
(1974) 12 GUJ CK 0007
In the Gujarat High Court

Porbandar Nagar Palika

APPELLANT

Vs

V.G. Patel Controlling Authority Under the Payment of
Gratuity Act, 1972 and Others

RESPONDENT

Date of Decision : 03-12-1974

Acts Referred:

Gujarat Municipalities Act, 1963 — Section 87, 87
Industrial Disputes Act, 1947 — Section 2(j)

Citation : (1975) 16 GLR 963

Hon'ble Judges : P.D. Desai, J;J.B. Mehta, J

Bench : Division Bench

Judgement

P.D. Desai J.

1. The sole question which falls for determination in this writ petition is whether the provisions of the Payment of Gratuity Act, 1972 (hereinafter referred to as the Act) apply to a local authority constituted and functioning under the provisions of the Gujarat Municipalities Act, 1963 and the question arises in the context of the facts stated hereinafter.

2. The Porbandar Nagar. Palika, the petitioner herein, is a local authority which employs a staff of several persons of different competence for discharging its functions and duties. Respondents Nos. 2 to 8 were in the employment of the Petitioner and all of them except respondent No. 8 have retired on attaining the age of superannuation. Respondent No. 8 has given up his job by tendering resignation. The said respondents were entitled to gratuity and they accordingly made a claim in that behalf. The petitioner was of the view that the rules relating to gratuity contained in the Bombay Civil Services Rules, as then in force, which were adopted by it as a scheme for payment of gratuity to its own staff, continued to apply notwithstanding the enactment of the Act and it accordingly determined and paid the amount of gratuity to respondent Nos. 2 to 7 calculated at the rate of the last basic salary drawn by the employee concerned for fifteen days of each completed year of service subject to the ceiling of the aggregate of

fifteen salaries. The claim of respondent No. 8 to gratuity was, however, negated on the ground that he had not completed the qualifying period of service, namely, twentyfive years. According to the respondents, after the enactment of the Act, the scheme for payment of gratuity framed by the petitioner stood abrogated having regard to the provisions of Section 14 and they therefore, contended that u/s 4 they were entitled to gratuity at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned for every completed year of service or part thereof in excess of six months subject to the maximum of twenty months' wages and that respondent No. 8 was also entitled to gratuity in that he had completed the qualifying period of service, namely, five years. On the petitioner's expressing its inability to accept the stand-point of the concerned respondents, the dispute was carried before respondent No. 1 who is appointed as the controlling authority u/s 3 and whose function it is u/s 7 to determine disputes of such nature. Respondent No. 1 passed various orders, which are appended collectively as Annexure "B" to the petition, upholding the claim of the concerned respondents and issued directions to the petitioner to pay the excess amount found payable to each respondent in accordance with the provisions of the Act. The various notices containing the requisition are appended collectively as Annexure "C" to the petition. The present petition was, therefore, filed challenging the orders at Annexure "B" and the notices at Annexure "C".

3. The sole ground on which the impugned orders and notices are challenged is that the Act does not apply to the establishment of a local authority and that, therefore, the direction to pay gratuity to respondents Nos. 2 to 8 calculated in the manner provided in the Act was ultra vires. Before dealing with the contentions canvassed before us in support of this ground, it would be useful to notice briefly the relevant provisions of the Act.

4. The object of the Act as disclosed by its long preamble is to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto. Section 1(3) indicates its extent and application and accordingly it applies to: (a) every factory, mine, oilfield, plantation, port and railway company; (b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State in which ten or more persons are employed, or were employed, on any day of the preceding twelve months; and (c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf. It is not in dispute that a local authority is not comprised in the category of establishments mentioned in (a) and (c) above and, therefore, the question of the applicability of the Act to a local authority will have to be determined only by reference to (b) above. It is also not in dispute that more than ten persons were employed by the petitioner during the relevant period and, therefore, the sole inquiry required to

