
(2016) 12 KL CK 0066

In the High Court Of Kerala

Case No : W.A. No. 1922 of 2014 and RP. 769 of 2014

Kerala State Backward Classes Development Corporation Ltd.

APPELLANT

Vs

The Industrial Tribunal

RESPONDENT

Date of Decision : 20-12-2016

Acts Referred:

Industrial Disputes Act, 1947 — Section 2(j)

Citation : (2017) 153 FLR 362 : (2017) 1 ILRKerala 529 : (2017) 1 KLT 728 : (2017) 1 LLJ 518

Hon'ble Judges : Mr. Antony Dominic and Mrs. Shircy V., JJ.

Bench : Division Bench

Advocate : Sri Paul Abraham Vakkanal, (Government Pleader), for the Respondent No. 1; Sri. G.P. Shinod, Advocate, for the Respondent No. 2; Sri. O.V. Radhakrishnan, Senior Advocate and Sri. Jayapradeep, V. (SC, KSBCDS), for the Appellant

Final Decision : Dismissed

Judgement

Mrs. Shircy, V., J. - Being aggrieved by the common Judgment in W.P (C) No.29529/2012 and W.P.(C) No.8618/2009 of the learned Single Judge, these appeals have been filed by the appellant, the Kerala State Backward Classes Development Corporation (hereinafter referred to as "the Corporation" for short).

2. Briefly, the facts are as follows. The appellant/ Corporation is a Government Company incorporated under the Companies Act . The main object of the Corporation is to promote the comprehensive development of the backward classes of Kerala by rendering assistance to their members to set up small scale and medium industries, small trades, business undertakings etc. The second respondent in W.P.(C) No. 8618/09 was appointed in the service of the Corporation as Junior Assistant on daily wages on 19/06/95. She worked on daily wages from 19/06/95 to 15/02/99 till she was terminated on 16/02/99. Then she raised an industrial dispute alleging that she had been denied employment and the Government referred the dispute to the Industrial Tribunal. By its Award, in

I.D.No.93/2002 dated 2/1/2009 the Industrial Tribunal answered the reference and directed the Corporation to reinstate her in employment with the benefit of full back wages with continuity of service.

3. In W.P(C)No.29529/2012, the respondents 2 to 16 were employed on daily wages as peons, drivers, part-time sweepers etc. on different dates during 1995 and 1996 and they were terminated from service on different dates from the year 1998 to 2000, even without a notice. The dispute in respect of 16 workmen were also referred by the Government to the Industrial Tribunal and decided in I.D.No.54/2003 on 8/10/12 in favour of the workers. In this Award, also the Industrial Tribunal had found that the termination of services of the workmen was illegal and unjustifiable and they were directed to be reinstated with 50% back wages and continuity of service with all consequential benefits.

4. The Corporation / appellant challenged the Awards in the writ petitions contending that the Corporation is not an industry as defined under the Industrial Disputes Act (hereinafter referred to as "the Act" for short) and the respondents are not workmen and their disengagement cannot be construed as retrenchment within the meaning of Section 25F of the Act. The learned Single Judge by a common judgment dismissed the writ petitions finding that there is no illegality or infirmity in the Awards and the Corporation was directed to comply with the directions in the impugned awards within a period of one month from the date of receipt of a copy of the judgment. Thereafter in W.P. (C)No.8618/2008, Review Petition was filed as R.P.No.769/2014 and R.P.No.768/2014 was filed in W.P(C) No.29529/2012. Both the Review Petitions were also disposed of by a common order on 13.10.2014. The common judgment is assailed in these appeals.

5. We heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents. The learned Government Pleader was also heard.

6. Kerala State Backward Classes Development Corporation Ltd. is a Company incorporated under the Companies Act. As revealed from the Memorandum of Association, the main object of the Corporation is to promote comprehensive development of the backward classes of Kerala by rendering assistance to the members to set up village and cottage industries, business undertaking etc. and to provide services for the upliftment of members of backward classes. The respondents 2 to 16 (W.P.29529/2012) have raised industrial dispute when they were terminated from service by the Corporation. The issue referred was whether the termination of service of daily rated employees of the Corporation, is legal and justifiable ? In I.D. No. 54/2013 Award was rendered on 8/10/2012 by the Industrial Tribunal in their favour directing the Corporation to reinstate them within three months with 50% of back wages and all other benefits from the date of notification of the Award. As per the Award in I.D. No.93/ 2002 dated 2/01/2009 the 2nd respondent in W.P. No.8618/2009 was also ordered to be reinstated with full back wages. The aforesaid Awards were challenged in the writ petitions.

