

(1995) 11 BOM CK 0044

In the Bombay High Court

Case No : Writ Petition No. 4513 of 1991

The President, Anatha Mahila Ashram, Kolhapur

APPELLANT

Vs

Smt. J.G. Ajagaonkar

RESPONDENT

Date of Decision : 14-11-1995

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Citation : (1996) 74 FLR 2415

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Judgement

B.N. Srikrishna, J.—This writ petition under Article 227 of the Constitution of India is directed against an Award of the Labour Court, Kolhapur, dated 22nd March, 1991 made in Reference (IDA) No. 29 of 1985 under the provision of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act").

2. The petitioner is a Public Charitable Trust which carries on the work of rehabilitation and relief to destitute women and children at Kolhapur. The Managing Body of the petitioner, inter alia, consisted of ex-officio Government Officers like District Probation Officer, the Commissioner of Kolhapur Municipal Corporation and the President of the Zilla Parishad. The Secretary of the Petitioner was the responsible person or Administrative Head for implementation of the policy decisions taken by the Managing Body. The Respondent was employed as full time Superintendent in the service of the petitioner from 3.8.1971 on monthly salary of about Rs. 600/-. The respondent had put in about ten years of blameless service in the employment of the petitioner. On 5.4.1982 the Respondent received a letter from the petitioner intimating that her resignation of service had been accepted in the meeting of the Managing Committee held on 14.3.1982 and that she was relieved from service with effect from 6.4.1982. The Respondent was further directed to hand over charge to the person named in the letter. By her letter dated 6.4.1982 the respondent denied that she had ever resigned from service or that her resignation was tendered

orally and accepted by the petitioner. The petitioner, however, maintained that the respondent had resigned from service and forcibly relieved her from work and even impounded her personal belongings which were returned to her after about one year, and that too when the Joint Director of Social Welfare Department, Pune, intervened.

3. The Respondent raised an industrial dispute for reinstatement in service with full back wages. The dispute was processed under the Act and resulted in Reference (IDA) No. 29 of 1985 being made to the Labour Court at Kolhapur. Before the Labour Court the petitioner contended that its activity did not amount to an "Industry" within the meaning of S. 2(j) of the Act and further that the respondent was not employed with it as a "workman" within the meaning of Section 2(s) of the Act. The petitioner maintained that for her personal grounds such as health and inability to work, the respondent had tendered resignation in the Managing Committee Meeting on 14.3.1982 when she was pulled up for not carrying out certain work properly. The petitioner, therefore, contended that, far from terminating the service of the respondent illegally or unjustifiably, her service had come to an end by her act of voluntary resignation.

4. The Labour Court framed the following issues, tried and answered them as under:

Consistent with these issues, the Labour Court held that the Respondent had not tendered oral resignation from her service as alleged by the petitioner and that her service had been terminated in an illegal, improper and unjustified manner by the petitioner. The Labour Court directed reinstatement of the respondent in service with continuity and full back wages from the date of termination till the date of reinstatement. Being aggrieved, the petitioner is before this Court by the present writ petition.

5. At the outset, it might be mentioned that Mr. Sakhare, learned Advocate for the respondent, pointed out that with effect from 31st August, 1991, the respondent reached the age of 60 years, which is the age of superannuation and, therefore, there could be no question of reinstatement of the respondent, the direction in the Award is being confined only to the payment of wages to the respondent between 5.4.1982 to 31st August, 1991.

6. Mr. Kochar, learned Advocate appearing for the petitioner, with greater vehemence than he is usually wont to, contended that the Award of the Labour Court was wholly erroneous in law on all issues. Firstly, he urged that the petitioner's activity was not established for any commercial business or with profit motive, but that it was for rehabilitation of and relief to destitute women discarded by society. According to Mr. Kochar, the petitioner believed in making the destitute women self-reliant and skilled so that they could stand on their feet. Towards this end, the petitioner engaged the services of a Craft Teacher to teach the women in the Ashram how to prepare articles from different goods. The Craft Teacher would collect orders for the articles from the market and those

orders used to be supplied through the Anath Mahilasharam and the sale proceeds were being added to the income of the Ashram, which would then be utilised predominantly for the objectives of the petitioner Ashram. The motive being predominantly "Charity", and given the total lack of commercial business or trade motive, the activity of the petitioner Ashram could never amount to an "industry" in the submission of Mr. Kochar.

