

(1966) 04 AHC CK 0007
In the Allahabad High Court
Case No : Civil Misc. Writ No. 1417 of 1961

Radhey Shyam Sharma

APPELLANT

Vs

M. Ashan the Assistant Labour Commissioner and Others

RESPONDENT

Date of Decision : 28-04-1966

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Citation : AIR 1967 All 143 : (1966) 2 LLJ 711

Hon'ble Judges : W. Broome, J; Satish Chandra, J

Bench : Division Bench

Advocate : Raja Ram Agarwal, for the Appellant; A.K. Kirty, for the Respondent

Final Decision : Dismissed

Judgement

Broome, J.—This reference arises out of a writ petition filed by the owner of a petrol pump employing one Munim and two salesmen or pump attendants to sell petrol and diesel oil to customers on a retail basis. The petitioner challenges an award given by the Assistant Labour Commissioner on 31-1-1961 under the provisions of the U. P. Industrial Disputes Act in respect of a dispute between the petitioner and his employees over the termination of the services of one Jamuna Prasad, who had been working for the petitioner as a pump-attendant. One of the contentions raised by the petitioner was that the Industrial Disputes Act did not apply to his business, which was a mere retail shop and not an industry, as defined in the Act.

2. The following issue has been referred to us for decision:

"Is a retail shop an industry as defined in Section 2(k) of the U. P. Industrial Disputes Act?"

3. The definition of "industry" given in Section 2(k) of the Act is extremely wide and comprehensive. It runs:

""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."

Judicial interpretation, however, has succeeded in narrowing down this definition and giving it greater precision. In *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, the Supreme Court, discussing the ambit of Section 2(j) of the Central Act (corresponding word for word with Section 2(k) of the U. P. Act), remarked :--

"We have yet to decide which are the attributes the presence of which makes an activity an undertaking within Section 2(j), on the ground that it is analogous to trade or business. It is difficult to state these possible attributes definitely or exhaustively; as a working principle it may be stated that an activity systematically or habitually undertaken for the production or distribution of goods or for the rendering of material services to the community at large or a part of such community with the help of employees is an undertaking. Such an activity generally involves the co-operation of the employer and the employees; and its object is the satisfaction of material human needs. It must be organised or arranged in a manner in which trade or business is generally organised or arranged. It must not be casual nor must it be for oneself nor for pleasure. Thus the manner in which the activity in question is organised or arranged, the condition of the co-operation between employer and the employee necessary for its success and its object to render material service to the community can be regarded as some of the features which are distinctive of activities to which Section 2(j) applies."

And in *The National Union of Commercial Employees and Another Vs. M.R. Meher*, Industrial Tribunal, Bombay and Others, , the following observations were made :--

"It would be realised that the concept of industry postulates partnership between capital and labour or between the employer and his employees. It is under this partnership that the employer contributes his capital and the employees their labour and the joint contribution of capital and labour leads directly to the production which the industry has in view. In other words, the co-operation between capital and labour or between the employer and his employees which is treated as a working test in determining whether any activity amounts to an industry, is the co-operation which is directly involved in the production of goods or in the rendering of service. It cannot be suggested that every form or aspect of human activity in which capital and labour co-operate or employer and employees assist each other is an industry. 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 the employer and his employees must be direct and must be essential.

4. Applying these criteria, we see no reason why a retail shop in which salesmen are employed should not be held to be an "industry" for the purposes of the

Industrial Disputes Act. Such a shop is undoubtedly "an activity systematically undertaken for the distribution of goods", involving co-operation between an employer and his employees; and this co-operation is directly and essentially related to the basic activity of the undertaking, which is the distribution of goods by the process of selling them to customers.

5. Shops which are run by a shop-keeper single-handed or only with the help of members of his family must of course be held to be outside this definition of industry, for, in such cases there are no employees and no question of cooperation between capital and labour or between employer and employees can possibly arise. We must also exclude shops in which persons are employed by the shop-keeper merely to keep the premises clean or for other subsidiary purposes of a like nature, not directly connected with the sale of the goods. For in such cases it cannot be said that the co-operation between the master and the servant is directly and essentially involved in the basic activity of the undertaking. Employees of that kind are in the same position as the typists and menial servants employed by a solicitor, regarding whom the Supreme Court in the *The National Union of Commercial Employees and Another Vs. M.R. Meher*, Industrial Tribunal, Bombay and Others, referred to above, made the following remarks :--

"Subsidiary work which is purely of an incidental type and which is intended to assist the solicitor in doing his job has no direct relation to the professional service ultimately rendered by the solicitor. The work done either by the typist or the stenographer or by the menial servant or other employees in a solicitor's firm is not directly concerned with the service which the solicitor renders to his client and cannot therefore be said to satisfy the test of co-operation between the employer and the employees which is relevant to the purpose. There can be no doubt that for carrying on the work of a solicitor efficiently, accounts have to be kept and correspondence carried on and this work would need the employment of clerks and accountants. But has the work of the clerk who types correspondence or that of the accountant who keeps accounts any direct or essential nexus or connection with the advice which it is the duty of the solicitor to give to his client? The answer to this question must in our opinion be in the negative. Similarly in the case of a retail shop, the mere employment of cleaners or other persons rendering services of an incidental type would not be sufficient to make that shop an "industry", as the work done by those persons would have no direct or essential nexus with the business of selling goods, which is the basic activity of the shop.

6. But a shop in which salesmen are employed is clearly an undertaking in which there is essential and direct co-operation between employer and employees in the basic activity of the concern and consequently must be treated as an "industry" in accordance with the criteria laid down by the Supreme Court in the above-mentioned cases.

7. Mr. R. R. Agarwal, who appears for the petitioner, has conceded that large shops employing numerous salesmen may well come within the definition of

"industry", but has attempted to argue that small retail shops employing only one or two salesmen would not. He contends that in such cases the co-operation of employer and employee is not essential, but only a matter of convenience, since it would be physically possible for the shop-keeper to take over the work of his employees and do it himself without their assistance. But this argument is based on a misinterpretation of the meaning of the word "essential", as used in the passage quoted above. When the Supreme Court said that "Co-operation between the employer and his employees must be essential," they were not using this word in the sense of "indispensable" or "unavoidable" but merely meant to say that the co-operation must be "of the essence", i.e. must be directly related to the essence of the undertaking. This is clear from the subsequent discussion in the same ruling, in which it has been pointed out that a solicitor must necessarily employ clerks in order to carry on his work efficiently, but nevertheless the work of those clerks has no essential nexus with the basic duties performed by the solicitor. The mere fact that clerks are necessary to a solicitor, therefore, does not make their co-operation "essential"; and in the same way the mere fact that salesmen are not strictly necessary to a petty shop-keeper cannot make their co-operation "non-essential". Whenever salesmen are employed in a retail shop, whether the shop be large or small and whether their services can be dispensed with or not, they must be held to be co-operating with their employer in a direct and essential manner in the basic activity of the shop.

8. Our answer to the question referred to us, therefore, is that where salesmen are employed in a retail shop, that shop is an "industry" for the purposes of the Industrial Disputes Act.

9. The case may now be returned to the single Judge for the decision of the remaining issues.