President, Kathiyawad Nirashrit Balashram Vs Dineshbhai Enabhai Chauhan

Court: Gujarat High Court

Date of Decision: Sept. 23, 2011

Acts Referred: Industrial Disputes Act, 1947 â€" Section 10(1), 17B, 2

Citation: (2012) 1 GLR 656 : (2012) 4 LLJ 550

Hon'ble Judges: R.R. Tripathi, J

Bench: Single Bench

Advocate: K.M. Patel, with Ms. Parul P. Vasavada, for the Appellant; Shalini S. Mair, for the Respondent

Judgement

Ravi R. Tripathi, J.
The matter is accompanied with Civil Application No. 3616 of 2011, filed by the respondent-workman praying for

grant of benefits flowing from Sec. 17B of the Industrial Disputes Act, 1947 (hereinafter referred to as "the I.D. Act"). Learned Advocate Ms.

Parul P. Vasavada for the opponent in Civil Application - original petitioner - establishment - "Kathiyawad Nirashrit Balashram" - an

"Orphanage", submitted that the establishment is, as the name suggests, meant for giving "shelter" to the persons who are "Nirashrit" - having no

"shelter", and therefore, payment of Sec. 17B will hamper the activities of the petitioner, and therefore, it will be in fitness of things, if, instead of

hearing the Civil Application, the main matter is heard.

1.1. The request was granted. The papers of main Special Civil Application are before the Court being accompanied with the Civil Application.

The main matter is taken up for final hearing, to which, learned Advocate Ms. Shalini S. Mair for the respondent-applicant of Civil Application, has

no objection.

2. Heard, learned Senior Advocate Mr. K.M. Patel with Ms. Parul P. Vasavada for the petitioner. The learned Senior Advocate for the petitioner

submitted that the facts of the present case, in nutshell, are set out in Para 1 of the petition. For ready perusal, the same is reproduced:

1. The petitioner/employer named above begs to file the present petition against the award of the Labour Court, Rajkot ordering

respondent/Gruhpati"s reinstatement with 40% back wages in a reference under Sec. 10(1)(c) of the Industrial Disputes Act, 1947. The Labour

Court did so in a dispute raised by the respondent/Gruhpati against his dismissal dated 31-4-1997. The petitioner/employer did it by holding the

respondent guilty of the charges of theft of the petitioner Balashram''s articles of food, such as wheat, gram, milk, tea etc. after holding an inquiry.

The Labour Court passed the award mainly on the ground that the punishment was disproportionate and reduced it to stoppage of two increments,

though the respondent was not working on a time scale earning increments. It did not consider at all evidence about the Balashram being an

industry or not or give a reasoned finding on the point of the petitioner being an industry or not. The petitioner had specifically pleaded that it was

not carrying on such activity which would make it an industry and the petitioner was not a workman. Despite this plea by the petitioner/employer

and the fact that the respondent had not led any evidence on the activities of the petitioner/employer, though it was his duty to do so the Labour

Court ordered his reinstatement. Since it was he who had sought reinstatement it was his duty to show that he is a ""workman"" of ""an industry"". The

burden was on him. The Labour Court considered this point most casually and rejected the plea of the petitioner that it was not carrying on

commercial activities by saying that it did not agree to this argument.

2.1. On perusal of the facts set out in Para 1 it is clear that the respondent was serving as ''Gruhpati'' of the ''Balashram'' - hostel. It is suggestive

by the name itself that the petitioner is a ''society'' and ''trust'' registered under the Societies Registration Act, 1860 and also under the Bombay

Public Trusts Act, 1950. The petitioner is running a ''Nirashrit Balashram'' meaning thereby, the children, who do not have any ''Ashray'' - place to

live, are kept by the petitioner. What is important, is that the respondent-workman was found committing theft of the food articles such as wheat,

gram, milk etc. meant for providing to the ''Nirashrit'' children. It is the case of the petitioner that, ''an inquiry was held and he (respondent-

workman) having found guilty of theft, his services were dispensed with''. This happened on 31st May, 1997. It is thereafter that he filed Reference

(L.C.R.) No. 218 of 1997, wherein, the learned Judge of the Labour Court, without taking into consideration the contentions raised by the

petitioner, partly allowed the Reference and quashed and set aside the order of dismissal dated 31st May, 1997 and also quashed order passed by

the petitioner of forfeiting his gratuity. The learned Judge was also pleased to order reinstatement of the respondent-workman on his original post

with 40% back wages and awarded Rs. 2,500/- towards cost of litigation. The learned Judge was, then, also pleased to observe that the order of

dismissal was very ''shocking, excessive and unbearable'', and therefore, it is quashed and proportionate to the offence, alternative punishment is

awarded of stopping two increments only, without future effect.

