

(1963) 09 MAD CK 0012

In the Madras High Court

Case No : Writ Petns. No's. 602 and 668 of 1961

L.M. Chitale and Another

APPELLANT

Vs

The Commissioner of Labour

RESPONDENT

Date of Decision : 13-09-1963

Acts Referred:

Constitution of India, 1950 — Article 19, 19(1), 19(6)

Tamil Nadu Shops and Establishments Act, 1947 — Section 2(16), 6

Citation : AIR 1964 Mad 131 : (1964) ILR (Mad) 167 : (1963) 2 LLJ 747 : (1964) 77 LW 90

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Advocate : D.B. Jagannath Rao and C.S. Rajappa, for the Appellant; S. Mohan, Addl. Govt. Pleader and S.V. Rama Iyengar, for the Respondent

Final Decision : Allowed

Judgement

Srinivasan, J.—These petitions under Article 226 of the Constitution pray for the issue of writs of certiorari to call for the records of the

Commissioner of Labour and to quash his order dated 27th October 1960, and the order of the Additional Commissioner for Workmen's

Compensation, dated the 26th April 1961 respectively. The facts are briefly as below.

2. The petitioner in W. P. No. 602 of 1961 is a partner of a registered firm of Chartered Architects. The firm of the petitioner terminated the

services of one T. M. Lingam, an employee, after issuing due notice to him. Though the termination of his service was not objected to by that

employee, he subsequently preferred an appeal under the Madras Shops and Establishments Act before the Commissioner for Workmen's

Compensation for payment of gratuity or other amounts, or, in the alternative,

for reinstatement. The petitioner objected to the proceedings contending that as the firm was carrying on a profession of consulting architects, it could not be classified as a shop or an establishment within the meaning of the Madras Shops and Establishments Act.

Upon this the question came before the Commissioner of Labour u/s 51 of that Act. The Commissioner held in order impugned that the" firm is not a commercial establishment but is a shop within the meaning of Section 2 [16) of the Act. It is contended by the petitioner that the partners of the firm are carrying on" the profession of consulting architects, the partners being members of the Royal Institute of British Architects as well as its Indian counterpart, the Indian Institute of Architects. It may be stated that the senior partner died and the present petitioner, Sri S. L. Chitale, is the sole surviving partner. According to the petitioner, the membership of the above institute is confined only to qualified architects who have to pass an examination conducted by the Royal Institute. Only persons with certain specified qualifications could become members of the Indian institute of Architects. Such a person should possess certain specified qualifications evidenced by diplomas granted by an authorised body.

It is further stated that as a member of these institutes, the petitioner is governed by certain exacting codes of professional conduct very much on the same lines as those governing advocates and auditors. A member is prevented from carrying on a business as auctioneers or estate agents or trading in materials used in connection with the building industry or to advertise or offer professional services or to accept a position in which his interest is in conflict with his professional duty. There are prescribed scales of professional charges. He is to function as an arbitrator between the building owner and the contractor, interpret the conditions of the contract between the two and generally to prepare plans, estimates and the like.

His employment as an architect is terminable by his client.

A long list of the duties which a consulting architect is bound to perform for his client are set out, which, according to the petitioner, are of a highly technical nature. In these circumstances, the petitioner complains that the determination by the Commissioner that the office of a consulting architect is a shop wherein services are rendered to customers is wholly incorrect. It is claimed that an architect's client cannot be termed a customer and

that the professional services rendered by the architect cannot be equated to a person carrying on a commercial business in a shop. It is for these reasons that the petitioner claims that his status as a person carrying on a profession has to be equated to that of a doctor or a lawyer or an auditor.

3. In W. P. No. 602 of 1961, the order Impugned Is that of the Commissioner of Labour made u/s 51 of the Madras Shops and Establishments

Act. This provision empowers the Commissioner of Labour to decide the question whether all or any of the provisions of the Act apply to an

establishment or to a person employed therein, and it was on the application of the petitioner for a declaration that the petitioner's office was not

an establishment coming within the purview of the Act that the Commissioner rendered the decision in question.

In W. P. No. 668 of 1961, the order of the Additional Commissioner for Workmen's Compensation is impugned. The facts relevant to this are

that the petitioner employed one Lingam as an engineer on a monthly salary of Rs. 300. It was found that the employee did not come up to the

expectations of the petitioner in so far as the performance of the technical services as an engineer are concerned. Accordingly, by a notice dated

the 1st May 1959, the services of Lingam were terminated. Lingam accepted the notice without any demur. On the 30th May 1959 he accepted the

termination of service and asked to be paid compensation admissible under the Industrial Disputes Act by payment of a lump sum covering leave

salary and service gratuity.