be made for the purposes of the decision of the present case is whether the establishment of a local authority is a shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in the State of Gujarat. The concerned law is the Bombay shops and Establishments Act, 1948 (hereinafter referred to as the Shops Act) and we shall presently make reference to the relevant provisions of the said Act. Before we do so, however, we might make further reference to the relevant provisions of the Act under consideration. Section 2 is the definition section and the definitions of the expressions "employee" and "employer" are found in Clauses (e) and (f) thereof. So far as it is relevant for the purposes of the present case, an employee as defined means any person (other than an apprentice) employed on wages, not exceeding one thousand rupees per mensem, in any establishment, etc. to do any skilled, semiskilled or unskilled, manual, supervisory, technical or clerical work whether the terms of such employment are express or implied, but does not include any such person who is employed in a managerial or administrative capacity. Similarly, an employer as defined means, in relation to any establishment etc. belonging to, or under the control of, any local authority, the person appointed by such authority for the supervision and control of employees or where no person has been so appointed, the chief executive officer of the local authority. Be it noted that this definition clearly implies that the Act was intended to apply to the establishment of local authority if other conditions were satisfied. Sub-section (1) of Section 4 provides that gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, (a) on his superannuation, or (b) on his retirement or resignation, or (c) on his death or disablement due to accident or disease. There are two provisos and an explanation to this sub-section which are not relevant, Sub-section (2) provides that for every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned. There are two provisos to this sub-section which again are not relevant, Sub-section (3) provides that the amount of gratuity payable to an employee shall not exceed twenty months' wages. Sub-sections (4), (5) and (6) are not relevant and they need not be read. Section 7 lays down the machinery for the determination of the amount of gratuity. Broadly speaking, it provides for a written application being made by a person who is eligible for payment of gratuity under the Act to the employer within such time and in such form as may be prescribed for payment of gratuity and for the determination of the amount of gratuity by the employer, as soon as it becomes payable whether or not such an application has been made. It further provides for notice in writing being given to the person to whom the gratuity is payable and for the payment of the gratuity within such time as may be prescribed. The dispute if any as to the amount of gratuity payable to an employee under the Act and certain other connected matters are required to be resolved by the controlling authority appointed u/s 3 after holding an inquiry and giving the parties to the dispute a reasonable opportunity of being heard and the controlling

authority is empowered to direct the employer to pay the amount of gratuity payable to an employee determined as a result of such inquiry, if such amount is in excess of the amount which he admits to be payable by him as gratuity. The determination of the controlling authority is subject to an appeal to the appropriate Government or such authority as may be specified by the appropriate Government in that behalf. Section 8 provides for a summary remedy for recovery of the amount of gratuity. Section 14 provides that the Act or any rule made thereunder shall have effect notwithstanding any thing inconsistent therewith contained in any enactment other than the Act or in any instrument or contract having effect by virtue of any enactment other than the Act. The effect of this section is that a scheme for payment of gratuity framed by any employer would stand superseded in so far as it is inconsistent with the provisions of the Act. As stated earlier, the provisions contained in Section 4 relating to payment of gratuity to an employee who has rendered continuous service for not less than five years and the maximum amount of gratuity payable being inconsistent with the scheme of gratuity adopted by the petitioner, a dispute arose between the petitioner and respondents Nos. 2 to 8 which has given rise to this petition.

5. We shall next refer to the relevant provisions of the Shops Act. The only provisions to which reference need be made are Sub-sections (4), (8) and (27) of Section 2 and Section 4 of the said Act. Sub-section (8) of Section 2 defines "establishment" and it reads as under:

(8) "Establishment" means a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment to which this Act applies and includes such other establishment as the State Government may, by notification in the Official Gazette, declare to be an establishment for the purposes of this Act;

Sub-section (4) defines "commercial establishment" and it runs 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 a society registered under the Societies Registration Act, 1860 and a 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 01 incidental or ancillary thereto but does not include a Sub-section (27) defines a "shop" and the definition is in the following words:

(27) "Shop" means any premises where goods are sold, either by retail or wholesale or where services are rendered to customers, and includes an office, a store room, godown, warehouse or work place, whether in the same premises or otherwise, mainly used in connection with such trade or business but does not include a factory, a commercial establishment, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment;

It would be seen that the definition of "establishment" takes in a "shop" and a "commercial establishment" amongst other things. However, the definitions of "shop" and "commercial establishment" are mutually exclusive. Section 4 of the Shops Act provides that notwithstanding anything contained in the said Act, the provisions thereof mentioned in the third column of schedule II shall not apply to the establishments, employees and other persons mentioned against them in the second column of the said Schedule. The proviso to the said section says that the State Government may, by a notification published in the Official Gazette, add to, omit or alter any of the entries in the said schedule and on the publication of such notification, the relevant entries shall be deemed to be amended accordingly. Now, on a reference to Schedule II of the Shops Act, it would appear that the effect of entry No. 3 thereof read in the light of the provisions of Section 4, is that all the provisions of the said Act are not applicable to the establishments of the local authorities. The provisions of Section 4 read with the relevant entry in the Schedule have given rise to an argument which we shall presently mention and dispose of at the very outset.

