
(2000) 04 P&H CK 0010
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 7021 of 1999

State of Haryana	Vs	APPELLANT
Jai Kishan and Another		RESPONDENT

Date of Decision : 18-04-2000

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 2, 25F

Citation : (2001) 2 LLJ 1159

Hon'ble Judges : R.L. Anand, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : Kartar Singh, for the Appellant; Jai Kishan, for the Respondent

Judgement

G.S. Singhvi, J.—This is a petition for quashing of the award, dated January 4, 1999, passed by the Presiding Officer, Industrial Tribunal- cum-Labour Court, Panipat (respondent No. 2) in reference No. 87 of 1995 and 1052 of 1998.

2. The facts which have bearing on the decision of the writ petition are that respondent No. 1 Jai Kishan was engaged as a daily-wage employee under the Sub-Divisional Officer, Sudkain Sub-Division (IB), Narwana in July 1989. His services were discontinued at the end of August 1993. By an order passed u/s 10(I)(c) of the Industrial Disputes Act, 1947 (for short, the Act), the State Government made a reference to respondent No. 2 for adjudication of the dispute relating to the legality and justification of the action of the employer to discontinue the services of respondent No. 1.

3. After considering the pleadings and evidence produced by the parties and hearing their representatives, respondent No. 2 held as under their representatives, respondent No. 2 held as under:

(1) That respondent No. 1-workman had actually worked under the employer for a period of more than 240 days within a period of 12 months preceding the date of termination of his services.

(2) The employer had not complied with Section 25F of the Industrial Disputes Act, 1947.

On the basis of these findings, respondent No. 2 declared the termination of respondent No. 1 as illegal and ordered his reinstatement with backwages.

The petitioner has challenged the impugned award on the following grounds:

(a) the Irrigation Department of the State does not fall within the term of "industry" as defined in Section 2(j) of the Act and, therefore, respondent No. 2 did not have the jurisdiction to entertain the reference made by the State Government;

(b) respondent No. 1 is not covered by the definition of workman and as such the so-called termination of his service cannot be nullified on the ground of violation of Section 2(oo) read with Section 25F of the Act.

We have carefully gone through the record and are of the considered opinion that the impugned award does not suffer from any error of law warranting issue of a writ in the nature of certiorari.

4. The petitioner's plea that the Irrigation Department does not fall within the definition of industry u/s 2(j) and, therefore, respondent No. 2 did not have the jurisdiction to entertain the reference deserves to be rejected. The reasons for this conclusion of ours are:

(a) it was neither pleaded on behalf of the petitioner nor any evidence was produced before respondent No. 2 to prove that the activities of the project/works in connection with which respondent No. 1 had been engaged from 1989 to 1993 did not involve carrying on of systematic activity with the aid and cooperation of the employees for the benefit of the public at large or that the project was undertaken by the State in discharge of its sovereign functions. Therefore, we are unable to hold that the Irrigation Department does not fall within the definition of industry. Moreover, plea of this nature, the determination of which depends on evaluation of evidence of the parties etc., cannot be allowed to be raised for the first time before the writ Court, particularly, when the petitioner has failed to lay factual foundation for such a plea;

(b) the decision of the Supreme Court in *Executive Engineer (State of Karnataka) Vs. K. Somasetty and others*, , relied upon by the petitioner cannot be made basis for nullifying the impugned award. In that case, the two-Judges Bench of the Supreme Court, without discussing the often quoted judgment of the seven-Judges Bench in *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others*, .

"It is now well-settled legal position that Irrigation Department and Telecommunication Department are not "industry" within the meaning of definition under Industrial Disputes Act as held in *Union of India (UOI) Vs. Jai Narain Singh*, and in *State of Himachal Pradesh Vs. Suresh Kumar Verma* and

another, . The function of the public welfare of the State is a sovereign function. It is constitutional mandate under the directive principles, that the Government should bring about welfare by all executive and legislative action. Under the circumstances, the State is not an "industry" under the Industrial Disputes Act."