7. The main question mooted for consideration in both these appeals is whether the Corporation is an industry coming within the purview of Section 2(j) of the Act and if so, whether the Corporation is bound to comply with Section 25F of the Act. Section 2(j) of the Act defines "Industry" in the following manner:

(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.

8. The Apex Court has interpreted the definition of industry contained in the Act in *Bangalore Water Supply & Sewerage Board v. Rajappa* 1978 (2) SCC 213 as:

" "Industry", as defined in Section 2(j) and explained in *Banerji* (supra), 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 e.g. making, on a large scale prasada or food), prima facie, there is an "industry" in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the organization is a trade or business it does not cease to be one because of philanthropy animating the undertaking." The "dominant nature test" for deciding whether the establishment is an "industry" or not is summarized as :

" (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 *University of Delhi* case 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 *corp'n. of Nagpur* 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 Section 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."

9. In *General Manager, Telecom v. A. Srinivasa Rao* [1997 (8)SCC 766] applying the doctrine enunciated in *Bangalore Water Supply Case* (supra) the Apex Court held that the Telecommunication Department of Union of India is an industry. It is further observed that the decision held in *Bangalore Water Supply Case*(supra) which was rendered long back nearly two decades earlier is the correct law and that Judicial discipline requires to follow the decision in *Bangalore Water Supply Case* (supra) and is a binding precedent.

10. In *All India Radio v. Santhosh Kumar* [1998 (3) SCC 237] it is held that the ratio in *Bangalore Water Supply case* (supra) will hold the field and observed as:

"The solitary contention canvassed before us by the learned Senior Counsel for the appellants is to the effect that All India Radio and Doordarshan Kendra discharge sovereign functions of the State and they are not industries within the meaning of Section 2(j) of the Act. Now, it has to be kept in view that as held by a Constitution Bench of this Court consisting of seven learned Judges in the case of *Bangalore Water Supply and Sewerage Board v. A. Rajappa* save and except the sovereign functions, all other activities of employers would be covered within the sweep of term "industry" as defined under Section 2(j) of the Act. The functions which are 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. Looking to the functions of Doordarshan and its setup, as seen from Annexure I, being the extracts from Doordarshan Manual Vol.1, it cannot be said that the functions carried on by them are of a purely sovereign nature. Day in and day out advertisements are being telecast and even serials are being telecast on payment of appropriate charges and on which there cannot be any dispute. Same is the position with All India Radio. However, learned Senior Counsel for the appellants vehemently relied upon a decision of this Court in the case of *Bombay Telephone Canteen Employees' Assn. Prabhadevi Telephone Exchange v. Union of India*. It is true that in that case a Bench of two learned Judges took the view that the telephone exchanges run by the Central Government were discharging sovereign functions and, therefore, the employees working in the canteen run by such telephone exchanges cannot be said to be working in an "industry" as defined under Section 2(j) of the Act. However, the said decision has been expressly overruled by a judgment of a three-Judge Bench of this Court in the case of *G.M. Telecom v. A. Srinivasa Rao*. In that case Chief Justice Verma speaking for the three Judge Bench in para 7 of the Report has expressly overruled the said decision. In that decision another decision in *Sub-Divisional Inspector of Post v. Theyyam Joseph* is also overruled. It has been held in the said decision that the ratio of the Constitution Bench judgment in *Bangalore Water Supply* holds the field and the amendment to the definition of Section 2(j) as made in 1982 is not yet brought in force and so long as the amending definition does not come into force the

decision in Bangalore Water Supply will hold the field. Consequently, it must be held that the appellant-All India Radio as well as Doordarshan are industries within the meaning of Section 2(j) of the Act and the said definition is operative being applicable at present and as existing on the statute book as on date."