6. It was contended on behalf of the petitioner that by virtue of the provisions of Section 1(3)(b), the Act applies to every shop or establishment "within the meaning of any law" for the time being in force in relation to shops and establishments in a State and not to every shop or establishment "as defined in any law" satisfying such description and that, therefore, all the provisions of the relevant law will have to be read together in order to ascertain whether a particular organisation or institution can be said to be a shop or establishment within the meaning of such law. Accordingly, Section 2(8) of the Shops Act which defines "establishment" will have to be read with Section 4 and Schedule II thereof and if it is so read it would be apparent that a local authority could never be an establishment within the meaning of the said Act because by virtue of entry 3 of Schedule II none of the provisions of the Act apply to the establishments of the local authorities and, therefore, even the definition section would not apply and the establishment of a local authority could never be termed as an establishment within the meaning of Section 2(8) of the Shops Act. We are unable to accept this contention. We do not think that the use of the phrase "within the meaning of any law" in Section 1(3)(b) has any special significance or that by the use of such expression the Legislature intended to convey a meaning different than that which could have been expressed by the words "as defined in any law". The definition clause contained in a statute is the legislative dictionary and unless the context otherwise requires all expressions used in the Act carry the meaning assigned to them in the definition clause. Therefore, in order to ascertain the meaning of an expression used in a statute, reference must necessarily be made to the definition section and if that expression is defined, then, it will ordinarily have that meaning for the purposes of the statute. Besides, so far as the Act under consideration is concerned, it will have to be borne in mind that it is an all India statute and that it seeks to incorporate by reference the definition of the terms "shop" and "establishment" as given in the various

state laws for the time being in force in relation to shops and establishments. The legislature could not have made specific reference to the definition clauses contained in various State Acts, for, that would have led to prolixity. It has, therefore, adopted this legislative formula or device. No undue stress could, therefore, be laid on the use of the expression "within the meaning of any law" in Section 1(3)(b) of the Act and the meaning of the terms "shop," and "establishment" for the purpose of that provision will have, to be ascertained by reference to the definition clauses contained in the relevant State-laws.

7. There is also no substance in the argument that in view of the fact that Section 4 read with entry No. 3 of Schedule II of the Shops Act has the effect of making the provisions of the said Act inapplicable to the establishments of the local authorities, no establishment of a local authority would be a "shop" or "establishment" within the meaning of the said law and consequently the Act under consideration would not apply to such an establishment. In the first place, the fact that the legislature had to introduce entry No. 3 in Schedule II of the Shops Act itself shows that the establishment of a local authority was covered within the meaning of the word "establishment" as defined in the said Act. The question of granting exemption would arise only if the Act was initially applicable. It would not be unreasonable to hold, therefore, that the establishment of a local authority is *prima facie* comprised within the meaning of the term "establishment" as defined in the said Act and accordingly it would also be covered by the said expression so far as the Act under consideration is concerned. Secondly, in Section 1(3)(b) the legislature has stopped short of using the words "within the meaning of any law for the time being in force" in relation to shops or establishments in a State; it has not used the expression "within the meaning of any law, for the time being in force, applicable to shops and establishments in a State." We must, therefore, ascertain whether a particular organisation or institution is covered by the definition of the term "establishment" as given in the relevant State law and, if it is so covered, the further inquiry as to whether or not on account of any exemption the provisions of the State law are applicable to such shops or establishments, is really not germane. The investigation into the question of exemption from the applicability of the relevant State law is altogether irrelevant factory, shop, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment;" for determining whether a particular shop or establishment is a shop or establishment within the meaning of such State law. It would not be permissible to rewrite or add words in Section 1(3)(b) of the Act under consideration, which would necessarily have to be done, if such an inquiry were to be undertaken as urged on behalf of the petitioner.

8. It would thus appear that in order to determine whether the establishment of a local authority is an establishment within the meaning of the Act under consideration, the proper approach would be to ascertain whether it is covered by the definition of the said term as given in the relevant state law referred to in Section (3)(b) and, if it is so covered, the Act under consideration would apply to

the local authority. No further inquiry in the direction whether by virtue of some exemption under the relevant State law the provisions of the said law apply to a local authority would be relevant. In our opinion, therefore, the argument urged on behalf of the petitioner based on the conjoint reading of Section 4 and Schedule II of the Shops Act is untenable.

9. That takes us to the material question, namely, whether having regard to the definition of the term "establishment" as given in the Shops Act, a local authority could be said to be an establishment for the purposes of the Act. The relevant definitions have already been set out earlier. The definition of the word "establishment" is very wide and it comprehends many things. It is not in dispute, however, that a local authority in order to fall within the meaning of the word "establishment" as given in the Shops Act must be a "commercial establishment" as understood in the said Act. It is nobody's case that it is covered by any other categories of establishments as enumerated in Section 2(8) of the Shops Act. Now, the expression "commercial establishment" is defined in Section 2(4) of the Shops Act and accordingly an institution or organisation in order to fall within the definition of the said expression must in the first instance be an "establishment." Secondly, it must be 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 other than a factory, shop, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment. The other part of the relevant definition clause is not applicable and no reference need be made to it. The question which then arises is whether a local authority is an establishment and whether it carries on any activity or undertakes any work of the nature specified above.

10. Now, so far as the first of these two aspects is concerned, it is obvious that the word "establishment" is used in Section 2(4) of the Shops Act in its ordinary meaning. In other words, it would be a redundant and futile exercise to import the definition of the word "establishment" as given in Section 2(8) of the Shops Act in order to find out the meaning of the word "establishment" used in Section 2(4) of the Act, for, it would only result in a circuitous inquiry. The word "establishment" in its ordinary usage means an organised body of men maintained for a purpose. It can hardly be disputed that the establishment of a local authority would satisfy this test. It is undoubtedly an organised body of men maintained for a purpose, namely, for discharging the functions and duties entrusted to the local authority under the relevant law. It would, therefore, follow that the first requirement of the definition of the term "commercial establishment" is satisfied.

