High Court to consider is not which decision lays down the correct law, as has been framed in the reference, but, the real question would be, which of the two decisions should be treated as binding on the basis of the well known principles of law governing precedents. When, however, the Supreme Court has itself considered its earlier judgement in Jaggannath case and distinguished it in Prathamsinh Parmar case, then there can arise no question of conflict between the two and the earlier judgement has to be read in the manner found distinguishable by the Supreme Court in the later judgement which has considered it.

26.4 We, therefore, answer question No.1 framed in reference in Special Civil Application No.8259 of 1996 and 2566 of 1997 as under :

The earlier judgement of three judge bench in Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., , having already been considered by the Supreme court in State of Gujarat and Others Vs. Pratamsingh Narsinh Parmar, , and distinguished, there is no conflict between the two decisions and the earlier judgement is to be read in the light of the said subsequent judgement which considered it and both will accordingly be binding precedents depending upon the nature of the functions of the establishment and the duties of its employees.

26.5 We also answer part of Question No.1 of the Questions referred in Special Civil Application No.4715 of 2003 and 4435 of 2001, and the question No.2 referred in Special Civil Application No.8259 of 1996 and 2566 of 1997 in the negative, by holding that, the Forest and Environment Department of the State Government is not an "industry" u/s 2(j) of the Industrial Disputes Act, 1947, and the question whether any of its units, establishments or undertakings, is an industry or not, will depend upon the nature of the work done by such entity and only when the activity undertaken amounts to an activity for production or distribution of goods and / or services for satisfying wants and desires of consumers, in the sense in which the concepts are understood in the field of industrial economy, satisfying the third ingredient of the triple ingredients test that such unit, establishment or undertaking of the department can be said to be "industry" unless falling in categories removed by constitutional and competently enacted legislative provisions from the scope of Industrial Disputes Act as indicated in clause (c) of Item IV of the guidelines laid down by the Supreme court in paragraph 161 of the Bangalore Water Supply case (supra), including law falling under Articles 309 to 311 of the Constitution.

27. The Irrigation Department of the Government of Gujarat is now no more an

independent department under the Rules of Business, 1990. The subject of irrigation and canals falls under "Narmada Water Resources and Water Supply Department" which appears at item 13 of the First Schedule to the Rules of Business with the allotment to it of the following sixteen subjects :

"[13] Subjects allotted to the Narmada, Water Resources and Water

1. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power relating to all projects in the State, including Sardar Sarovar Project and projects connected with diversion of water of enroute rivers the command area of Sardar Sarovar Project, subject to the provisions of list-I.
2. Lift Irrigation [except by societies falling within the meaning of that term under the Gujarat Co-operative Societies Act, 1961 and Persons other than Corporate bodies] and Tube wells including Tube wells connected with Sardar Sarovar Project other than list Irrigation [See also entry No. 16 under A & CD].
3. Budget and accounts under Irrigation heads including budgets and accounts relating to Sardar Sarovar Project.
4. Deleted.
5. All matters relating to command area development organization including those relating to Sardar Sarovar Project [See also entry No. 1 under A & CD].
6. Matters connected with rehabilitation of people affected by Sardar Sarovar Project.
7. Matters connected with land acquisition relating to Sardar Sarovar Project [See also entry No. 15 under RD].
8. Matters connected with planning programmes and monitoring of afforestation activities in the catchment and command area of Sardar Sarovar Project [See also entry No. 1 under F & ED, entry No. 10 under RD and entry No. 6 under R & BD].
9. Matters connected with development of fisheries in Sardar Sarovar and Water storage related to Sardar Sarovar Project and other connected projects [See also entry No. 9 under P & FD].
10. Execution and maintenance on behalf of the Central Government of such works debitable to Central Revenue as may be entrusted to the Government of Gujarat as the agent of that Government Budgets and Accounts connected with those works if any [See also entry No. 10 under RD and entry No. 6 under R & BD].
11. Works, lands and building Vested in or in the Possession of Government for the purpose of the State and assigned to the Narmada Water Resources and Water Supplies Department.

12. Works, lands and building vested in or in the possession of the Government for the purpose of the Union [including Naval, Military and air Force Works] and be assigned to the Narmada Water Resources and Water Supplies Department [See also entry No. 10 under RD and entry No. 6 under R & BD].

13. Matters relating to registration of Contractors and Supplies and other ancillary matters.

13[a] Village water supply for human beings as well as for cattle and Government water supply schemes and water works.

[b] Preparation and execution of sanitary projects such as water supply drainage, boring etc. when required to be done by Government agency for municipalities and local bodies and Government.

[c] Budget and accounts under public health heads.

[d] Water Tanker Organization.

[e] Accounts and Estimates of Gujarat Water Supply and Sewerage Board and water Tanker Organization.