With effect from the 1st of June 1959, Lingam ceased to attend office. About a month later, he filed an appeal before the Additional Commissioner

for Workmen's Compensation. Before that authority, the petitioner contended that no provision of the Madras Shops and Establishments Act

applies to the petitioner's firm and further that Lingam having accepted the notice of termination, and having voluntarily stopped attending the

office, could not invoke the jurisdiction of the Additional Commissioner. It was in these circumstances that the Additional Commissioner directed

the petitioner to approach the Commissioner of Labour u/s 51 of the Act. Consequent upon the order of the Commissioner holding against the

petitioner's contention, the Additional Commissioner deter' mined in the

proceedings u/s 41 (2) before him that the termination of the services of Lingam was without reasonable cause.

4. The question that arises for consideration in both of these writ petitions is whether the office of a firm of chartered architects comes within the scope of the expressions "shop" or "establishment" under the Madras Shops and Establishments Act. At the outset it may be pointed out that u/s 6 of the above said Act, the State Government purported to exempt certain classes of establishments from the operation of the Act; among them are, Advocates' chambers, doctors' consulting rooms, dispensaries attached to doctors' consulting rooms, nursing homes, hospitals and other institutes for the treatment and care of the sick, infirm, the destitute or the mentally unfit. I am referring to this exemption in the forefront, for it is contended on the other side that but for this exemption, even the advocates' chambers and doctor*' consulting rooms would come within the scope of the above said Act. I

5. The Act was intended to provide for the regulation of conditions of work in, shops, commercial establishments, restaurants, theatres and other establishments. A "commercial establishment" is defined to mean an establishment which is not a shop. "Establishment" means "a shop, commercial establishment, restaurant, eating house, etc." The expression "shop" is defined to mean "any premises where any trade or business is carried on, or where services are rendered to customers, and includes offices, store rooms, godowns and ware-houses, whether in the same premises or otherwise, used in connection with such business, but does not include a restaurant, eating house or commercial establishment.

These three definitions are important, but they are by no means very easy to interpret. In so far as the commercial establishment and shop are concerned the one does not include the other. But "establishment" is the general expression which takes in both a shop and a commercial establishment. The view taken by the Commissioner of Labour was that the petitioners do render service to their clients and customers and that though such services depend upon their own personal skill and proficiency, that does not make any difference in determining whether the premises is a shop or not.

The petitioners have employed staff working in the premises, doing various kinds

of jobs such as drawing of plans, working out costs, making bills and maintaining registers. It is for these reasons, principally that the petitioners offer services to their clients and customers, that the Commissioner of Labour held that the definition of a shop will be attracted. He also placed some reliance upon the fact that the office of a chartered architect has not been exempted while advocates' chambers and doctors' consulting rooms have been exempted. He thought that by implication even the advocates' chambers and the doctor's consulting rooms would otherwise have to be regarded as shops within the meaning of the Act" and if that was so, there was no reason why a different view should be taken of the office of a chartered architect.

6. The question that I have to determine is whether the office of a chartered architect is a premises where any trade or business is carried on or where services are rendered to customers. At the outset, I may mention that there is certainly a fundamental difference between a profession and a trade or business. That seems to be implicit in the reference to "profession, occupation, trade or business" found in Article 19 of the Constitution. It is normally understood that trade or business is carried on with a profit motive. I do not think it is necessary to cite any authority for that view. But when we come to the question of a profession or an occupation, though they are carried on for the purpose of earning a livelihood, it would certainly be far from correct to say that a profit motive underlies the carrying on of these activities. Article 19(6) of the Constitution which enables the State to make laws imposing reasonable restrictions on the exercise of the right conferred by Article 19(1)(g) clearly makes a distinction between the carrying on of a profession on the one hand and the carrying on of a trade or business on the other. It therefore seems to me that it cannot be said that the carrying on of a profession is the same thing as the carrying on of a trade or business. Section 2, Sub-section (16), defining a shop is, in my opinion, restricted in its scope. It clearly envisages an activity which as commonly understood is associated with the carrying on of trade or commerce and cannot take in establishments where professional services are rendered.

7. In *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, the construction of Section 2(j) of the Industrial

Disputes Act came into question. That section defines "industry" to mean "any business, trade, undertaking, manufacture or calling of employers, and includes any calling service, employment, handicraft or Industrial occupation or avocation of workmen." Their Lordships examined the meaning of the expression "business or trade". They referred to the secondary meaning of the expression! "trade as any business carried on with a view to profit, whether manual or mercantile, as distinguished from the liberal arts or learned professions and from agriculture", while business is a wider term and means "practically anything which is an occupation as distinguished from a pleasure." They had to consider what meaning had to be ascribed by the various expressions found in the definition by reason of their juxtaposition in the particular provision. They observe thus:

The argument is that certain essential features or attributes are invariably associated with the words "business and trade" as understood in the popular and conventional sense, and it is the colour of these attributes which is taken by the other words used in the definition, though their normal import may be much wider. We are not impressed by this argument It is only where the intention of the Legislature in associating wider words with words of narrower significance is doubtful or otherwise not clear that the present rule of construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful; but where the object of the Legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service.