7. In my judgment, the contention appears to be wholly misconceived. In fact, the contention is no longer *res integra* in view of the *locus classicus* on the subject, *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others*, . Bangalore Water Supply was a judgment of seven learned Judges of the Supreme Court delivered after a survey of the entire law on the subject and the review of all extant decisions, dealing with the concept of "industry" within the meaning of Section 2(j) of the Act. After minute analysis of the concept of "industry" in section 2(j) of the Act, the Supreme Court laid down the test of an "industry" in these unmistakable words (*vide* paragraph 161) :

"161. "Industry", as defined in S. 2(j) and explained in *D.N. Banerji Vs. P.R. Mukherjee and Others*, has a wide import.

(a) Where (i) systematic activity, (ii) organised by co-operation between employer and employees (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 *prasad* or food) *prima facie*, there is an industry in that enterprise.

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

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

(d) If the 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 a 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 activity 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" casings 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 organising 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, (i v) 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, 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, of some departments are not productive of goods and services it isolated, even then, the predominant 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 clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by Government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within S. 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.

V. We overrule *Safdarjung The Management of Safdarjung Hospital, New Delhi Vs. Kuldip Singh Sethi*, , *The National Union of Commercial Employees and Another Vs. M.R. Meher*, *Industrial Tribunal, Bombay and Others*, , *Secretary, Madras Gymkhana Club Employees" Union Vs. Management of the Gymkhana Club*, , *University of Delhi and Another Vs. Ram Nath*, , *The Dhanrajgirji Hospital Vs. The Workmen*, and other rulings whose ratio runs counter to the principles enunciated above, and *The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others*, is hereby rehabilitated".

In my view, this judgment is a complete answer to the contention of Mr. Kochar.

However, considering the unusual persistence with which Mr. Kochar pursued the point, I shall refer to his contention in somewhat greater details than it normally would have merited.

14th November, 1995

8. In *Bangalore Water Supply*, (supra), the Supreme Court specifically considered the sweep of the term "industry" as defined in Section 2(j) of the Act and also whether it would take within its ambit a "charitable institution". The Supreme Court categorically rejected the argument that, because there is absence of trade, commerce or business in the running of a charitable establishment or because there is absence of profit motive, a charitable institution would not fall within the definition "industry" u/s 2(j) of the Act.. As the Supreme Court points out, "Profit making motive is not a sine qua non of "industry" functionally or definitionally". While emphatically rejecting this argument, the Supreme Court quoted with approval the observations of Powers, J., in *Federated Municipal and Shire Employees" Union of Australia v. Melbourne Corporation* (26 CLR 508) (Aus.) :-

"If that argument were sufficient, then a philanthropist who acquired a clothing factory and employed the same employees as the previous owner had employed would not be engaged in an occupation about which an industrial dispute could arise, if he distributed the clothes made to the poor free of charge or even if he distributed them to the poor at the bare cost of production".

The Supreme Court posed the question, "Are Charitable Institutions Industries ?", and answered it thus (vide paragraph 125) :

"Can charity be "industry" ? This paradox can be unlocked only by examining the nature of the activity of the charity, for there are charities and charities. The grammar of labour law in a plurality society tells us that the worker is concerned with wages and conditions of service, the employer with output and economies and the community with peace, production and stream of supply. This complex of work, wealth and happiness, firmly grasped, will dissolve the dilemma of the law bearing on charitable enterprises. Charity is free; industry is business. Then

how ? A lay look may scare; a legal look will see; a social look will see through a hiatus inevitable in a sophisticated society with organisational diversity and motivational dexterity".

The Supreme Court pointed out that charitable institutions would broadly fall into one of the following three categories :

(i) Where the enterprise, like any other, yields profits but they are siphoned off for altruistic objects.

(ii) Where the institution makes no profit but hires the services of employees as in other like businesses but the goods and services, which are the output, are made available, at low or no cost, to the indigent needy who are priced out of the market.

(iii) Where the establishment is oriented on a humane mission, fulfilled by men who work, not because they are paid wages, but because they share the passion for the cause and derive job satisfaction from their contribution.

The Supreme Court held that the first two are "industry", while the third is not. Despite his vehement submissions, Shri Kochar does not dispute that the petitioner fails in Category No. (ii), which the Supreme Court has clearly held to be an industry. Finally, after the survey of the entire law, the test for determining which activity would fall within the ambit of the term "industry" u/s 2(j) was postulated by the Supreme Court in paragraph 161 as already extracted.

9. The learned Judge of the Labour Court has correctly applied this complex test and come to the right conclusion that the petitioner's Ashram is an "industry". I find no reason to differ from his conclusion or to interfere with his finding.