11. The question whether the second requirement of the relevant definition clause is satisfied or not has given rise to much controversy. We find, however, to our good fortune that there are two decisions of the Supreme Court which throw direct light on the question under consideration and we shall, therefore, first make reference to them.

12. In *Dr. Devendra v. State* 10 G.L.R. 156 the Supreme Court was concerned with the question whether a doctor's dispensary is a "commercial establishment" within the meaning of the Shops Act. In paragraph 5 of the decision, the Supreme Court took note of the argument urged on behalf of the appellant in that case to the effect that in the definition of the expression "commercial establishment" the real emphasis was on the nature of the activity carried on by an establishment and that in order to fall within the ambit of the said term the activity must be a commercial activity. It was observed that the argument was well-founded and must prevail. Proceeding further it was observed in paragraph 6 that though the relevant definition clause used words of very wide import, in the matter of construing its language, the principle of *noscitur a sociis* was required to be adopted. Accordingly, the word "profession" used in the relevant definition clause must take colour from the words "business" and "trade" with which it was associated and it must have attributes or features which are invariably associated with business and trade as understood in the popular and conventional sense. Therefore, a professional establishment cannot come within Section 2(4) of the Shops Act unless the activity carried on therein was commercial in character. The definition of the word "commerce" as given by Lord Campbell in *Mokay v. Rutherford* 6 Moore P.C. 425 was then alluded to and it was observed that it could not be taken to be wholly valid for the purpose of construing an industrial legislation in a modern welfare State. It was then observed:

It is clear that the presence of the profit motive or the investment of capital tradition associated with the notion of trade and commerce cannot be given an undue importance in construing the definition of "commercial establishment" u/s 2(4) of the Act. In our opinion, the correct test of finding whether a professional activity falls within Section 2(4) of the Act is whether the activity is systematically and habitually undertaken for production or distribution of goods or for rendering material services to the community or any part of the community with the help of employees in the manner of a trade or business in such an undertaking.

Proceeding further in the same paragraph reference was made to the decision of the Supreme Court in *Dooars Tea Co. Ltd. Vs. Commissioner of Agricultural Income Tax, West Bengal*, in which case the question was whether the work of solicitors was an industry within the meaning of Section 2(j) of the Industrial Disputes Act, 1947 and the tests adopted in that decision were alluded to. It was then observed:

Applying a similar line of reasoning, we are of the opinion that the dispensary of the appellant would fall within the definition of Section 2(4) of the Act if the activity of the appellant is organised in the manner in which a trade or business is generally organised or arranged and if the activity is systematically or habitually undertaken for rendering material services to the community at large or a part of such community with the help of the employees and if such an

activity generally involves co-operation of the employer and the employees. To put it differently, the manner in which the activity in question is organised or arranged, the condition of the cooperation between the employer and the employees being necessary for its success and its object being to render material service to the community can be regarded as some of the features which render the carrying on of a professional activity to fall within the ambit of Section 2(4) of the Act.

13. It is true that this decision interpretes the word "profession" used in Section 2(4) of the Shops Act, as emphasised on behalf of the petitioner. However, as the very reasoning adopted in the decision shows, that word was construed in the light of the other two words, namely, "business and trade" used along with it and for that purpose certain essential features or attributes of business and trade were also considered. The decision is, therefore, in point for the purpose of appreciating whether the activities carried on by a local authority could be said to be amounting to carrying on of any business or trade or any work in connection with or incidental or ancillary to any business or trade. In this context it is required to be borne in mind that according to the Supreme Court the presence of profit motive or investment of capital, which is traditionally associated with the notion of trade and commerce, is not required to be given undue importance in determining whether a particular activity amounts to carrying on of trade or commerce. All that is required to be seen is whether the activity is generally organised or arranged and systematically or habitually undertaken in a commercial manner for rendering material services to the community at large or a part of such community with the help of employees and involves co-operation of the employer and employees. If these features are present, the activity would fall within the meaning of the expression "trade or business" in the context of Section 2(4).