They later on proceed to observe that in so far as the expression "trade or business" as conventionally understood is concerned, it would not be appropriate to adopt that conventional interpretation for the purpose of an industrial adjudication. They state further-

It is clear, however, that though Section 2(j) uses words of very wide denotation, a line would have to be drawn in a fair and just manner so as to

exclude some callings, services or undertakings. If all the words used are given their widest meaning, all services and all callings would come within

the purview of the definition; even service rendered by a servant purely in a personal or domestic matter or even in a casual way would fall within

the definition. It is not and cannot be suggested that in its wide sweep the word "service" is intended to include service howsoever rendered in

whatsoever capacity and for whatsoever reason. We must, therefore, consider where the line should be drawn and what limitations can and should

be reasonably implied in interpreting the wide words used in Section 2(j).....

It is clear from, the above decision that despite the fact that words of a very wide significance are used in the section, it is permissible to limit the scope of such a provision.

8. A case" somewhat similar in its implication with the present one was considered by the Supreme Court in *The National Union of Commercial*

Employees and Another Vs. M.R. Meher, Industrial Tribunal, Bombay and Others, . In that case, the question arose, whether a solicitor"s firm

carrying on the work of an attorney satisfied the definition of an ""industry"" within the meaning of Section 2(j) of the Industrial Disputes Act. Their

Lordships pointed out that the distinguishing feature of an industry is that for the production of goods or for the rendering of service, co-operation

between capital and labour or between employers and employees must be direct and essential. They observed that the service rendered by a

solicitor functioning either individually or working together with a partner is service which is essentially individual. It depends upon the professional

equipment, knowledge and efficiency of the solicitor concerned. The following observations of their Lordships appear to be important in the

present context:

The very concept of the liberal professions has its own special and distinctive features which do not readily permit the inclusion of the liberal

professions into the four corners of industrial law. The essential basis of an industrial dispute is that it is a dispute arising between capital and labour

in enterprises where capital and labour combine to produce commodities or to render service. This essential basis would be absent in the case of

liberal professions. A person following a liberal profession does not carry on his profession in any intelligible sense with the active co-operation of

his employees, and the principal, if not the sole, capital which he brings into his profession is his special or peculiar intellectual and educational

equipment. That is why on broad and general considerations which cannot be ignored, a liberal profession like that of art attorney must, we think,

be deemed to be outside the definition of ""industry"" u/s 2(j).

I have earlier pointed out that there is a fundamental distinction recognised between the carrying on of a profession and the carrying on of a trade or business. In *Inland Revenue Commissioners v. Maxse*, 1919-1 KB 647, this distinction has also been referred to. There a person was the sole proprietor, editor and publisher of a monthly magazine. He contributed a large party of each number. He was assessed to excess profits duty. He contended that the profits were earned by reason of his personal qualifications and that he was therefore exempt from duty by virtue of the relevant provision of the Finance Act. The court of appeal held that he was carrying on both the profession of a journalist, author or man of letters and also a business of publishing his own periodical. They distinguished between the two capacities. Though the exemption in so far as the profits arose from his personal qualifications was governed by the relevant provision of the Finance Act, that there is a distinction between the carrying on of a profession and the carrying on of a trade or business appears to be established by this decision.

9. The other part of the definition of a "shop", that is, a "shop" means "any premises where services are rendered to customers" is to my mind equally inapplicable to the case of a chartered architect. It is not denied by the other side that a chartered architect does carry on a learned profession and that it is his special qualifications that are placed at the disposal of his clients. The manifold duties of a chartered architect and the restrictions that have been placed upon the discharge of his professional functions have been referred to by the learned counsel. The code of professional conduct prescribed by the Royal Institute of British Architects indicates that [He is as much constrained in the performance of his functions as a lawyer or a solicitor is.

Learned counsel for the petitioners has also referred to *corpus juris* where an architect is defined as one skilled in practical architecture, one whose profession is to devise the plans and ornamentation of buildings or structures or direct their construction. The requirement of learning, skill and integrity for the carrying on of that profession are also indicated. That an architect is called upon to prepare plans on behalf of his client for the construction of a building, to prepare estimates and the like and even to supervise the construction in the interests of his client are not denied. How

in these circumstances it can be said that the office of a consulting architect can be regarded as premises where services are rendered to customers

it is difficult to see. In the context in which this part of the definition finds place, associated with trade or business on the one side and with offices,

store rooms, godowns and warer houses on the other, ordinary principles of construction would appear to require that this part of the definition

should be construed as services rendered to customers in the carrying on of trade or business. The matter is not covered by any authority, but I am

certainly of the view that the office of an architect cannot be termed a premises where services are rendered to customers.

10. The fact that Government purported to exempt advocates" Chambers, Doctor"s consulting rooms and the like cannot serve to interpret the

section in the manner urged by the respondent. The result is that the order of the Commissioner of Labour holding the office of an architect to be a

shop displays an error on the face of the record and amounts to a misapplication of the provisions of the section. Equally, the order of the

Additional Commissioner for Workmen"s Compensation granting relief to the second respondent Lingam in W. P. No. 668 of 196X on the basis

that the petitioner"s office is a shop cannot be sustained. Both the petitions are allowed. The rules are made absolute. There will, however, be no

order as to costs.