(1996) ILR (MP) 282 : (1994) 1 LLJ 1113 : (1993) 1 MPJR 129 : (1993) 38 MPLJ 586 : (1993) MPLJ 586

Madhya Pradesh High Court (Gwalior Bench)

Case No: Miscellaneous P. No. 514 of 1990

Mahesh Bhargawa		APPELLANT
	Vs	
State of M.P. and Others		RESPONDENT

Date of Decision: Feb. 24, 1993

Acts Referred:

- Industrial Disputes Act, 1947 - Section 2

Citation: (1996) ILR (MP) 282 : (1994) 1 LLJ 1113 : (1993) 1 MPJR 129 : (1993) 38 MPLJ 586 : (1993) MPLJ 586

Hon'ble Judges: S.K. Dubey, J; S.K. Chawla, J

Bench: Division Bench

Advocate: H.N. Upadhyay, for the Appellant; P.N. Kelkar, A.A.G. for Respondent No. 1 and Arvind Dudhawat, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S.K. Chawla, J.

An order of termination of service of a clerk is under challenge in this writ petition.

The petitioner Mahesh Bhargawa was given appointment as a casual clerk by M.P. Vidhik Sahayata Tatha Vidhik Salah Board (M.P. Legal Aid and Legal Advice Board, hereafter referred to as "Board") for 89 days by order dated December 16, 1988 (Annexure P-1). He was posted to work in the Office of Tehsil Legal Aid and Advice Committee. Sheopurkalan in Morena District. He contined to work as Clerk even after the expiry of 89 days stipulated in the appointment order. Ultimately by order dated December 8, 1989 (Annexure P-2), said to have been served on the petitioner on December 22, 1989, his

services were terminated with immediate effect. It is that order which is under challenge in this writ petition.

The challenge was made on different grounds mentioned in the writ petition, but the only ground canvassed before us was that activities of the Board are "industry" within the meaning of Section 2(j) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") and the termination in question being retrenchment not fulfilling the pre-requisites viz. one month"s notice or pay in lieu thereof, payment of retrenchment compensation and notice to Government or an authority specified by it, mentioned in Section 25F of the Act, the same was invalid and liable to be quashed.

The writ petition is contested by the Board. Its defence is that employment of the petitioner was for a fixed period of 89 days only. Even that appointment, given as it was by the then Secretary of the Board, Premji Shrivastava, was in violation of the directions of M.P. Government (Annexure R-1) that no new post by the Board shall be created without prior sanction of the Government. There was no post or vacancy to which the petitioner could have been validly appointed. After expiry of 89 days, the service of the petitioner was never extended. He was allowed to work without authority by respondent No. 3 i.e. Tehsil Legal Aid Officer, Sheopurkalan. A departmental action is being taken by the Board against him for unauthorisedly allowing the petitioner to work. It is also the defence of the Board that when the fact about invalid appointment of the petitioner came to the knowledge of the Board, the impugned order of termination was passed. It was denied that the activities of the Board are "industry" or that the provisions of Industrial Disputes Act, 1947 are attracted to the present case. It is however not challenged that if the Board is held to be an "industry" and provisions of Industrial Disputes Act, 1947 are held to be attracted, the termination in question was without fulfilment of the conditions mentioned in Section 25F of the Act.

The definition of "industry" is given in Section 2(j) of the Act This clause, as it originally stood, may be reproduced here:-

"(j) "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."

It may at once be stated here that a new definition of "industry" has been given by Act No. 46 of 1982, whereby a new Clause (j) has been substituted for the above clause, by Section 2(c) of the said Act, from a date to be notified for the enforcement of that provision. That date of enforcement, even after a lapse of more than 10 years, has not yet been notified. More will be said about it in the sequel. The only point worth mentioning here is that the original definition of "industry" still holds the field.