14. The next decision to which reference may be made is Chief Commissioner, Delhi and Others Vs. Federation of Indian Chambers of Commerce and Industry, New Delhi and Others, . The question in that case was whether the Federation of Indian Chambers of Commerce and Industry, New Delhi was a "commercial establishment" within the meaning of Section 2(5) of the Delhi Shops and Establishments Act, 1954. The Supreme Court observed in paragraph 10 of the report that the question was really not res Integra since in an earlier decision F Management of The Federation of Indian Chambers of Commerce and Industry Vs. Their Workman, Shri R. K. Mittal, it was held that the activity of the Federation was in the nature of a business or trade. In paragraph 17 of the decision it was pointed out that in B.K. Mittal's case the question arose in the context of the Industrial Disputes Act and was determined by reference to definition of the term "industry" as contained in Section 2(j) of the said Act. However, "business or trade" was an element common to the definitions of "commercial establishment" and "industry" given in the respective statutes and the decision in Mittal's case was, therefore, treated as directly on the point since the question whether the activities of the Federation amounted to business or

trade activities was directly and substantially in issue in the said case as well. A passage from the decision in Mittal's case as extracted and cited in which the view taken has that the linchpin of the definition of "industry" was to ascertain "the systematic activity which the organisation is discharging, namely, whether it partakes the nature of a business or trade..." It was pointed out in para 19 that in Mittal's case the activities of the Federation carried on in a systematic manner, with a view to assisting its members and other businessmen and industrialists and even non-members, such as giving them the right to subscribe to its bulletin, taking up their cases and solving their difficulties and obtaining concessions and facilities for them from the Government, were treated as business activities and material services rendered to businessmen, traders and industrialists and it was in the light of those activities that the Federation was treated as "industry". In paragraph 21 it was again emphasised that though the observations in Mittal's case were made in the context of the definition of "industry" they were equally applicable in the case arising under the Delhi Shops and Establishments Act. In paragraph 23 it was observed that though the rendering of services was not specifically mentioned as an element of the definition of "commercial establishment" in the Act under consideration (whereas it was so mentioned in the wider definition of the word "industry" in the Industrial Disputes Act), yet that very element appeared in the definition of the expression "shop" in the Act under consideration and that it was, therefore, immaterial whether the activities of the Federation brought its premises within the ambit of a "shop" or a "commercial establishment." In paragraph 24 it was observed that it was well-settled that a systematic activity could be a business activity even if no dividends were declared or profits shared. In paragraph 27 certain activities of the Federation were alluded to and the fact that the profit derived by it was ploughed back and not distributed amongst its members was taken note of. However, that factor was not treated as altering the position that the activities of the Federation were trading or business activities. The final conclusion in paragraph 28 in the light of the foregoing discussion was that the premises of the Federation were "commercial establishment" within the meaning of the Delhi Shops and Establishments Act.

15. This decision throws a flood of light on the problem presented for our determination and it is important in more than one respect. It emphasises that business and trade are common elements in the definition of the word "industry" in the Industrial Disputes Act and the word "commercial establishment" in the Delhi Shops and Establishments Act and on that basis it treats a decision holding an establishment to be an "industry" within the meaning of the former Act as binding for the purposes of the decision of the question whether such an establishment is a "commercial establishment" within the meaning of the latter Act. On a parity of reasoning it would be safe to hold that a decision holding the establishment of a local authority as "industry" within the meaning of the Industrial Disputes Act would conclude the question whether such an establishment is a "commercial establishment" within the meaning of our Shops

Act, for, the same common element, namely, business or trade, is to be found in the definitions of the relevant words in the said two Acts. Furthermore, the decision also brings into focus the fact that the test to be applied for the purpose of determining whether a particular establishment is a commercial establishment is whether the systematic activity which it carries on partakes the nature of a business or trade and that such a systematic activity would be a business activity even if no dividends are declared or profits shared.

16. On a conjoint reading of the aforesaid two decisions of the Supreme Court, therefore, the test to be applied for the purpose of determining whether the establishment of the petitioner is a commercial establishment or not is whether it systematically or habitually undertakes activities which partake the nature of a business or trade or renders material services to the community at large or a section of such a community with the help and co-operation of its employees. It matters not whether in the taking up of such activity profit motive or investment of capital or sharing of profits, which notions are traditionally associated with the concept of trade and commerce, are absent. It is in the light of this test that the question posed before us will be resolved.

17. It would be pertinent at this stage to refer to yet another decision of the Supreme Court which has explained the meaning of the term "material services." In *The Management of Safdarjung Hospital, New Delhi Vs. Kuldeep Singh Sethi, Hidayatullah, C.J.* speaking for the Court expounded the true connotation of the said expression while dealing with the question whether a hospital run by the Government or a charitable institution could be said to be "industry" within the meaning of the Industrial Disputes Act. It was observed at page 1413 of the report:

What is meant by "material services" needs some explanation too. Material services are not services which depend wholly or largely upon the contribution of professional knowledge, skill or dexterity for the production of a result. Such services being given individually and by individuals are services no doubt but not material services. Even an establishment where many such operate cannot be said to convert their professional services into material services. Material services involve an activity carried on through co-operation between employers and employees to provide the community with the use of something such as electric power, water, transportation, mail delivery, telephones and the like. In providing these services there may be employment of trained men and even professional men, but the emphasis is not on what these men do but upon the productivity of a service organised as an industry and commercially valuable. Thus the services of professional men involving benefit to individuals according to their needs, such as doctors, teachers, lawyers, solicitors etc., are easily distinguishable from an activity such as transport service. The latter is of a commercial character in which something is brought into existence quite apart from the benefit to particular individuals. It is the production of this something which is described as the production of material services.