14.[i] All matters pertaining to appointments, postings, transfers, promotions, conduct, grants of leave, pension etc. in respect of all Gazetted Officers [other than those covered under entry No. 45 in the subjects allotted to the GAD] and non-gazetted Government servants under administrative control of the Department.

[ii] All matters pertaining to grant of pensions in respect of class-I and II Officers of the Secretariat Cadre under the administrative control of the Department and

[iii] All matters pertaining to grant of leave and to impose penalties as specified at serial number 1 and 2 of rule 6 of the Gujarat Civil Services [Discipline and Appeal] Rules, 1971 and to institute disciplinary proceedings for imposing penalties as specified at serial numbers 3 to 8 of the said rule-6 in respect of Class-II officers of the Secretariat cadre under administrative control of the department [See also entry No. 45 under GAD].

15. Inquiries and statistics for the purpose of any of the matters in this list.

16. Fees in respect of any of the matters in this list, but not including Fees taken in any Court."

27.1. It will be seen from the above subjects of the Narmada Water Resources and Water Supply Department that "irrigation and canals" is just one of the sub-topics in the subject of "Water" at Srl.No.1. Creation or amalgamation of departments for the more convenient transaction of business and allocation of business to the respective departments is a primary inalienable constitutional function of the executive head. In view of possible changes in subjects allotted to the departments that can be made by amending the rules of business of the government constitutionally framed by the executive head, it will not be possible

for the court to declare the entire Department as industry on the basis of the subjects allotted at a given point of time. Each subject may be governed by diverse laws relating to it and such laws would in turn provide for the manner in which they are required to administratively implemented. It is only when the executive undertakes an activity in connection with the relevant subject of its allotment of business under the law or under some administrative directions, declared and crystallized in form of policy, scheme or the like and the functions of such establishment and nature of the duties of its employees satisfy the triple ingredients test, that particular establishment can be termed as "industry" within the meaning of section 2(j). Many of the subjects allotted to the department may warrant exercise of bare administrative functions involving no activity for production and / or distribution of goods and services to satisfy human wants, while some subjects may warrant establishment of entities for undertaking activities which may properly be called "industry". Allotment of business in different States to their Departments will depend on their respective Rules of Business and under the same head, different subjects may have been allotted under the Rules of Business of different States. Therefore, the precedents are required to be viewed keeping this aspect in mind and not merely on the basis of the compendious name of the Department which may have been allotted numerous subjects including subjects that have nothing to do with any production or distribution activity in its industrial sense.

27.2 With the above prelude, we may now consider the question whether Irrigation and canal work of the Narmada Water Resources & Water Supply Department by virtue of the nature of its functions and the duties of its employees is "industry". Understandably, on this aspect there was lack of vehemence on behalf of the State in the face of the binding decisions of the Supreme Court in *Des Raj (supra)* and *State of Gujarat v. P.W. D. Employees Union (supra)* holding that the work undertaken by the irrigation department was industry.

27.3 The question whether the irrigation department of the government was "industry" within the meaning of section 2(j) of the Act came up for consideration in *Des Raj and Ors Vs. State of Punjab and Ors*, wherein one of the appellants was a foreman in the Mechanical Construction Division under the Irrigation Department, who had applied u/s 33C(2) of the Industrial Disputes Act, 1947 before the Labour Court for recovery of arrears of annual increments. The other appellant was a T-Mate in the P.W.D. Drainage Division, whose services were terminated without complying with the requirements of the law, and who had challenged the termination order before the Labour Court. The third appellant was an Operator in the Mechanical Division, Rohtak under the Irrigation Department of Haryana State, whose services were terminated and who thereupon approached the Labour Court. The common question involved in these proceedings was as to whether the irrigation department of either Government is an "industry". The Supreme Court referred to the decision in *D.N.Banerji (supra)* in which it was held that it was incumbent to ascertain what the statute means

by industry and industrial dispute, leaving aside the original meaning attributed to the words in a simpler state of society, and that the definition was apparently intended to include within its scope what might not strictly be called a trade or business venture. The Supreme Court then referred to the decision in *Hospital Mazdoor Sabha* (supra) in which it was held that the words used in an inclusive definition denote extension and cannot be treated as restricted in any sense. The Supreme Court also referred to the decisions in *Corporation of City of Nagpur* (supra), *Bangalore Water Supply* (supra) and in paragraph 9 of the judgement, proceeded to consider the Administration Report of the Public Works Department, which dealt with the irrigation department and noticed that the task involved construction of multipurpose, major, medium and minor irrigation projects, maintenance of network of channels, regulation of canal supplies, enforcement of water laws etc. and levying of crop-wise supply rates on the irrigators for recovery through the State Revenue Department. It was held that the facts extracted from the Report apparently gave a picture of the activities of the Irrigation Department which fell within the ambit of "industry" u/s 2(j) of the Act.

