
(2014) 07 BOM CK 0278

In the Bombay High Court

Case No : Criminal Writ Petition No. 3989 of 2013

Kavita Pravin Tilwani

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 10-07-2014

Acts Referred:

Bombay Shops and Establishments Act, 1948 — Section 2(4)
Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 2(j)

Citation : (2015) 4 ALLMR 254 : (2014) 4 BomCR(Cri) 150 : (2015) 2 MhLj 271

Hon'ble Judges : V.M. Kanade, J;P.D. Kode, J

Bench : Division Bench

Advocate : M.M. Deshmukh, A.P.P. and Harshad Pimple, Advocate for the Respondent

Judgement

1. Heard the petitioner appearing in person and the learned Counsel appearing on behalf of respondent Nos. 2 and 3, as also the learned APP for the State. By this petition which is filed under Article 226 of the Constitution of India, the petitioner is seeking an appropriate writ, order and direction declaring that the Maharashtra Act No. 64 of 1977, insofar as it includes medical practitioner within the definition of the expression "commercial establishment" under section 2(4) of the Bombay Shops and Establishments Act, 1948 is unconstitutional. By the said amendment, a medical practitioner who is duly registered under the provisions of the Maharashtra Medical Council has been included in the definition of the said expression. It is submitted by the petitioner that prior to the amendment, medical practitioners were not included in the definition of the said expression. However, subsequently by the said amendment, all professionals have been included in the definition of the said expression. The petitioner, who is a doctor by profession, has invited our attention to the judgment of the Apex Court in Dr. Devendra M. Surti Vs. The State of Gujarat, and also of a Division Bench of this Court in Narendra Keshrichand Fuladi and another Vs. State of Maharashtra, . She also relied on another Division Bench decision of this Court in Criminal Writ

Petition No. 1232 of 1995 (M/s. A.F. Ferguson & Company & others v. The State of Maharashtra & another) decided on 5-5-2006. She has also relied on a Division Bench decision of this Court in Criminal Writ Petition No. 1731 of 2002 (Dr. (Smt.) Shubhada Motwani v. The State of Maharashtra & Ors.) decided on 12-6-2014.

2. On the other hand, learned Counsel appearing on behalf of the Corporation submits that some time may be given to him to file affidavit in reply. In our view, since the issue is squarely covered by the aforesaid judgments of the Apex Court and this Court, the question of now permitting the Corporation to file an affidavit does not arise since the petition was filed in 2013 and was immediately served on the Corporation thereafter.

3. The learned Counsel for the Corporation has submitted that in this case the petitioner had registered herself under the Bombay Shops and Establishments Act, 1948. However, thereafter she had not renewed the said registration. He submitted that, therefore, it was now not open to the petitioner to challenge the validity of the said section.

4. In our view, since this submission of the respondent-Corporation can be taken care of by referring to the settled position in law as laid down by the Apex Court and other High courts and therefore the request for adjournment for filing an affidavit is declined.

5. In 1977 section 2(4) of the Bombay Shops and Establishments Act, 1948 has been amended and the amended provision reads as under:

"(4) "Commercial establishment means an establishment which carries on, any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession (and includes establishment of any legal practitioner, medical practitioner, architect, engineer, accountant, tax consultant or any other technical or professional consultant and also includes) a society registered under the Societies Registration Act, 1866 (XXI of 1860), and charitable or other trust, whether registered or not, which carries on (whether for purposes of gain or not) any business, trade or profession or work in connection with or incidental or ancillary thereto but does not include a factory, shop, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment;"

6. The Apex Court in the case of Devendra M. Surti (supra) has held that private dispensary of a doctor is not a commercial establishment. The Apex Court in the said judgment has observed as under:

"7. It is therefore clear that a professional activity must be an activity carried on by an individual by his personal skill and intelligence. There is a fundamental distinction therefore between a professional activity and an activity of a commercial character and unless the profession carried on by the appellant also partakes of the character of a commercial nature, the appellant cannot fall within

the ambit of section 2(4) of the Act. In *The National Union of Commercial Employees and Another Vs. M.R. Meher, Industrial Tribunal, Bombay and Others*, it was held by this Court that the work of solicitors is not an industry within the meaning of section 2(j) of the Industrial Disputes Act, 1947 and therefore any dispute raised by the employees of the solicitors against them cannot be made the subject of reference to the Industrial Tribunal....."

A similar issue had arisen before the Division Bench of this Court in the case of *Narendra Keshrichand Fuladi (supra)*. There the question which fell for consideration before the Court was whether a legal practitioner having an office can be treated on par with the other commercial establishments. The Division Bench held that a legal practitioner having an office cannot be said to be carrying on commercial activity and would not fall within the definition of the expression "commercial establishment". This Bench also, by order dated 12-6-2014 passed in the petition filed by Dr. (Smt.) Shubkada Motwani (*supra*) raising similar issue, has held that the amendment incorporating medical practitioners within the definition of the expression "commercial establishment" will have to be struck down since doctors cannot fall within the definition of the said expression. The writ petition is accordingly allowed in terms of praye Clauses (a) and (b) and is accordingly disposed of.