It would appear, therefore, that an activity which is organised like an industry so as to result in the production of some service useful to the community (as distinguished from individuals) such as electric power, water, transportation, mail delivery, telephones and the like with the co-operation between employers and employees would qualify as material services since it brings into existence something which is commercially valuable and caters to the community at large apart from resulting in benefit to particular individuals.

18. Before proceeding to apply the abovementioned well-settled tests to the facts of the present case, it would be convenient to deal with an incidental argument urged on behalf of the petitioner in the context of the decision in Dr. Devendra's case (supra). It was urged that the decision in the said case was rested principally on certain observations in the previous decision of the Supreme Court in *National Union of Commercial Employees and Anr. v. M.R. Maker*, Industrial Tribunal, Bombay (supra) and that since the ratio of the last-mentioned case was considerably affected by subsequent decisions of the Supreme Court, the decision in Dr. Devendra's case no longer held the field and it could not be relied upon to interpret the term "commercial establishment." Now, there are two grounds on which this submission must be rejected. In the first place, as pointed out earlier, the decision in Dr. Devendra's case is a direct authority on the interpretation of the relevant words occurring in the definition of the term "commercial establishment" in the Shops Act and unless it is expressly overruled by a subsequent decision of the Supreme Court, it would not be open to us to disregard it on the ground that the very basis on which it is founded has been shaken by subsequent decisions of the Supreme Court. A declaration of law made by the Supreme Court on a given point cannot be brushed aside by us by the process of examining the basis of its reasoning and ascertaining whether the said basis has been undermined by some pronouncements made in a different context in another decision of the Supreme Court. In the next place, there is no warrant for the proposition that the ratio of the decision in the *National Union of Commercial Employees's* case (supra), which has been relied upon in Dr. Devendra's case, has been undermined by any of the subsequent decisions of the Supreme Court to which our attention was invited. The question in the said case was whether a solicitor's firm was "industry" within the meaning of the Industrial Disputes Act and the relevant observations made in the said case and cited in Dr. Devendra's case emphasise that an organised activity in the manner of trade or business with co-operation between capital and labour or between employer and employees and the consequential production of goods or rendering of material services to the community is an essential pre-requisite for an activity to be classified as an industry. It is that test which was applied in the said case for determining the question that arose for decision. In the later decisions of the Supreme Court to which our attention was invited, namely, *Secretary, Madras Gymkhana Club Employees' Union Vs. Management of the Gymkhana Club*, and *The Management of Safdarjung Hospital, New Delhi Vs. Kuldeep Singh Sethi*, this test has not only not been disapproved but reiterated. In a still later decision in

Federation of Indian Chambers of Commerce and Industry v. Their workman Shri R.K. Mittal (supra) this very test was applied in determining whether the Chamber of Commerce was an industry. It might be pertinent to note further that in the S.J. Hospital's case (supra) an attempt was made on behalf of the respondent workman to challenge the ratio of the National Union of Commercial Employee's case (supra) but it proved abortive (see paragraphs 17 and 18 of the report). In our opinion, therefore, the submission that the authority of Dr. Devendra's case has been weakened or its ratio is undermined by subsequent decisions of the Supreme Court cannot be accepted.

19. Let us now proceed to consider in the light of the aforesaid discussion whether the establishment of a local authority falls within the definition of the expression "commercial establishment". It is well-settled that local authority ordinarily discharges dual functions; it may be statutorily entrusted with regal functions strictly so called, such as making of laws, disposal of certain cases judicially etc. which are the primary and inalienable functions of a constitutional Government and also with other welfare activities see The Corporation of the City of Nagpur Vs. Its Employees, . The former, being delegated regal functions, would not amount to carrying on of any activity which partakes the nature of business or trade or renders material services to the community. The concerned section of the establishment of the local authority which deals exclusively with those functions would not ordinarily fall within the concept of "commercial establishment" and it must, therefore, be excluded from the ambit thereof. However, so far as the establishment dealing with the other activities is concerned, the question whether it is covered by the definition of the term "commercial establishment" must inevitably arise.