2.2. The learned Senior Advocate for the petitioner submitted that the fact that the respondent-workman was not in a time-scale, there was no

question of any annual increments, and therefore, alternative punishment provided by the learned Judge is without any application of mind. The

learned Senior Advocate for the petitioner also submitted that the learned Judge has erred in observing that, the punishment of dismissal was

''shocking, excessive and unbearable'', this is without taking into consideration the fact that the respondent-workman was working as ''Gruhpati'',

whereby, he was supposed to take care of the children who are ''Nirashrit'' as a ''loco parentis''. It was he, who had to take care of the fact that

the children are provided all possible facilities including food etc. instead of that, he was found committing theft of food articles, resultant effect of

which was that, the children were deprived of that quantity, which is stolen by the respondent-workman.

2.3. The learned Senior Advocate for the petitioner emphatically submitted that, it was contended before the learned Judge of the Labour Court

that, ""the petitioner cannot be considered to be an ''industry'' by any standards"", and therefore, the learned Judge was required to dismiss the

Reference on that ground alone, but it is painful that the learned Judge, without giving any cogent reasons for holding the petitioner to be an

''industry'', allowed the Reference and passed the award as set out hereinabove.

2.4. The learned Senior Advocate for the petitioner relied upon a decision of Division Bench of this Court in the matter of Raj Ratna Seth Shri

Nanjibhai Kalidas Mehta v. Ashok Bhasin, reported in 1981 GLH 411, wherein, the Division Bench of this Court was pleased to observe as

under :

In view of the fact that petitioner-Gurukul is running a simple venture 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, would

be exempt from the operation of the definition of the word """"industry"". It is obvious that wide though may be the sweep of the definition of the

word ""industry"", yet, institutions like the one before the High Court would be exempt from the definition of the word ""industry"", because, here, we

find that most of the work which is required for these Gurukuls is done by the students themselves barring heavy work of lifting heavy things,

cleaning big utensils, sweeping vast area of campus etc. and in Gurukul more than 700 students in the school and 250 in the college serve

themselves and also assist a great deal in keeping the premises clean and tidy. Under these circumstances, since the employment of outside help i.e.

help other than those of the students themselves, is in minimal matters and the employees are marginal employees, without destroying the non-

employee character of the institution, this particular institutions falls squarely within the exception carved out in Clause (b) of Para III, at page 596

of the Report, viz. Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, .

3. Learned Advocate Ms. Shalini S. Mair, appearing on behalf of the respondent-workman vehemently submitted that the submission of the

petitioner that it is not an ''industry'' is rightly rejected by the learned Judge of the Labour Court and in support of her submission, she placed

reliance on a decision of the Hon''ble the Apex Court in the matter of Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, .

The learned Advocate for the respondent-workman, in this regard, relied upon the following observations of the Hon''ble the Apex Court :

Industry'' as defined in Sec. 2(j) has a wide import.

Where there is (i) systematic activity, (ii) organized 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 e.g. making, on a large scale, prasad or food,) prima facie, there is an ''''industry

in the enterprise.

(Emphasis supplied)

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

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

If the organization is a trade or business it does not cease to be one because of philanthropy animating the undertaking.

Although Sec. 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to over-reach itself.

Undertaking'''' must suffer a contextual and associational shrinkage as explained in D.N. Banerji Vs. P.R. Mukherjee and Others, , so also, service,

calling and the like. This yields the inference that all organised activity possessing the triple elements above mentioned, although not trade or

business, may still be ''''industry'''' provided the nature of the activity viz., the employer-employee basis, bears resemblance to what is found in trade

or business. This takes into the fold of ''''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.

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.