11. In *State of Gujarat and others v. Pratamsingh Narsinh Parmar* [2001 (9)SCC 713] the Hon''ble Supreme Court held 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". Ordinarily, a department of the Government cannot be held to be an industry and rather it is a part of the sovereign function. To find out whether the respondent in the writ petition had made any assertion that with regard to the duty which he was discharging and with regard to the activities of the organisation where he had been recruited, we find that there has not been an iota of assertion to that effect though, no doubt, it has been contended that the order of dismissal is vitiated for non-compliance with Section 25-F of the Act. The State in its counter-affidavit, on the other hand, refuted the assertion of the respondent in the writ petition and took the positive stand that the Forest Department cannot be held to be an industry so that the provisions of Section 25-F of the Act cannot have any application. In the absence of any assertion by the petitioner in the writ petition indicating the nature of duty discharged by the petitioner as well as the job of the establishment where he had been recruited, the High Court wholly erred in law in applying the principles enunciated in the judgment of this Court in *Jagannath Maruthi Kondhare* to hold that the Forest Department could be held to be "an industry".

12. In *State of U.P. v. Charan Singh* [2015(8)SCC 150] it has been observed as :

"On the basis of the aforesaid rival legal contentions urged on behalf of the parties and the evidence on record, we have come to the conclusion that the High Court has rightly held that the state is liable to pay the entire amount due to the workman for the period 24.2.1997 to 31.1.2005, as the State has kept the workman out of job for many years arbitrarily and unreasonably despite the Award of reinstatement of the respondent on an equivalent post which was passed by the Industrial Tribunal. Thus, not reporting for the duty of fisherman offered to him by the appellant cannot be said to be unjustified on the part of the respondent. In support of the above said conclusions arrived at by us, we record our reasons here under:-

It has already been rightly held by the Industrial Tribunal that the Department of Fisheries is covered under the definition of "Industry" as defined under Section 2 (k) of the Act and also in accordance with the statement of R.W.1 and E.W.1 Shri. R.B. Mathur, on behalf of the appellant before the Industrial Tribunal, because the object of the establishment of the appellant-department is fulfilled

by engaging employees and that the department is run on a regular basis. Thus, the matter of termination of the services of the workman of the said department can be legally adjudicated by the Industrial Tribunal as the matter is covered under the provisions of the Act read with the Second Schedule in Entry No.10. Thus, it has been rightly held by the courts below that the dispute raised by the workman in relation to the termination of his services by the appellant is an industrial dispute."

13. Before the Industrial Tribunal in I.D No. 54/2003 WVs.1 to 5 were examined and Exts. W1 to W 14 were marked on the side of the respondents (workmen) and Exts. M1 to 5 were marked on the side of appellant (Management). In I.D.No.93/02 WV1 was examined and Exts. W1 to 5 were marked on the side of the workman and on the side of the appellant (Management) Exts.M1 to M5 were marked. The Industrial Tribunal after considering the evidence on record and the rival legal contentions of both parties have answered the questions referred in favour of respondents holding that the Corporation is an "Industry" and the termination of their services were illegal and liable to be set aside. As revealed from the Memorandum of Association, the main object of the corporation is to promote the comprehensive development of backward classes of Kerala to assist them to start and develop cottage industries, workshops etc. Incidental or ancillary to the attainment of the main object of the Corporation as well, the other object are narrated in the Memorandum of Association and it cannot be said that the functions carried on by the Corporation are of purely sovereign nature so as to exclude it from the definition of industry, but on the other hand, the main object to render services for the development of the backward classes of the community, does not fall within the definition of sovereign function. The facts of the case are to be tested in the touchstone of the decisions rendered by the Hon'ble Supreme Court. As the object of the Corporation was "development of the particular group of people" it renders service pure and simple and the Corporation could not place any materials as to indicate that the respondents discharged sovereign function of the State. As the ratio laid down by the Constitution Bench in Bangalore Water Supply case (supra) still holds the field, the decisions reported in Executive Engineer (State of Karnataka) v. K. Somasetty & others (1997 (5) SCC 434), State of H.P. v. Suresh Kumar Verma & Another (1996 (7)SCC 562), Bharat Sanchar Nigam Limited v. Man Singh [(2012)1 SCC 558] and Mahboob Deepak v. Nagar Panchayat, Gajraula & Another [2008(1) SCC 575] etc. are not applicable to the facts of this case. So, the findings of the Industrial Tribunal that the Corporation constitutes an "Industry" as defined under Section 2(J) of the Act, is absolutely correct.