27.4 The question whether the activity of construction and maintenance of medium size irrigation works undertaken by the State Government in its Public Works Department (Irrigation) was industry, came up for consideration before a Division Bench of this Court way back in 1986 in *P.W.D. Employees Union through its Secretary v/s State of Gujarat and others*, reported in 28(2) GLR 1070 and the Court, after an elaborate consideration of the matter and following the decision of the Supreme Court in *Bangalore Water Supply* case, held, in paragraph 19 of the judgement, that the petitioners who were working in the Public Works Department (Irrigation) of the State Government were entitled to the benefits of the Industrial Disputes Act since the activities undertaken by the irrigation Department were industry within the definition of the term "industry" u/s 2(j) of the Act and they cannot be said to be discharging sovereign functions *stricto sensu*. In paragraph 10 of the judgement, the Division Bench re-produced the guidelines given in *Bangalore Water Supply* case by the Supreme Court in paragraph 161 of its judgement. This decision was confirmed by the three Judge Bench of the Supreme Court in *Shah Babu Lal v. Mela Ram*, (2002) 10 SCC 147 .

27.5 The decision of the Division Bench in *P.W.D. Employees Union* (supra) was unfortunately not pointed out before the Court in *S.C.Thakur v. State of Gujarat*, reported in (2000) 1 GLR 482 and *State of Gujarat v. Deenanji Bidhaji Thakor*, reported in (2003) 2 GLH 420. The decision of the Supreme Court in *Des Raj* (supra) and the decision of this Court in *P.W.D. Employees Union* (supra), which was confirmed by the Supreme court in *Shah Babu Lal v. Mela Ram*, (2002) 10 SCC 147 , were rendered in the context of the undertakings of the irrigation department which were held to be industries. Obviously, the activities of the department which were only administrative in nature and had nothing to do with any production and / or distribution of goods and services were not under consideration and the holding that the irrigation department is an industry has an obvious reference to the undertaking of the irrigation and canals works by the

department that fell under consideration and not all the sections or the units of the department which may be "non-industry".

27.6 The Division Bench of this Court in S.C.Thakor (supra) was dealing with a case of employees engaged as daily wagers for cleaning of canals by removing mud, cleaning and opening the water outlets to smaller canals and repairs of canals in the Irrigation Department. The Court upheld the decision of the learned Single Judge and dismissed the appeal on the ground that the learned Single Judge had rightly rejected the petition, because, the petition was vague and it was not stated how many days of service was rendered by the workmen, nor was it stated whether they had worked continuously for more than ten years and in each such year, for 240 or more days. The Court incidentally noted in paragraph 18 of the judgement (after holding that the petition was rightly rejected by the learned Single Judge) that the irrigation department cannot be said to be an industry u/s 2(j) of the Act, referring to the decisions of the Supreme Court in Executive Engineer (State of Karnataka) Vs. K. Somasetty and others, , Union of India v. Narayan Singh reported in (1995) 4 SCC 672 and State of Himachal Pradesh Vs. Suresh Kumar Verma and another, .

27.7 In State of Gujarat v. D.B.Thakor (supra), the Division Bench of this Court was dealing with a case where the respondent workman was engaged in the Irrigation Department as Chokidar on daily wage basis. His services were terminated on the ground that no work was available. The Labour Court set aside the order of termination, directing reinstatement of the workman with consequential benefits. A specific contention was raised before the Single Judge that the irrigation department of the State of Gujarat was not "an industry" relying upon the decision of the Supreme court in Soma Setty (supra), but the learned Single Judge did not consider it on the ground that it was not raised before the Labour Court, and dismissed the petition. It was contended on behalf of the State that though in Des Raj case (supra), the Supreme court had taken the view that the irrigation department was an "industry", later on, in the case of Soma Setty (supra), the Supreme Court "clearly held that irrigation department of the State is not an industry" and for taking this view, the Supreme Court had relied upon Jay Narayan Singh case and Sureshkumar case. It was submitted that the Supreme court right from 1995 in as many as three judgements, took the consistent view that the Irrigation Department of the State cannot be said to be an "industry". The Division Bench found itself "in complete agreement" with this submission, and held in paragraphs 6.1 and 7 of the judgement as under :

"6.1 After the judgement of the Hon"ble Supreme Court in Des Raj's case (supra), there are as many as three judgements of the Honourable Supreme Court and in all the three judgements the Honourable Supreme Court has taken a consistent view that the Irrigation Department of the State Government is not an "industry". This consistent view of the Honourable Supreme Court expressed since 1995 onwards was also followed by the Division Bench of this Court in Shankerji Chelaji Thakor's case (supra), wherein it has

been observed that: "The function of public welfare of the State is a sovereign function. It is the constitutional mandate under the Directive Principles that the Government should bring about welfare State by all executives and legislative actions. Under these circumstances, the State is not an "industry" under the Industrial Disputes Act. Even otherwise, since the project has been closed, the respondent has no right to the post since he had been appointed on daily wages".