Turning to the case law bearing on the definition of" industry", it may be mentioned that concept of "industry" followed a zig-zag course until a Seven-Judge Bench of the

Supreme Court gave the decision in the case of Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, The concept until then suffered modification, shrinkage and amplification from time to time. However, from the beginning there was no doubt that "industry" was not to be understood in a narrow sense, confined to merely private enterprise of business or trade. Activities of Municipal Corporation in many of its departments were held to be "industry", being "undertaking" analogous to trade or business. In the case of The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others, even a hospital run by the Government without profit motive was held to be an "industry". A discordant note was however struck in the case of The Management of Safdarjung Hospital, New Delhi Vs. Kuldip Singh Sethi, which held that hospitals run by the Government and even private associations, not on commercial lines but on charitable lines or as part of the functions of Government Department of Health, could not be included in the definition of "industry". But the concept of "industry" more or less got settled, except that there do still arise difficulties in practical application, with the decision in Bangalore Water Supply"s case (supra). Krishna Iyer, J. representing the majority opinion in that case summed up his conclusions in paragraph 131 of the report. Some of the important conclusions may with advantage be reproduced here (p.404):-

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

Where (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, i.e. making on a large scale prasad or food) prima facie, there is an industry in that enterprise.

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 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.

The consequences are (i) professions, (ii) clubs, (iii) educational institutions, (iv) cooperatives, (v) research institutes, (vi) charitable projects and (vii) other kindred adventures, if they fulfil the triple tests listed above cannot be exempted from the scope of Section 2(j). Sovereign functions, strictly understood (alone) qualify for exemption (from the scope of Section 2(j));

Sovereign functions, strictly understood (alone) qualify for exemption (from the scope of Section 2(j)); but not the welfare activities or economic adventures undertaken by

Government or statutory bodies.

The concept of "industry" enunciated in Bangalore Water Supply case (supra) continued to hold the field thereafter, and will also continue to hold the field, until it is replaced by the new statutory definition given in Section 2(j), referred to already. It is not necessary to set out the new definition because it is still to come in force. It may however be mentioned that the new definition gives recognition to the test, which was aptly called the "triple test", propounded in Bangalore Water Supply"s case (supra) for determining whether any activity is an "industry". Thus the new definition states that "industry" means a systematic activity carried on by cooperation between employer and his workmen (whether such workmen are employed by much employer directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely spiritual or religious in nature). This is called a triple test because the tests are three, namely (1) systematic activity, (2) organized by co-operation between employer and employee and (3) for the production, supply or distribution of goods or material services. The new definition no doubt also goes further and expressly excludes certain areas of activity from the field of "industry", which would otherwise fall within the ambit of the ratio in Bangalore Water Supply"s case (supra).

Commenting adversely on the failure of the Government to notify the date of enforcement of the new definition, the Supreme Court observed in Des Raj and Ors Vs. State of Punjab and Ors, in para 10 as follows (p-162):-

"We have not been able to gather as to why even six years after the amendment has been brought to the definition of industry in Section 2(j) of the Act the same has not been brought into force. This Court on more than one occasion has indicated that the position should be clarified by an appropriate amendment and when keeping in view the opinion of this Court the law was sought to be amended it is appropriate that the same should be brought into force as such or with such further alterations as may be considered necessary, and the legislative view of the matter is made known and the confusion in the field is cleared up."

Another five years have gone by after the above observations of the Supreme Court and yet the date of enforcement of the provisions giving new definition of "industry" has yet to be notified.

Coming back to the present case, the question that arises for decision is, if activities of the Board fall within the ambit of the definition of "industry". A reference to an Act called "The M.P.Samaj Ke Kamjor Vargon Ke Liye Vidhik Sahayata Tatha Vidhik Salah Adhiniyam, 1976" (Act No. 26 of 1976) at this place is appropriate. The preamble of this Act shows that it is an Act to provide juridical in the form of legal aid and legal advice to the weaker sections of the people with a view to bring the system of justice within their reach and thereby making the legal process a surer mean to social and economic justice