20. Now, we are concerned in the present case with a local authority which is a municipality constituted and functioning under the Gujarat Municipalities Act, 1963. A perusal of the said Act shows that it creates a local authority, which is a juristic person capable of holding and disposing of property, upon which powers are conferred inter alia to impose and collect taxes, cesses and licence fees and to borrow moneys and to constitute the amount so collected as the fund of the municipality from and out of which the liabilities of the municipality are to be met. The said Act, besides entrusting certain sovereign functions to the municipality, imposes on it the duty to carry put various welfare activities in the interest of the public and confers powers for the discharge of such duties and functions satisfactorily. Section 87 of the said Act prescribes the statutory duties and functions of the municipality and it inter alia imposes on every municipality the obligation to make reasonable and adequate provision for obtaining a supply or an additional supply of water; watering public streets and places; cleansing public streets and places and sewers and all spaces not being private property; introducing and maintaining the system of water-closet; disposing of night soil and rubbish; constructing, altering and maintaining markets slaughter-houses, privies, drains, sewers, sewerage works, bathe, drinking fountains etc. and providing suitable accommodation for calves, cows or buffaloes required within

the municipal borough for the supply of animal lymph; lighting public streets, places and buildings and extinguishing fires and protecting life and property when fires occur. Section 91 prescribes the discretionary functions of a municipality and it inter alia provides that a municipality may, either wholly or partly out of the municipal property and fund, construct, establish or maintain public parks, libraries, museums, offices, shops, markets, rest-houses, places of entertainment etc., construct, maintain, manage, organise or purchase telephone lines, or mechanically propelled transport facilities, for the conveyance of the public, or any work for the supply of electrical energy or gas. It might also provide for supplying, constructing and maintaining receptacles and other appliances on or for the use of private, premises for receiving and conducting the sewage thereof into sewers under the control of the municipality and establishing and maintaining a farm or factory for the disposal of sewage. It might also set up dairies or farms for the supply of milk or milk products. It might also undertake construction of buildings for housing houseless persons or manufacture of building materials and their distribution at fair prices. It might start granaries and construct and maintain godowns and depots for preservation of foodgrains and vegetables and establish and maintain nurseries for fruit bearing trees and vegetables and arrange for storage and distribution of the fruits and vegetables grown therein. These are the various activities which a municipality is required to undertake either as a part of its statutory duties or as a matter of its discretion, as the case may be. The scheme of the Act and the relevant provisions noted above show that in certain respects a municipality is similar to any big undertaking in private sector which takes up the work of manufacture, trade or business or of rendering of material services with the difference that the source of its constitution and the manner of its functioning is different and it has certain additional statutory powers for the carrying out of its functions more satisfactorily.

21. Now, it could hardly be disputed that the activities aforementioned which a municipality might undertake would partake the nature of business or trade or amount to rendering material services to the community. These activities have an economic content and result in the production, distribution and consumption of goods and materials or availability of material services. The activities are to be carried on by the municipality as a occupation as distinguished from pleasure; they would be carried on in a systematic and habitual manner on commercial lines for the benefit of the community at large or a section thereof and they would involve co-operation of the employer and employees. It is true that profit motive or investment of capital or quid pro quo might be absent when a municipality undertakes most of these activities. The capital required for undertaking such activities is ordinarily provided by the municipal fund constituted as aforesaid and by and large the activities are not a profit earning apparatus run in return for consideration received. The absence of these features, however, is a matter of no consequence, for, the traditional notions which associate those components with the concept of trade or business, are not

of much relevance in the context of modern industrial legislation as repeatedly stressed by the Supreme Court. The displacement of the traditional capital structure which generates profits from consideration received in return for the carrying on of such activities would not make the concerned municipal activities any the less commercial activities. Those sections of the establishment of the municipality which attend to these and similar branches of work must, therefore, be held to be "commercial establishment".

22. We would like to make it clear at this juncture that we must not be understood as laying down that only those sections of the establishment of the municipality which are directly concerned with the carrying on of such or similar activities are to be treated as a commercial establishment. The sections which carry on such activities and the other sections which control or feed it constitute a composite unit and any artificial demarcation between the two would be unrealistic. Therefore, not only those sections which are directly connected with the carrying on of such activities but also other sections which are intimately connected with it so as to form an integrated whole would be covered within the ambit or "commercial establishment". To illustrate, the section which is connected with the collection of municipal taxes or revenue which is essentially an earning department, or the administrative section, cannot be de-linked from the section which attends to activities connected with public conveyance, water works, sewerage, markets etc. The question, therefore, whether other sections of the municipal establishment would be covered within the definition of the term "commercial establishment" must be decided in each case on an integrated view of the activities of the municipality. In such a case, a working formula might be evolved and solution found by ascertaining whether the associate section of the establishment is primarily and predominantly concerned with the activities of commercial nature undertaken by the municipality. In other words, the predominant functions of such associate section shall be the criterion for the purpose of deciding whether it also assumes the colour of a commercial establishment.

23. It would not be out of place to mention at this stage that many of the activities undertaken by a local authority have been held to be "industry" within the meaning of the Industrial Disputes Act by the Supreme Court in its various decisions. In *D.N. Banerji Vs. P.R. Mukherjee and Others*, services which deal with supply of power, light or water to the public and system of public conservancy or sanitation, which are comprised within the definition of the word "public utility service" given in Section 2(n) of the said Act, were held to be "industry" and disputes between municipalities and their employees in the said branches of work were held to be falling within the ambit of the expression "industrial dispute". In *Baroda Borough Municipality v. Its workmen* AIR 1957 S.C. 1110 the electrical department of the municipality which generated and supplied energy to private consumers was held to fall within the ambit of the expression "industry" and a dispute regarding the payment of bonus between the employees in that department of the municipality and the municipality was

treated as an industrial dispute. In the Nagpur Corporation's case (supra) the following departments of the Corporation were held to be governed by the Act:

Tax Department, Public Conveyance Department, Fire Brigade Department, Lighting Department. Water Works Department, City Engineer's Department, Enforcement (Encroachment) Department. Sewage Department, Health Department, Market Department, Public Gardens Department. Public Works Department, Assessment Department. Estate Department, Education Department, Printing Press Department. Building Department and General Administration Department.