7.1 In view of the above, when there are three later direct judgements of the Honourable Supreme Court on this point and when those judgements have been followed by Division Bench of this Court in 2001, then, we are of the considered opinion that the reference made by the learned Single Judge on this point should not come in our way in deciding the issue before us".

28. The two Division Benches of this Court, thus, in both the above cases relied upon the Supreme Court decision in case of Soma Setty, in which it was observed in paragraph 3 of the judgement that: "It is now well settled legal position that the Irrigation Department and Telecommunication Department are not an industry" within the meaning of section 2(j), "as held in" Jay Narayan Singh case and Sureshkumar case. There is no indication in the judgement as to the nature of the project in which the daily wagger was appointed. Since the project was closed and the respondent was a daily wagger, the court held that the respondent had no right to any post. The decision in Des Raj case (supra) was not brought to the notice of the Supreme Court.

28.1 In Jay Narayana Singh case (supra), the Supreme court, in paragraph 2 of the judgement, held that : "We have not the slightest hesitation in holding that the Ground Water Board is not an industry". The Court was not at all concerned with the question whether irrigation department of the government was industry. The decision of the Supreme court was in respect of the Central Ground Water Board and it does not even purport to lay down any ratio on the question whether irrigation department of the State was industry. There was, therefore, no question of any conflict between this decision and the decision in Des Raj's case in which no question regarding Central Ground water Board being industry or not, ever arose. The decision in Jay Narayan was confined only to Central Ground Water Board in respect of which the Court did not have "the slightest hesitation in holding that the Central Ground Water Board was not an industry".

28.2 Even in Sureshkumar Verma (supra), the Supreme Court was not at all concerned with the question whether the irrigation department of the government was industry or not. In that case, the question was altogether different and the court was concerned with the direction given by the Division Bench of the High Court to re-engage Assistant Development Officers on daily wages. The Supreme Court held: "The Court cannot give any direction to re-engage them in any other work or appoint them against existing vacancies. Otherwise, the judicial process would become other mode of recruitment de hors the rules." The Court held that: "The appointment on daily wages cannot be a conduit pipe for regular appointments which would be a back-door entry,

detrimental to the efficiency of service and would breed seeds of nepotism and corruption".

28.3 We are perplexed as to how the decision in Jay Narayan's case (supra) or Suresh Kumar case (supra) can be said to be laying down any ratio in conflict with Des Raj case. If the counsel had read the judgments of the decisions in Jay Narayan and Sureshkumar case before the Court, instead of just referring them without disclosing their contents, there would have been no occasion for the Court to hold that it was a well settled legal position that the irrigation department was not an industry within the meaning of the definition under the I.D. Act as held in Jay Narayan Singh and Suresh Kumar, because, these two cases did not at all lay down any such ratio and were concerned with the aspects totally different from irrigation department being an industry or not. It would, therefore, not be correct to say that a consistent view that irrigation department of the State Government is not an industry was taken in Jay Narayan or Sureshkumar cases, as assumed by the Division Bench of this Court in paragraph 6.1 of the judgement in D.B.Thakor (supra).

28.4 We, therefore, hold that there is no conflict between the ratio of the decision of the Supreme Court in Des Raj case holding that the irrigation department is an industry and the ratio of the decisions in Jay Narayan and Sureshkumar, as the later two decisions were not in respect of the irrigation department and do not lay down any ratio contrary to the ratio in Des Raj case. The assumption in the decision in Soma Setty (supra) about these two decisions holding that Irrigation and Telecommunication Departments are not industry, is not at all borne out from these decisions. The decision in Des Raj, therefore, holds the field and the undertaking of irrigation work would be an industry u/s 2(j) of the Act. The Division Bench of this Court deciding P.W.D. Employees Union case (supra), was directly concerned with the question of the irrigation division of the Public Works Department of the State of Gujarat and it was specifically held that the PWD (Irrigation) was 'industry' on the basis of Bangalore Water Supply case. That decision of the Division Bench has been upheld by the Supreme court in Shah Babu Lal v. Mela Ram, (2002) 10 SCC 147 , which is a three-judge bench judgement which will have a precedential value stronger than the decision in case of Soma Setty and this Court is, therefore, bound to follow the same. On the basis of the decisions of the Supreme Court in Des Raj (supra) and State of Gujarat v. P.W.D.. (supra) it can be said that it is well settled that activity of the irrigation and canals work undertaken by the Department is industry.