and for matters ancillary thereto. The Board has been established u/s 3 of the Act. It is a body corporate, having perpetual succession and a common seal with power to acquire, hold and dispose of property both movable and immovable and to contract and sue or be sued in its name. There are also Legal Aid and Advice Committees at district, tehsil and village levels to assist the Board. The functions of the Board are given in Section 23. Confining ourselves at the present to only main functions of the Board, it may be stated that its functions are to supervise, direct and control the operation and administration of the legal aid and legal advice throughout the State, to render assistance to members of weaker sections of the people to assert, defend or dispute a claim in legal proceedings, to encourage conciliation in legal proceedings, to educate members of the weaker sections of the people in particular about the civil rights and the rights made available to them under various enactments, to sponsor voluntary organizations consisting of lawyers and law students and to encourage them to render free legal aid to the weaker sections of the people, to sponsor legal advice clinics and so on. The Board approves a panel of legal practitioners every year u/s 40. The legal aid and advice is given through the panel of legal practitioners who are also paid remuneration by the Board. The legal aid is given in the modes described in Section 36. The modes are by:-

(a) payment of Court fees, process fees, expenses of witnesses and all other charges payable or incurred in connection with legal proceedings;

(b) representation by a legal practitioner in legal proceeding;

(c) supply of certified copies of judgments and orders in a legal proceeding;

(d) preparation of appeal paper books including printing and translation of documents in a legal proceeding.

From the above account, it is clear that the Board, as its name indicates, has twin functions of providing legal aid and legal advice to the society particularly to its weaker sections, to help secure justice. It is obvious that providing legal aid is material service, as it is rendered monetarily. With regard to rendering legal advice, the service is akin to legal practitioner''s service. In fact, that service is in the main rendered by the Board by engaging legal practitioners from among its panel. A lawyer for that matter renders service, material and temporal service as distinguished from spiritual service. Asingle lawyer with a clerk or two assisting him, may not be said to be running an industry, not because the service which he renders is not material service, but because there is nothing like organised labour in his case. The claim of legal professions, as of other liberal professions, for exclusion from the purview of industry, was firmly rejected in Bangalore Water Supply case (supra), overruling the previous The National Union of Commercial Employees and Another Vs. M.R. Meher, Industrial Tribunal, Bombay and Others, Krishna Iyer, J. speaking in Bangalore Water Supply case (supra) observed in paragraph 79 as follows (p. 387):

"We have, therefore, no doubt that the claim for exclusion on the score of liberal professions is unwarranted from a functional or definitional angle. The flood-gates of exemption from the obligations under the Act will be opened if professions flow out of its scope."

Further in paragraph 81 His Lordship observed (p.388):

"The result of this discussion is that the Solicitor"s case is wrongly decided and must, therefore be overruled. We must hasten, however, to repeat that a small category, perhaps large in numbers in the mofussil, may not squarely fall within the definition of industry. A single lawyer, a rural medical practitioner or urban doctor with a little assistant and/or menial servant may ply a profession but may not be said to run an industry. That is not because the employee does not make a contribution nor because the profession is too high to be classified as a trade or industry with its commercial connotations but because there is nothing like organised labour in such employment. The image of industry or even quasi- industry is one of the plurality of workmen, not an isolated or single little assistant or attendant."

The conclusion is that in giving legal advice or rather in arranging to give legal advice, the Board renders material service, apart from the admitted position of rendering material service by giving legal aid, to bring the Board"s activities within the purview of "industry". The triple test in the case of the Board is fully satisfied, inasmuch as the activities undertaken by the Board are systematic activities, organsied by co-operation between employer and employees for supply and distribution of material services. The Board is therefore prima facie industry.

It was however contended by Shri Arvind Dudhawat, learned counsel for the Board, that Board "s activities helped in the administration of justice and hence the Board"s function was sovereign in character. It was further argued that it is an admitted legal position that sovereign functions qualify for exemption from the purview of "industry" and for that reason, the Board was not an "industry". Another argument put forward was that the Board was brought into existence by the State Government in fulfilment of Directive Principles of State Policy given in the Constitution of India.