5. As regards the Telecommunications Department the view of the two-Judges Bench will be deemed to have been overruled by a three-Judges Bench in General Manager, Telecom Vs. A. Srinivasa Rao and Others, . Some of the observations made in the latter decision are extracted below, in Para 5, at page 257 of LLJ :

"7. A two-Judges Bench of this Court in Sub-Divisional Inspector of Post, Vaikam, and others Vs. Theyyam Joseph, etc., , held that the functions of the Postal Department are part of the sovereign functions of the State and it is, therefore, not an "industry" within the definition of Section 2(j) of the Industrial Disputes Act, 1947. Incidentally, this decision was rendered without any reference to the seven-Judge Bench decision Bangalore Water Supply case (supra). In a later two-Judges Bench decision in Bombay Telephone Canteen Employees Association case (supra), this decision was followed for taking the view that the Telephone Nigam is not an "industry". Reliance was placed in Theyyam Joseph cases (supra), for that view. However, in Bombay Telephone Canteen Employees Association case (supra) (i. e., the latter decision) we find a reference to Bangalore Water Supply case. After referring to the decision in Bangalore Water Supply, case (supra) it was observed that if the doctrine enunciated in Bangalore Water Supply case (supra) is strictly applied, the consequence is "catastrophic" With respect, we are unable to subscribe to this view for the obvious reason that it is in direct conflict with the seven- Judges Bench decision in Bangalore Water Supply case (supra), by which we are bound. It is needless to add that it is not permissible for us, or for that matter any Bench of lesser strength, to take a view contrary to that in Bangalore Water Supply (supra), or to by pass that decision so lone as it holds the field. Moreover, that decision was rendered long back - nearly two decades earlier - and we find no reason to think otherwise. Judicial discipline requires to follow the decision in Bangalore Water Supply case. We must therefore, add that the decisions in Theyyan Joseph case (supra) and Bombay Telephone Canteen Employees Association (supra), cannot be treated as laying down the correct law..."

In our opinion, what the three-Judges Bench of the Supreme Court has said about the judgment of the two-Judges Bench in the context of Telecommunications Department can appropriately be applied to a case like the present one because, as mentioned hereinabove, the petitioner did not produce any evidence before the Labour Court to prove that the activities of the Irrigation Department are akin to or an integral part of the sovereign functions of the State. That apart, in view of the decision of the seven-Judges Bench in Bangalore Water Supply and Sewerage Board v. A. Rajappa and Ors. (supra), it is not possible to nullify the award on the basis of the judgment of the two-Judges

Bench in K. Somasetty case (supra). In the Bangalore Water Supply and Sewerage Board case (supra), their Lordships, after a threadbare analysis of the definition of industry in the context of various judicial precedents, culled out the following propositions:

"I. (a) Where (i) systematic activity, (ii) organised 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, i. e., making, on a large scale prasada or food) prima facie, there is an industry in that enterprise.

(a) 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 organisation is a trade or business it does not cease to be one because of philanthropy animating the undertaking.

II. Although Section 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself.

(a) "Undertaking" must suffer contextual and associational shrinkage as explained in Banerji and in this judgment, so also, service, calling and the like. This yields the inference that all organised activities possessing the triple elements in I (supra), although not trade or business, may still be "industry" provided the nature of the activity viz., the employer-employee basis, bears resemblance to what we find in trade or business. This takes into the fold "industry", undertakings, callings and services, adventures "analogous to the carrying on of trade or business." All features, other than the methodology of carrying on the activity viz., in organizing the co-operation between employer and employee, may be dissimilar. It does not matter, if on the employment terms there is analogy.

III. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults or inner sense of incongruity or outer sense of motivation for or resultant of the economic operations. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between employer and workmen, the range of this statutory ideology must inform the reach of the statutory definition. Nothing less, nothing more.