The consequences are (i) professions, (ii) clubs (iii) educational institutions, co-operatives, (iv) research institutes, (v) charitable projects and (vi)

other kindred adventures, if they fulfil the triple tests listed above, cannot be exempted from the scope of Sec. 2(j).

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.

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....

(Emphasis supplied)

3.1. The learned Advocate for the respondent-workman invited attention of the Court to Page 95 from where, the affidavit-in-reply of respondent

starts. The learned Advocate for the respondent-workman invited attention of the Court to Para 3, which reads as under :

I respectfully submit that I was working in petitioner institute as rector. I was working my duties as per instructions given to me by my employer. In

eye of law, I am falling in definition of workman as per Sec. 2(s) of I.D. Act.

3.2. The learned Advocate for the respondent also drew attention to Para 5, wherein, the learned Advocate has referred to case of Bangalore

Water Supply (supra).

3.3. The learned Advocate for the respondent also referred to a decision of the Madras High Court in the matter of S. Thilagavathi Vs. The

Presiding Officer, Labour Court and Madurai Children''s Aid Society, . The learned Advocate for the respondent-workman submitted that the

High Court of Madras was pleased to hold a ''registered society'' used as ''home for children with Government aid and donations'' an ''industry''.

The learned Advocate for the respondent-workman submitted that the said decision will squarely apply to the facts of the present case because, in

that case also, it was a registered society, which was used as a home for children, and therefore, as was held by the Madras High Court, this Court

shall also endorse the decision of the learned Judge of the Labour Court that the petitioner is an ''industry''.

3.4. On careful consideration of the said decision, this Court is of the opinion that the learned Advocate for the respondent-workman has missed

an important aspect and that is that, ""the registered society, which was used as home for children with Government aid and donations, was giving

them vocational training to get equipped for self-help jobs."" It was in light of the facts placed before the Madras High Court that the Court

observed that, ''thus the society was carrying on systematic activities on the basis of organized co-operation between employer and employees to

satisfy human wants''.

3.5. On careful consideration of the facts of the case on hand, this Court is not able to find out any such activity undertaken by the petitioner, and

therefore, this Court is of the opinion that the said decision will have no application to the facts of the present case.

3.6. So far as the decision of the Hon''ble the Apex Court in case of Bangalore Water Supply (supra) is concerned, the learned Senior Advocate

for the petitioner has rightly invited attention of the Court to Page 596, wherein, the Hon''ble the Apex Court has carved out an exception in sub-

clause (b) of clause (iii) of Para 16l. There, the Hon''ble the Apex Court has observed as under :

(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.

(Emphasis supplied)

3.7. The learned Advocate for the respondent-workman could not satisfy this Court that the petitioner is carrying on such activity which will satisfy

the test laid down by the Hon''ble the Apex Court in the aforesaid decision in Bangalore Water Supply case (supra). The learned Advocate for the

respondent-workman could not satisfy on the aspect of activity of the petitioner being ''organized by co-operation between employer and

employees''. Besides that, the learned Advocate for the respondent also could not satisfy this Court that the activities run by the petitioner-

establishment are for ''production and/or distribution of goods and services calculated to satisfy human wants and wishes''. It will be important to

note that even Hon''ble the Apex Court has carved out an exception in the said test when it says that, ''(not spiritual or religious but inclusive of

material things or services geared to celestial bliss e.g. making, on a large scale, prasad or food)''. The learned Advocate for the respondent-

workman could not satisfy that any such activity is carried on by the petitioner-establishment.

3.8. This Court cannot be unmindful of the fact that the petitioner-establishment-institute is carrying on an activity and it cannot be expected of the

institute that it will not have that activity carried on systematically, but only because it is carrying on its activity systematically, it cannot be said that it

answers the test laid down by the Hon''ble the Apex Court.

3.9. What is important is that, the respondent-work man was required to satisfy bringing on record sufficient material to show that the activity of

the petitioner-establishment was organized by co-operation between ''employer and employees''. In fact it is other-way-round and if the test of

''dominant nature is applied, it will be clear that, ''it was in minimal matter, marginal employees are hired without destroying the non-employee

character of the unit.