28.5 In General Manager, Telecommunication v. Srinivasan Rao, reported in AIR 1998 SC 656, a three -judge bench of the Supreme Court overruling the decision in Sub-Divisional Inspector of Post, Vaikam, and others Vs. Theyyam Joseph, etc., , in which, Postal Department was held not an industry, and the decision in Bombay Telephone Canteen Employees" Association, Prabhadevi Telephone Exchange Vs. Union of India and another, , taking the view that the Telephone Nigam is not an industry, held that these two decisions cannot be treated as

laying down the correct law. Thus, the very foundation of the observation that it is well settled legal position that the Irrigation Department and Telecommunication Department are not industry within the meaning of definition of the word industry u/s 2(j) does not exist. The decision of this Court in PWD Employees Union (supra) as confirmed by the three judge bench judgement of the Supreme Court in State of Gujarat v. P.W.D. Employees Union (supra) governs the field and therefore, the decision of this Court in S.C. Thakor case (supra) and D.B.Thakor case (supra) to the extent they take the contrary view by holding that the irrigation department is not an industry are per incuriam, since the decision in P.W.D. Employees Union (supra) was not noticed in both the cases, and in D.B.Thakor, the decision of the Supreme Court in Des Raj (supra) was erroneously not followed.

28.6 We therefore answer the part of question No.1 relating to the irrigation department, of the questions referred in Special Civil Application No.4715 of 2003 and 4435 of 2001, by holding that the activity of irrigation and canal works undertaken by the Narmada Water Resources and Water Supply Department is an "industry". As regards the questions No.2 and 6 referred in the said matter, we hold that the decision of the Division Bench in P.W.D. Employees Union v. State of Gujarat reported in 28(2) GLR 1070, which is confirmed by the Supreme court by a three judge bench judgement in the decision in Shah Babu Lal v. Mela Ram, (2002) 10 SCC 147 , holding that the irrigation department of the P.W.D. is an "industry" u/s 2(j) of the Industrial Disputes Act, 1947, lays down the correct law and the decision in S.C.Thakor v. State of Gujarat reported in (2000) 1 GLR 482 and State of Gujarat v. D.B.Thakor, reported in (2003) 2 GLR 420, to the extent they hold to the contrary, do not lay down correct law and are, therefore, overruled. In view of the above discussion, the decision of the learned Single Judge in State of Gujarat v. Maniben, reported in (2003)2 GLR 368 has correctly followed the decision of the Division Bench of this Court in P.W.D. Employees Union v. State of Gujarat, reported in 28 (2) GLR 1070 and the decision of the Supreme Court in Des Raj and Ors Vs. State of Punjab and Ors, , for holding in paragraph 44 of the judgement that the Irrigation Department of the State is an "industry". The question No.4 is answered accordingly. The question No.2 "Whether the Forest Department of the State of Gujarat is an "industry" as referred in Special Civil Application No.8259 of 1996 and 2566 of 1997, is already answered hereinabove. The question No.5 therefore stands answered accordingly.

29. The inquiry into the nature of the work undertaken by the department in a particular venture, the type of agency through which the work is done, the duties of the employees and matters connected therewith would all be questions of fact. It is on the basis of factual data relating to the undertaking and its work that the question whether such entity is industry or not, can be decided. The question of application of the statutory definition of industry on the basis of the facts established would be a question of law. It will thus be seen that the point as to the jurisdiction of the industrial forum is not a pure question of law, but a mixed

question of law and facts. As held by the Supreme Court in *The Manager, Bengal Nagpur Cotton Mills Ltd. Vs. J. Bastian*, , where there is an industrial dispute, it is generally necessary that points of such importance should be raised before the original Industrial Court. (See also *United Commercial Bank Ltd. Vs. Secretary, U.P. Bank Employees Union and Others*, .

29.1 The question whether the Department of Government is industry within the meaning of section 2(j) of the Act is, therefore, in our opinion, a mixed question of law and facts and it cannot be allowed to be raised for the first time before this Court, if it is not raised before the industrial forum, from which, such proceedings before this Court arise. The question No.3 referred in Special Civil Application No.4715 of 2003 and 4435 of 2001 is answered accordingly.

30. It was strongly contended relying upon the decision of the Supreme Court in *Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others*, by the learned counsel for the petitioners in Special Civil Application No.8259 of 1996 and 2566 of 1997 that the employees who have been working for more than a decade ought not to be kept on casual basis for an unreasonably long time. The daily wagers in the forest and environment department who were working for more than 10 to 15 years are not given the benefits of the Government Resolution dated 17-10-1988 though they are entitled to be treated on equal footing with those to whom the benefits of the resolution were being given. Reference was made to the daily wagers of *Bauchraji Temple* administered by the government having been given the benefits for contending that the benefits ought to be extended also to the daily wagers of the forest department. It was contended that the denial of the benefits of the said resolution to the daily wagers working in the forest and environment department was per se discriminatory, unjust and contravened their fundamental right to equality.