10. Shri Kochar then urged that, even if the Petitioner's Ashram were an industry, the first respondent was not a "workman" within the meaning of Section 2(s) of the Act. Hence, the reference is untenable, contends Shri Kochar. The learned Judge has correctly appraised the evidence on record. He has found that the respondent was not only required to carry out the decision taken by the Managing Committee of the Ashram, but she was also required to maintain accounts, registers of admission and release and submit reports regarding "matters". In addition, she was required to supervise the conduct of the girls and ladies in the Ashram. Here again, the matron used to do the work of reporting regarding the behaviour and conduct of the women admitted in the Ashram, and based thereupon the respondent used to report to the Probation Officer. The learned Judge has correctly emphasised that the petitioner failed to place on record details to show as to what power the respondent had been invested with or what exactly were her duties. The learned Judge also rightly held that the burden of proving that the nature of duties performed by the respondent was managerial and/or supervisory lay squarely upon the petitioner and that this burden had not been discharged. According to the Labour Court, the duties of the respondent appeared to be of clerical nature only and, if) may add, she was

nothing but a glorified clerk. In these circumstances, it is not possible to accept the contention that the respondent was not a "workman" within the meaning of Section 2(s) of the Act.

11. Shri Kochar invited my attention to the judgment of the Division Bench of this Court in Reserve Bank of India v. Waman Baburao Shinde & Ors. 1994 2 CLR 440, in which it was held that a supervisor incharge of the trainees' hostel was not a "workman" within the meaning of Section 2(s) of the Act. This judgment is easily distinguishable on facts. That was a case where the list of duties was specifically placed on record. The hostel supervisor was put in charge of a large staff of 70 and declared to be the Head of Administration of the Hostel. The facts clearly showed that the control required to be exercised by the hostel supervisor left no manner of doubt that the duties were essentially supervisory. In my view, the judgment proceeds on the peculiar facts before it and is of no avail to the petitioner.

12. Finally, as to the merits of the case, Shri Kochar was the least vociferous. The story put forward by the petitioner that the respondent had orally resigned in the committee meeting, to say the least, is highly improbable. As the learned Judge of the labour Court pointed out, the Committee consisted of one practicing advocate and several ex officio Class I Government Officers like the Superintendent of District Home, District Probationer Officer, Commissioner of Kolhapur, Municipal Corporation, President, Zilla Parishad, Kolhapur, and Social Welfare Officer, who must be presumed to be aware of the procedure adopted for permitting an employee to resign from service. It is improbable that the respondent, after having worked for more than 20 years, would suddenly decide to tender oral resignation at the meeting of 14th March, 1982. The letter dated 8th April, 1982 addressed by the respondent to the petitioner stating that the Social welfare Officer had informed her that she should tender resignation in writing after inspection, which was to be held by the Social Welfare Officer on 5th April, 1982 and 7th April, 1982, also belies the contention that she had tendered resignation orally on 14th March, 1982 or that, it had been accepted forthwith and that she had been relieved from service. The discussions in paragraphs 16 and 17 of the impugned Award show that there was some dispute between the petitioner, one Kamat, and the respondent, as to the 5 bags of cement, which were taken from another institution, of which the said Kamat was also the President. According to the respondent, as President Kamat demanded 5 bags of cement, she had given it. In the meeting of 14th March, 1982, the respondent was asked to explain the position regarding the cement bags. She placed on record what the facts were, according to her. Because it, apparently annoyed the powers that be there was an attempt to pressurise her to resign from service, which she resisted. Assuming there was some ground for suspecting the respondent of some misconduct, it was obligatory upon the petitioner to level such a charge against her and give her an opportunity of rebutting the charge by holding a proper domestic enquiry. Instead of doing so, the petitioner adopted the dubious procedure of maintaining that the respondent had orally resigned

from service, despite protestations to the contrary by the petitioner. In these circumstances, I am of the view that the Labour Court was right in holding that the respondent had been illegally, improperly and unjustifiably terminated from service. Consequently, the relief of reinstatement with full back wages granted by the impugned Award is liable to be upheld, though, in view of the respondent's crossing the age of superannuation with effect from 31st August, 1991, there would be no need for reinstatement. The respondent would, therefore, be entitled to full back wages from 5th April, 1982 to the date of her reaching the age of superannuation, i.e., 31st August, 1991.

13. In the result, I am of the view that there is no substance in the petition. The petition is liable to be and is hereby dismissed. The petitioner shall pay to the respondent full back wages for the period from 5th April, 1982 to 31st August, 1991, calculating the back wages from month to month in accordance with the terms of service. The payment of back wages shall be made within a period of four weeks from today. Rule discharged. No order as to costs.