So far as sovereign functions are concerned, it appears that it has never been doubted in the decisions of the Supreme Court that sovereign functions of the Government are outside the pale of "industry". Gajendragadkar. J. (as he then was) observed in the report in the case of The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others,

"It would be possible to exclude some activities from Section 2(j) without any difficulty. Negatively stated, the activities of the Government which can be properly described as regal or sovereign activities are outside the scope of Section 2(j)."

Subba Rao, J. (as he then was) observed in the decision in the case The Corporation of the City of Nagpur Vs. Its Employees,

"Before considering the positive aspects of the definition, what is not an industry may be considered. However wide the definition of "industry" may be, it cannot include the regal or sovereign functions of State."

Chandrachud, C.J. (as he then became) on April 7, 1978, delivering his minority opinion in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, in paragraph 9 of the report went to the extent of saying that even the State"s sovereign activity will not fall outside the definition of "industry" His Lordship observed (p.76):

"One of the exceptions carved out by the Court is in favour of activities undertaken by the Government in the exercise of its inalienable functions under the Constitution, call it regal, sovereign or by any other name. I see no justification for excepting these categories of public utility activities from the definition of "industry". If it be true that one must have regard to the nature of the activity and not to who engages in it, it seems to be beside the point to enquire whether the activity is undertaken by the State, and further, if so, whether it is undertaken in fulfilment of the State"s Constitutional obligations or in discharge of its Constitutional functions. In fact, to concede the benefit of an exception to the State"s activities which are in the nature of sovereign functions is really to have regard not so much to the nature of the activity as to the consideration who engages in that activity."

The above extreme view taken by Chandrachud, C.J. was however not shared by the majority of the Judges. Speaking for the majority Krishna Iyer, J. observed in paragraph 131 as follows Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others,

"(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 sever-able, then they can be considered to come within Section 2(j)."

So the view held by the Supreme Court was that activities of the Government which could properly be described as sovereign activities fell outside the scope of "industry". In this connection our High Court in the case of Security Paper Mill Vs. Hari Sankar Namdeo and Another, took the view that it is open to the Legislature to include even undertaking established by Government in exercise of sovereign functions within the definition of "industry". It was thus held that Security Paper Mill run by the Central Government in exercise of its sovereign function was an "industry" by necessary implication because Defence Establishment, India Government Mints and India Security Press were industries mentioned in First Schedule of the Industrial Disputes Act, 1947. Leaving aside for the moment those undertakings which are established by Government in exercise of its

sovereign functions but which may be ''industry'' because of express or necessary implication in an enactment, the position which is undisputed is that activities of the Government which are sovereign, are outside the scope of the definition of "industry".

But what are the sovereign functions of the Government? As observed by His Lordship Gajendragadkar, J. in the case of Hospital Mazdoor Sabha (supra) they are functions which a Constitutional Government can and must undertake for governance and which no private citizen can undertake. In line with the above view, His Lordship Subba Rao, J. in Nagpur Corporation v. Its Employees, (supra) approved of the observations of Lord Watson in Coomber v. Berks Justices (1883) A.C. 61that functions such as administration of justice, maintenance of order and repression of crime are among the primary and inalienable functions of a constitutional Government. The observations of Issacs, J. in his dissenting judgment in Federal State School Teachers'' Association of Australia v. State of Victoria 1928 2941 C.L.R. 569, that regal functions are inescapable and inalienable and that they are legislative power, the administration of flaws and the exercise of judicial power, were also approved.

Coming to the present case, giving legal aid and legal advice, are functions which any private person can and may undertake. They are not inalienable functions of the Government necessary for governance. Those functions may help to secure justice. But by exercise of those functions the Board does not administer justice. Functions which help to secure justice are not functions constituting administration of justice. Those functions of the Board are, therefore, in no sense, sovereign functions, or even instance of exercise of sovereign functions delegated to the Board by the Government The Board cannot, therefore, justly claim exemption from the scope of the definition of ''industry'' on that score.