30.1 It appears from the record that representations were made to the State Government by the labour Union for attending to the matters relating to the daily wagers and work charged employees of the Public Works Department. The demands involving policy decisions affected not only the R & B Division, but also Irrigation Department, Forest Department, Agricultural Department, Water Supply Department and other Departments. The Committee of nine members headed by the Minister of Road & Building was therefore constituted under the resolution dated 24-3-1988 to consider those demands and make recommendations to the government. The Committee made a report, a copy of which is at Annexure "I" to the petitioner's rejoinder dated 13th April 2000 in Special Civil Application No.8259 of 1986. It appears from the preamble of the report that the committee dealt with the demands made in separate memoranda submitted by the different labour unions, copies of which were annexed to the report at its Annexure "Kh" which are not placed on record. The report considered the demands of the daily wagers and skilled workers like masons, carpenters, plumbers, who were being engaged mainly for maintenance of

construction in the Roads & Building, Irrigation, Forest and Agriculture Departments since long. A list of such daily wagers and skilled workers engaged in the Roads & Buildings Department was annexed at Annexure "ka" (not placed on record), which as per the report, contained about 25,586 labourers of whom 2,344 were on work charged basis. It was stated in the report that similar information was not prepared and made available to the Committee in respect of irrigation and other departments which also engaged daily wagers. The Report, however, clearly suggests that the recommendations were made for the daily wagers engaged not only in the Roads & Board Department, but also in other Departments including the Forest Department.

30.2 It was pointed out on behalf of the petitioners that, a bi-partite settlement was arrived at between the State Government and the Gujarat Rajya Jaher Bandhkam Mazdoor Mandal as well as various other Unions of daily wage workmen working under different departments of the State, on the basis of the recommendations made by the said committee wherein the Unions had also accepted the recommendations and accordingly, the resolution dated 17-10-1988 came to be passed accepting all the recommendations. These facts are pointed out from the affidavit-in-reply dated 16-2-1995 filed by the Deputy Secretary to the Government in Roads & Building Department in Special Civil Application No.600 of 1995, in which by a further affidavit-in-reply dated 9-4-1997, a copy of the said settlement dated 1-10-1988 was annexed. The said 2(p) settlement shows that it was signed also on behalf of the Forest and Environment Department by its Deputy secretary. It is therefore clear that the benefits of the Government Resolution dated 17-10-1988 are intended to apply to all the daily wagers and skilled workers of not only the Road & Building Department but also other departments, including the Forest & Environment Department, engaged in the work of maintenance and repairs of constructions in all such Departments. The resolution does not discriminate between the daily wage labourers and skilled workmen engaged in different Departments including the Forest and Environment Department and applies to all the daily wage labourers and skilled workmen engaged in the work of maintenance and repairs of construction by such Departments and therefore, does not violate the equality clause.

30.3 The said resolution incorporates the policy decision of the government in respect of the daily wage labourers and skilled workmen engaged in maintenance and repairs of constructions. Even the 2(p) settlement referred to the daily wage labourers and skilled workmen like mason, carpenters and plumbers engaged in the work of maintenance and repairs of construction in the government department and to the recommendations of the committee constituted under the resolution dated 24-3-1988. It is, therefore, clear that the benefits of the resolution dated 17-10-1988 were intended only for the daily wagers who were engaged in maintenance and repairs of constructions in various government departments including the Forest and Environment Department.

30.4 The daily wagers engaged in the work of maintenance and repairs of

constructions are treated as a separate class for extending the benefits under the resolution dated 17.10.1988 and all those who fall in such class are treated similarly. Such a classification on the basis of the nature of work done by the employees cannot be said to be irrational or discriminatory. The Committee had examined the matter and considered the demands of the Unions and recommended the benefits for those who were engaged in the maintenance and repairs of constructions in the government departments. Extending such benefits to a particular class by the government has budgetary implications and if the government has on the basis of the nature of work extended the benefits only to those engaged in such work which is on the face of it distinguishable from other work, others who are not similarly situated cannot claim such benefits as a matter of right. There is a reasonable nexus between the type of work done by the daily wagers and the benefits of such work extended to them under the resolution. Extension of similar benefits to the workmen engaged in other type of works would be a matter of policy depending upon the nature of the functions of the concerned department and the type of work taken from the workmen engaged therein.