In S.J. Hospital's case (supra) the services defined as "public utility service" in the Industrial Disputes Act were held as answering "the test of an industry run on commercial lines to produce something which the community can use" on the ground that "these are brought into existence in a commercial way and are analogous to business in which material goods are produced and distributed for consumption." Reference was also made in the said decision to the sixth Clause in Section 2(n) of the said Act which empowers the appropriate Government by a notification in the Official Gazette to declare under certain circumstances any industry specified in the first schedule to be a public utility, service and it was observed that what could be so declared had to be an industry in the first place. On a reference to the first schedule, it would appear that transport (other than railways) for the carriage of passengers or goods by land or water and fire brigade services are amongst the various services specified therein. It would thus appear that any municipal establishment which supplies power, light or water to the public or provides for any system of public conservancy or sanitation or organises transport or fire brigade services would, according to the said decision, be covered within the definition of the word "industry". These decisions given in the context of the definition of "industry" in the Industrial Disputes Act have a direct bearing on the question under consideration since, as pointed out in the case of Chief Commissioner v. Indian Chambers (supra), they are equally applicable in relation to the definition of "commercial establishment" in the Shops Act in view of the fact that "business" and "trade" are elements common to the definitions of the said expressions in the two Acts. None of these decisions including the decision in Nagpur Corporation's case has been subsequently overruled (vide Dhari Gram Panchayat v. Its Safai Kamdars 12 GLR 287 and Mazdoor Mahajan, Rajkot v. D.M. Vin 15 GLR 32. In our opinion, therefore, those sections of the establishment of a local authority, which carry on activities that have been held to be "industry" within the meaning of the Industrial Disputes Act, would ordinarily be covered within the ambit of the expression "commercial-establishment" and accordingly, to such sections of the establishment the Act would undoubtedly apply.

24. Coming now to the facts relating to the case of the petitioner, the petition and the returns do not bring out with sufficient particulars the nature of the various activities undertaken by the petitioner. In the affidavit-in-reply filed by

the first respondent there is, however an averment to the effect that the petitioner is running a bus service. In the affidavit-in-rejoinder filed on behalf of the petitioner this allegation is not controverted and all that is stated is that there is a separate unit of the establishment of the municipality which runs a bus service for the benefit of the citizens of the town of Porbandar. In the absence of better particulars we shall have to proceed on the assumption that the petitioner undertakes all activities which form part of its statutory functions and duties u/s 87 of the Gujarat Municipalities Act and in addition undertakes at least one more activity, namely, the running of a transport service which form, part of its discretionary functions. Now, amongst the statutory duties are comprised the supply of water, conservancy and sanitation, fire brigade service etc. which are undoubtedly activities which result in the production of material goods or services useful to the community. The transport service is an undertaking which partakes the nature of a business or trade In these circumstances, those sections of the petitioner-municipality which deal with these activities and those other sections which are interlinked or intimately and prominently connected with these activities would undoubtedly qualify as "commercial establishment" and the Act would be applicable to the employees in such sections which all form an integrated whole. It was fairly stated on behalf of the petitioner that it did not wish to discriminate between the employees in those sections and other sections of the municipality and that, therefore, on the view which we are inclined to take, it had no objection even if the whole of the establishment of the municipality was treated as a commercial establishment to which the provisions of the Act apply. In view of the posture adopted on behalf of the petitioner, the conclusion is inevitable that the provisions of the Act apply to its entire establishment and that all of employees would be governed by it. The first respondent was, therefore, justified in taking the view that he did and in issuing the impugned notices to the petitioners.

25. In the result, the petition fails and is dismissed. The petitioner will pay the costs of the petition to the first respondent as well as to the rest of the respondents in two separate sets.

26. After the pronouncement of the judgment, an oral application was made on behalf of the petitioner for a certificate under Article 133(1) of the Constitution of India. We do not think that this is a fit case for the grant of a certificate. As the foregoing discussion would reveal, our decision rests on principles which are well-settled as a result of the pronouncements of the Supreme Court in several decisions. The application is, therefore, rejected.

27. At the request of the petitioner, however, the interim relief granted at the stage of the admission of the petition will continue for a period of fifteen days after the certified copy of this judgement is made ready for delivery on the condition that the petitioner will apply today for the certified copy on payment of urgent charges.