(a) The consequences are (i) professions, (ii) clubs, (iii) educational institutions, (iv) co-operatives, (v) research institutes, (vi) charitable projects, and (vii) other kindred adventures, if they fulfil the triple tests listed in I (supra), cannot be exempted from the scope of Section 2(j).

(b) a restricted category of professions, clubs, co-operatives and even gurukulas

and little research labs, many may qualify for exemption if, in simple ventures, substantially and, going by the dominant nature criterion, substantively, no employees are entertained but in minimal matters, marginal employees are hired without destroying the non-employee character of the unit.

(c) If, in a pious or altruistic mission many employ themselves, free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause, such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre or ashramites working at the bidding of the holiness, divinity or like central personality, and the services are supplied free or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then the institution is not an industry even if stray servants, manual or technical, are hired. Such eleemosynary or like undertakings alone are exempt - not other generosity, compassion, developmental passion or project.

IV. The dominant nature test:

(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 the *University of Delhi and Another Vs. Ram Nath*, or some departments are not productive of goods and services if isolated, even then, the dominant nature of the services and the integrated nature of the departments as explained in the *The Corporation of the City of Nagpur Vs. Its Employees*, 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 clause, 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."

6. The other points urged on behalf of the petitioner is that respondent No. 1 was a daily wage employee and therefore, the provisions of Sections 2(oo) and 25F of the Act are not attracted in this case. For deciding this issue, we consider it proper to analyse Section 2(s) of the Act. The same reads as under:

"2(s). "Workman", means any person (including an apprentice) employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward whether the terms of employment be expressed or implied, and for the purpose of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been

dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person - (i) who is subject to the Air Force Act, 1950 (45 of 1950) or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or .

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

This definition can be divided in 3 parts. The first part is explanatory. It takes within its fold any person employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. The second part is inclusive in nature. It enlarges the scope of the definition of workman so as to include those whose relationship of master and servant may have been brought to an end due to dismissal, discharge or retrenchment. The third part excludes some persons from the purview of the definition of "workman".

7. In our opinion while, deciding whether or not person fall within the definition of workman the Court has to keep in mind the following factors:

(i) whether the person concerned i employed in an industry;

(ii) whether he is employed to do manual, unskilled, skilled, technical, operational, clerical or supervisory work ; and

(iii) whether such employment is for hire or reward.

If these factors are found present in given case, the employee concerned will fall within the definition of workman even though the terms of employment may not have been reduced in writing and irrespective of the fact that such person may have been dismissed, charged or retrenched from service. But, a person who is subject to the Air Force Act, 1950, the Army Act, 1950 or the Navy Act, 1957 or who is employed in the Police Service or as an officer or employee of a prison or who is employed mainly in a managerial or administrative capacity or who is employed in a supervisory capacity and draws wages exceeding Rs. 1,600 per mensem is excluded from the definition of "industry".

8. The definition of "industry" does not make any reference to the nature of employment and the conditions of service. Therefore, the source of employment or entry in the service, the mode of payment of wages and the length of the period of employment do not have any bearing on the determination of the issue whether or not a person falls within the definition of "workman". In other words,

a person will fall within the definition of "industry" even though he may be daily-wager or may be receiving consolidated salary. In *L. Robert D'souza Vs. Executive Engineer, Southern Railway and Another*, , the Apex Court held that a person engaged for doing casual work is also governed by the provisions of the Industrial Disputes Act.

9. In view of the above discussion, we hold that respondent No. 1 falls within the definition of workman u/s 2(s) of the Act and respondent No. 2 did not commit any error in entertaining the reference made by the State Government.

10. The petitioner has not challenged the finding of fact recorded by the Labour Court that respondent No. 1 had worked under the employer for a period of 240 days in 12 months preceding the termination of his service and that before terminating his service, the condition precedent enshrined in Sections 25-F(a) and 25-F(b) of the Act had not been complied with. We, therefore, hold that the impugned award does not suffer from any error of law.

11. Hence, the writ petition is dismissed.