30.5 The work of maintenance and repairs of constructions is by and large continuous and of permanent nature unlike the work of those daily wagers who are seasonally engaged in the nurseries for preparing seedlings, digging pits, milching, weeding, thrashing of plants etc. Such seasonal daily wagers engaged in this type of work by the nurseries in the Forest Department cannot be equated with those who are engaged in the work of maintenance and repairs of constructions. The stand of the government not to extend the benefits of the government resolution dated 17-10-1988, which applies only to the daily wagers engaged for maintenance and repairs of constructions, to the daily wagers of nurseries of the Forest Department, keeping in view the nature and duration of their work, cannot, therefore, be said to be unjust or arbitrary. It may also be mentioned that the Supreme Court has in *Delhi Development Horticulture Employees Union (supra)* deprecated back-door entry in service by the process of so called regularization. For regularizing, there must be a regular and permanent post or it must be established that although the work of regular and permanent nature is available, the device of keeping the workman on ad hoc or temporary basis has been resorted to, with a view to deny them the legitimate benefits of permanent employees. Furthermore, the service conditions of the employees of the Forest Department are governed by the recruitment rules framed under Article 309 such as *Watchman [Forest Department] Recruitment Rules, 1975*, *Khalasi [Gujarat Forest Inferior Service] Recruitment Rules, 1977*, *Guards [Subordinate Service] Recruitment Rules 1969* etc. The rules framed under Article 309 cannot be nullified by recognizing the modes of regularization that are in conflict with the recruitment rules which provided for regular modes of recruitment.

30.6. The government resolution dated 17-10-1988 makes it clear that it is applicable only to the daily wagers who are working for maintenance and repairs

of construction in various department of the Government including the Forests and Environment Department. We are, therefore, of the view that the government resolution dated 17-10-1988 is applicable to the daily wagers of the Forest and Environment Department engaged in the work of maintenance and repairs of constructions in that Department and not to the daily wagers engaged in other types of work in that department. The question No.3 referred in Special Civil Application No.8289 of 1996 and 2566 of 1997 will stand answered accordingly.

Answers to the Questions referred :

31. Our answers to the questions referred to this Full Bench are, therefore, summed up as under :-

Que-1 referred in Special Civil Applications No. 8259 of 1996 and 2566 of 1997:

"Which judgement of the Hon"ble Supreme Court namely in the case of Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., (three bench judgement) or judgement of the Hon"ble Apex Court in the case of State of Gujarat and others v. Prathamsinh Narsinh Parmar (supra) decided on 31/1/2001 in Civil Appeal No.1684 of 1994 lays down correct law and is binding on this court?"

Ans-1 The earlier judgement of three judge bench in Chief Conservator of Forests and another, Vs. Jagannath Maruti Kondhare, etc. etc., , having already been considered by the Supreme court in State of Gujarat and Others Vs. Pratamsingh Narsinh Parmar, , and distinguished, there is no conflict between the two decisions and the earlier judgement is to be read in the light of the said subsequent judgement which considered it and both will accordingly be binding precedents depending upon the nature of the functions of the establishment and the duties of its employees.

Que.1 of Special Civil Application Nos. 4715 of 2003 & 4435 of 2001 and Que.2 of Special Civil Application Nos. 8259 of 1996 and 2566 of 1997:

Que-1 "Whether the Forest Department and the Irrigation Department of the State can be said to be an industry within the meaning of Section 2(j) of the Industrial Disputes Act, 1947 or not ?"

Que-2 Whether Forest Department of the "State" is an industry or not?

Ans-(i) The Forest and Environment Department of the State Government is not an industry u/s 2(j) of the Industrial Disputes Act, 1947 and the question whether any of its unit, establishment or undertaking is an industry or not will depend upon the nature of the work done by such entity and only when the activity undertaken amounts to an activity for production or distribution of goods and / or services for satisfying wants and desires of consumers, in the sense in which the concepts are understood in the field of industrial economy, satisfying the third ingredient of the triple ingredients test, that such unit, establishment or

undertaking of the Department can be said to be industry, unless falling in the categories removed by constitutional and competently enacted legislative provisions from the scope of the Industrial Disputes Act as indicated in clause (c) of Item IV of the guidelines laid down by the Supreme court in paragraph 161 of Bangalore Water Supply case (supra), including the law falling under Articles 309 to 311 of the Constitution.

Ans[ii] The activity of Irrigation and canal Works undertaken by the Narmada Water Resources and Water Supply Department is an "industry" u/s 2(j) of the Industrial Disputes Act, 1947.

Que-3 referred in Special Civil application Nos. 8259 of 1996 and 2566 of 1997:

Que-3 "Whether the petitioners or similarly situated employees of the Forest Department are entitled to the benefit of Government Resolution dated 17-10-1988?"

Ans-3 The Government Resolution dated 17th October 1988 is applicable to the daily wagers of the Forest & Environment Department engaged in the work of maintenance and repairs of constructions in that Department, and not to the daily wagers engaged in other types of work in that Department.