(Emphasis supplied)

4. Though the fact does not have a direct bearing on the merits of the matter, yet, it is relevant and important and that fact is that, during the

pendency of the Reference before the learned Judge of the Labour Court, the respondent-workman filed a complaint under the Atrocity Act being

C.R. No. 2 of 1996 on 17th July, 1996 at Malaviyanagar Police Station, Rajkot, a copy of which is produced at Annexure ''I'', page 85 against

Bhanubhai Jayantilal Dave, Manager, Jayantbhai Dhirajlal Desai, Secretary, and Gatubhai @ Manoharlal Saubhagyachand Doshi, Member. In the

said case, police, after inquiry, filed ''B'' Summary on 6th September, 1996, wherein, police has recorded that, ''''the friends of the complainant,

who were studying with him, who were residing at Rajkot - Shri Kanaksinh Vakhatsinh Jhala and Jashubhai Haribhai Patel had stated in their

statement that, after the complainant - Dineshbhai Chauhan was suspended, he had met the deponent and had stated that, ''if the institute pays me

Rs. 40,000/-, I am going to resign''''. In this regard, he had met the Manager of the institute and had talked to him. It is thereafter that again he had

met the deponent (Kanaksinh Vakhatsinh Jhala) and had stated that, ''if over and above my rights, if the institute pays me Rs. 40,000/-, then I am

ready to resign''.

4.1. This submission is construed by the police and rightly so, that the said complaint was filed by the respondent-workman only with a view to

extort money from the institute and as the complainant - respondent-workman was not able to get that money, had resorted to filing of complaint

under the Atrocity Act.

4.2. The police has also obtained the medical certificate of the complainant, his wife and child and the same was found to be non-corroborative to

the facts of the complaint.

4.3. In the Report, police has also referred to a statement given by the Superintendent of the institute - Ashaben Trilokbhai Shah and there also, it

is stated by the deponent that, "the complainant - Gruhpati - Dineshbhai Jinabhai Chauhan had threatened the Superintendent, who was otherwise

required to give instructions to Gruhpati on telephone, that, if she will give any further instructions, he will send her to jail by alleging an offence

under the Atrocity Act. This fact was brought to the notice of the Trustees and the Manager by the Superintendent. After that, the Trustees and the

Manager had asked the complainant not to behave in this manner but as the conduct did not improve, Trustee - Jayantbhai Dhirajlal Desai had

given in writing to the District Collector, Rajkot and the Police Inspector, Malaviyanagar Police Station, Rajkot on 12th June 1996. They were

also given zerox copies of the letters of the complainant, which were obtained by police while inquiring into the matter under the said complaint.

4.4. As mentioned hereinabove, it is not having a direct bearing on the merits of the matter when the question comes to decide as to whether, the

petitioner-institute is an "industry" and the respondent is "workman", as contemplated under Sec. 2(s) of the I. D. Act.

5. At his juncture, it will also be proper to refer to the photographs produced at Annexure "H". There are as many as 13 photographs. The

photograph at serial No. 3 is suggestive of the fact that the inmates of the "Ashram" - the girls and boys are doing the work at the institute.

Similarly, the photograph Nos. 4, 5, 6, 7, 9, 10, 11, do suggest that the inmates of the "Ashram" are doing various activities. Coming back to the

test of "dominant nature" it will be clear that substantively no employees are entertained but in minimal matters, marginal employees are hired but

that does not destroy the character of the unit being "non-employee".

6. On careful perusal and consideration of the award, it is clear that the learned Judge has not taken into consideration the material placed before

him in its right perspective. The learned Judge has committed a grave error in holding that the petitioner-establishment is an "industry" and allowing

the Reference in part.

7. In light of the aforesaid discussion, this Court is of the opinion that the award and order dated 5th October, 2010 cannot be allowed to operate.

Hence, the same is quashed and set aside. Rule is made absolute with no order as to costs. At this juncture, at the request of the learned Advocate

for the respondent-workman, it is clarified that so far as order with regard to forfeiture of Gratuity is concerned, the same is not approved by this

Court. It is made clear that it will be open for the respondent-workman to approach the petitioner for Payment of Gratuity. Once the petitioner is

so approached, the petitioner will do the needful in the matter. In case the petitioner does not do anything it will be open for the respondent to take

recourse to the remedy available in law.