14. In W.P.(C)No.29529/12, the respondents were appointed on daily wages in the year 1995 and they were disengaged in the year 1998. They were appointed as drivers, peons, sweepers etc. on daily wages. In W.P.(C) No. 8618 of 2009, the 2nd respondent was appointed as Junior Assistant on 19.6.1995 on daily wages. She worked there till 15.2.1999 and was terminated on 16.2.1999. It is established that the respondents had continuously worked for more than 240

days in a calendar year, to be more specific, for more than 3 to 5 years. Now the question to be answered is whether there is violation of provisions of Section 25F of the Act. Section 25F of the Act reads as:

"25F. Conditions precedent to retrenchment of workmen.-No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

15. In *Himanshu Kumar Vidyarthi & Others v. State of Bihar & Others* [(1997)4 SCC 391], the Supreme Court held as follows:

"Every department of the government cannot be treated to be "industry". When the appointments are regulated by the statutory rules, the concept of "industry" to that extent stands excluded. Admittedly, they were not appointed to the posts in accordance with the rules but were engaged on the basis of need of the work. They are temporary employees working on daily wages. Under these circumstances, their disengagement from service cannot be construed to be a retrenchment under the Industrial Disputes Act. The concept of "retrenchment" therefore cannot be stretched to such an extent as to cover these employees."

16. The definite stand taken by the Corporation in both the Reference before the Tribunal was that the recruitment of the respondents/employees was not by any selection process and such being the case, there is no question of termination. It is also contended that there was no public notice, no written test, no appointment order or termination order and the employees in dispute were recruited in an interview and so there was no selection process. It is also contended that the special rules for recruitment of the employees to the Corporation was framed in the year 1996 (after their appointment) and they were allowed to continue even after the commencement of special rules. The respondents along with the counter affidavit had produced Ext. R1(a) by which the Government accorded sanction to regularize the services of 56 employees and two other employees by Ext. R1(b). The learned counsel for the respondents would argue that the Corporation being the instrumentality of State is bound by the mandates of Articles 14 and 16 of the Constitution of India and it cannot discriminate the similarly placed persons. No doubt, the Corporation can make appointment to its service only in accordance with the principles contained in

Articles 14 and 16 of the Constitution of India. The contention of the Corporation is that the Special Rules for selection of employees was framed only in the year 1996 and the Special Rules were amended on 29.9.1997 and thereafter, the employees are selected as per the Rules. It is well established that the services of 56 employees recruited by the Corporation before the Special Rules were framed, were regularized. Two sets of workmen in the same industry have received unequal treatment. Such being the case, the contention raised by the contesting respondents in both the writ appeals is that there is discrimination by the Corporation in regularizing their employment, even though all of them have worked for more than 240 days continuously in the Corporation and hence it is neither fair nor legal but, is contrary to the well established principles of law. Article 14 of the Constitution enshrines the principle of equality. As per Article 16, there shall be equality for all citizens in the matter relating to employment.

17. As mentioned above, the rules for recruitment were framed by the Corporation only in the year 1996, though the Corporation commenced its functioning in the year 1995. Such being the case, we have no hesitation to conclude that termination of the services of the respondents are unfair and unreasonable. Some of them are even on the verge of attaining the age of retirement. The evidence adduced by the respondents before the Industrial Tribunal would establish that they have continuous service for more than 240 days in a year preceding 12 months on daily wages as they were appointed immediately on commencement of the Corporation from 28.2.1995 till termination in the year 1999 and 2000. Here, the evidence would establish the fact that there was illegal retrenchment by the Corporation and hence, the finding of the Industrial Tribunal that the Corporation has not complied with the provisions contained in Section 25F of the Act is quite justifiable. The Awards of the Industrial Tribunal for reinstatement, with back wages is also justified in the light of the decision in *Jasmer Singh v. State of Haryana and Another* (2015 (4) SCC 458).

18. The learned Single Judge has rightly dismissed the writ petitions. We, thus, do not find any reason warranting interference with the impugned Judgment. The respondents 2 to 16 in W.A. No.1941 of 2014 are entitled for reinstatement with 50% of back wages with continuity of service. The 2nd respondent in W.A. No.1922 of 2014 is also entitled for reinstatement with back wages with continuity of service. Since the facts involved in these two appeals are similar, we think that it is proper to direct her also to be reinstated with 50% back wages. The respondents shall be reinstated by the Corporation within a period of one month from the date of receipt of a copy of this judgment.

Both appeals are dismissed accordingly.