With regard to contention based on Directive Principles of State Policy, Shri Arvind Dudhawat, learned counsel for the Board, drew attention to Article 39A of the Constitution of India, which is as follows:-

"39.A Equal justice and free legal aid. - The State shall ensure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

It was submitted that the above Directive Principle bestowed a duty on the State to provide free legal aid by suitable legislation or schemes to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. It was in pursuance of this Directive Principle that Government of M.P. had enacted the Act entitled M.P. Samaj Ke Kamjor Vargon Ke Liye Vidhik Sahayata Tatha Vidhik Salah Adhiniyam, 1976 (Act No. 26 of 1976) and the Board was constituted under that Act to discharge the functions of providing free legal aid and free legal advice.

A similar argument based on Directive Principle was advanced to claim exemption from the scope of "industry" but was expressly repelled in the case of Hospital Mazdoor Sabha (supra) Gajendragadkar, J. (as he then was) made the following observations in The State of Bombay and Others Vs. The Hospital Mazdoor Sabha and Others,

"An attempt is, however, made by the appellant to suggest that in view of the Directive Principles enunciated in Part IV of the Constitution and in view of the ideal of a welfare State which has been placed before the country Governments, both at the level of the States as well as at the Centre, undertake several welfare activities; and the argument is that the field of governmental or regal activities which are excluded from the operation of Section 2(j) should be extended to cover other activities undertaken by the Governments in pursuit of their welfare policies. In our opinion, this contention cannot be accepted. The activities which do not fall within Section 2(j) and which are described as governmental or regal or sovereign have been pithily described by Lord Watson as "the primary and inalienable functions of a Constitutional Government." (Vide: Coomber v. Justices of Berks (1883) 9 A.C. 61); and it is only these activities that are outside the scope of Section 2(j). It sounds incongruous and self-contradictory to suggest that activities undertaken by the Government in the interests of socio-economic progress of the country as beneficial measures should be exempted from the operation of the Act which in substance is a very important beneficial measure itself."

The utmost that can be said, if an activity is in fulfilment of Directive Principles of State Policy, is that it is welfare activity, but a welfare activity would not by itself qualify for exemption. As observed in Bangalore Water Supply case (supra): "Sovereign functions strictly understood alone qualify for exemption, not the welfare activities undertaken by Government or statutory bodies." Hence the argument that activities of the Government undertaken through the Board are in pursuance of Directive Principles of the State Policy, is of no avail.

For the foregoing reasons, we are of the view that the activities of Board fall within the definition of "industry" in Section 2(j) of the Act. The provisions of Section 25F of the Act were therefore, squarely attracted to the impugned termination. The plea of the Board that appointment of the petitioner was an invalid appointment against no post or vacancy and that the petitioner unauthorisedly continued in service after expiry of the fixed term and hence termination of such service did not attract the provisions of Section 25F of the Act, cannot be accepted. The definition of "retrenchment" as given in Section 25F is wide and comprehensive enough to include all types of terminations of service unless the termination fell within any of the ex-cepted categories mentioned therein. An invalid appointment is not one of the exceptions. Therefore, termination of invalid appointment will also be a clear case of retrenchment for which preconditions mentioned in Section 25F should have been fulfilled. Reference may be made to the decision in Iftikar Ahmed v. Municipal Council Ambah reported in 1992 MPLR 104, laying down that termination of invalid appointment would also amount to retrenchment making it necessary that the provisions of Section 25F should have been fulfilled to make the termination valid. Since

in the present case it is an admitted position that impugned termination was done without fulfilling the pre-requisites mentioned in Section 25F, there is no doubt that the same was invalid and is liable to be quashed.

The petitioner in the present case did not avail of the alternative remedy available to him under the Industrial Disputes Act but came directly to this Court in a writ petition. He has simply prayed for quashing of termination order in the writ petition and has not gone further, and in our opinion rightly, to pray for back wages. After the termination is quashed, the petitioner can seek his remedy that may be available to him under law for back wages.

For the foregoing reasons, this writ petition is allowed. The order of termination of petitioner''s service dated December 8, 1989 (Annexue P-2) is held to be invalid and is quashed. No order as to costs. The amount of security deposit, outstanding, if any, shall be refunded to the petitioner.