Answers to Questions 2 to 6 referred in Special Civil Applications No.4715 of 2003 and 4435 of 2001:

Que-2 "What is the correct law between the two different views / ratio laid down by two different Division Benches of this Court in case of P.W.D. Employees Union and Others Vs. State of Gujarat and Others, wherein the Irrigation Department of the State is held to be an industry for the purpose of I.D. Act, and decision of Division Bench of this Court in case of SHANKERJI CHELAJI THAKOR v. STATE OF GUJARAT reported in 2000 [1] GLR 482 and the recent decision in case of STATE OF GUJARAT v. D.B. THAKORE reported in 2003[2] GLR 420, wherein the Irrigation Department is not held to be an industry for the purpose of I.D.Act, 1947; and therefore, which decision is binding to this Court?"

Ans-2 The decision of the Division Bench in P.W.D. Employees Union v. State of Gujarat reported in 28 (2) GLR 1070, which is confirmed by the Supreme court by a three-judge bench judgement in its decision in Shah Babu Lal v. Mela Ram, (2002) 10 SCC 147 , holding that the irrigation department of the P.W.D. is an "industry" u/s 2(j) of the Industrial Disputes Act, 1947, lays down the correct law and the decision in S.C.Thakor v. State of Gujarat reported in (2000) 1 GLR 482 and State of Gujarat v. D.B.Thakor, reported in (2003) 2 GLR 420, to the extent they hold to the contrary, do not lay down correct law and are, therefore, overruled.

Que-3 "If the party to the proceedings, for the first time, raised the contention that Irrigation Department or Forest Department is not an industry, before this Court without raising the same question before the Labour Court or the Industrial tribunal concerned, whether such question can be said to be a pure question of

law or the same can be said to be a mixed question of law and facts;

and

Whether such contention can be permitted to be raised before this Court when it was not raised before the lower court?"

Ans-3 The question whether the Department of Government is industry within the meaning of section 2(j) of the Act is a mixed question of law and facts and therefore, it cannot be allowed to be raised for the first time before this Court, if it is not raised before the industrial forum, from which, such proceedings before this Court arise.

Que-4 "Whether the view taken by this Court [Coram: H.K.Rathod, J.] as Single Judge in case of STATE OF GUJARAT v. MANIBEN VIRAJI reported in 2003 [2] GLR 368 can be said to be a correct law or not?"

Ans-4 The decision of the learned Single Judge in State of Gujarat v. Maniben, reported in (2003) 2 GLR 368 has correctly followed the decision of the Division Bench of this Court in P.W.D. Employees Union v. State of Gujarat, reported in 28 (2) GLR 1070 and the decision of the Supreme Court in Des Raj and Ors Vs. State of Punjab and Ors, , for holding in paragraph 44 of the judgement that the Irrigation Department of the State is an "industry".

Que-5 "The decision making reference made by this Court [Coram : Justice K.M.Mehta, J.] referring the issue to the Division Bench of this Court to decide "whether Forest Department of the State is an industry or not?" may also be taken up and considered for decision by the larger Bench of this Court?"

Ans-5 Question No.2 "Whether forest department of the State is an industry or not" referred in Special Civil Application No.8259 of 1996 and 2566 of 1997 is already answered hereinabove.

Que-6 "When the case of EXECUTIVE ENGINEER [STATE OF KARNATAKA] v. K.SOMASETTY relied upon by the Division Benches of this Court in last two decisions in case of SHANKERJI CHELAJI THAKOR v. STATE OF GUJARAT reported in 2000 [1] GLR 482 and the recent decision in case of STATE OF GUJARAT v. D.B.THAKORE reported in 2003 [2] GLR 420, wherein the Irrigation Department is not held to be an industry for the purpose of I.D.Act, 1947; the Apex Court by three Hon"ble Judges Bench in case of GENERAL MANAGER, TELECOM reported in 1998 [78] FLR 143 has taken a view regarding telecommunication department being not an industry, was specifically overruled, in that circumstances, whether above referred last two decisions of the divisions benches of this Court on the issue, is binding decision or not?"

Ans-6 In view of the three judge bench decision of the Supreme Court in Shah Babu Lal v. Mela Ram, (2002) 10 SCC 147 , confirming the decision of this Court in P.W.D. Employees Union v. State of Gujarat, reported in 28 (2) GLR 1070, the decisions of the Division Bench in S.C.Thakor v. State of Gujarat reported in

(2001) GLR 482 and State of Gujarat, reported in (2003) 2 GLR 420, to the extent they take the view that the Irrigation Department is not "industry", are not binding decisions.

The questions referred to us under these two references are answered accordingly. Special Civil Applications in which these two references are made and all other matters which are tagged with those petitions will now be placed before the appropriate court for their disposal in light of this judgement and the above answers. Both the references stand disposed of accordingly with no order as to costs.