
Narendra Keshrichand Fuladi and another Vs State of Maharashtra

Special Civil Application No. 1165/78 with Special Civil Application No. 1185/78

Court: Bombay High Court

Date of Decision: Sept. 28, 1984

Acts Referred:

Industrial Disputes Act, 1947 "Section 2

Citation: (1985) 2 LLJ 24 : (1985) MhLj 1

Hon'ble Judges: D.B. Deshpande, J; B.A. Masodkar, J

Bench: Division Bench

Judgement

Deshpande, J.

By these two petitions, the petitioners pray for striking down the amendment to S. 2(4) of the Bombay Shops and

Establishments Act, 1948 (Bombay Act LXXIX of 1948), effected by S. 2(b) of the Maharashtra Act No. LXIV of 1977.

2. The petitioners contend that they do not have any establishment as contemplated by the Bombay Shops and Establishments Act, 1948 ("the

Shops Act" for short). Petitioner No. 1 in Special Civil Application No. 1165 of 1978 has employed only one clerk who does miscellaneous work

like keeping briefs and carrying them to the Court, and he never employs any organised labour which is involved in carrying on the legal profession

by the petitioner.

3. The petitioner in Special Civil Application No. 1185 of 1978 is also an Advocate. Besides being an Advocate, he is also duly elected as the

Secretary of the Akola Bar Association. The Shop Inspector of the first respondent, Municipal Council, Akola, issued instructions to this petitioner

requiring him to register himself under the provisions of section 7 of the Shops Act, on the assumption that his office-cum-residence is a

commercial establishment as defined u/s 2(4) of the Shops Act and also asking him to send a list of Advocates who come within the purview of the

Act.

3A. According to Shri. A. S. Bobde, the learned counsel for the petitioners, the amendment of the definition of "commercial establishment" as

contained u/s 2(4) of the Shops Act by the amending Act LXIV of 1977, enlarging the meaning of "commercial establishment" so as to include

establishment of any legal practitioner, could not be justified by Entry 24 of List III of the Seventh Schedule of the Constitution of India and the

State Legislature has no competence to legislate on the subject by including the establishment of a legal practitioner in the definition of "commercial

establishment", under the guise of that Entry. It is also contended that in view of the prevalence of the Advocates Act, 1961, which governed the

legal practitioners, it was not competent for the State Legislature to legislate on the same subject. It was further urged that the class of legal

practitioners did not partake all the attributes of business, commerce or trade which was necessary for bringing them under the definition of

commercial establishment"" and in view of the avowed object of the Act as originally framed, the inclusion of legal practitioners in the definition was

arbitrary and irrational and was, therefore, violative of Article 14 of the Constitution of India. Shri V. G. Palshikar, the learned counsel who

intervened on behalf of the Maharashtra Bar Council, and Shri L. Mohta for the petitioner in Special Civil Application No. 1185 of 1978, adopted

the submissions of Shri. A. S. Bobde.

4. On the other hand, it was urged by Shri. B. P. Jaiswal, the learned Assistant Government Pleader on behalf of the respondents, that it was not

only under Entry No. 24 of List III of Seventh Schedule of the Constitution that the State Legislature derived its power to legislate, but it was

referable also to Entry No. 26 of that list which deal with legal, medical and other professions, and there could not be any repugnancy between the

provisions of the Shops Act and the Advocates Act, as the amending Act LXIV of 1977, after being passed by the State Legislature, received the

President's assent on the 29th November, 1977 and would, therefore, prevail in the state of Maharashtra, in view of Article 254(2) of the

Constitution. While submitting that no question of competency of the State Legislature can arise in these circumstances, it was contended that the

amendment sought to enlarge the definition of commercial establishment by including the establishment of a legal practitioner along with others, and

the amendment was not, therefore, violative of Article 14 of the Constitution.

5. Before proceeding to deal with the rival contentions raised by the parties, it is necessary to remember the test laid down by Lord Coke in

Haydon's case (1584) 7 Co Rep 78 , as approved by the Supreme Court in The Corporation of the City of Nagpur Vs. Its Employees, that in

order to arrive at the real meaning of the words, the following matters are to be considered : (1) What was the law before the Act was passed; (2)

What was the mischief or defect for which the law had not provided; (3) What remedy Parliament has prescribed; and (4) The reason of the

remedy. The scheme of the Shops Act came to be considered in several cases and notably in *Sakharam Narayan Kherdekar v. City of Nagpur*

Corporation 1964 I LLJ 156, *N.E. Merchant and Another Vs. State*, and *Dr. Devendra M. Surti Vs. The State of Gujarat*,

6. Prior to the amendment of the Maharashtra Act LXIV of 1977, the question, which arose, was whether professional activity of a legal

practitioner or medical practitioner could be included in the definition of commercial establishment under S. 2(4) of the unamended Act. The

preamble to the Act states that is an Act, "to consolidate and amend the law relating to the regulation of conditions of work and employment in

shops, commercial establishments, residential hotels, restaurants, eating houses, theatres, other places of public amusement or entertainment and

other establishments. Under S. 2(6), "establishments" means a shop, commercial establishment, residential hotel, restaurant, eating house, theatre,

or other place of public amusement or entertainment to which this Act applies and includes such other establishments as the State Government

may, by notification in the Official Gazette, declare to be an establishment for the purpose of this Act. Each one of these components has been

defined in the Act.

Under S. 2(4), "commercial establishment" means an establishment which carries on, any business, trade or profession or any work in connection

with, or incidental or ancillary to, any business, trade or profession and includes a society registered under the Societies Registration Act, 1960,

and a charitable or other trust, whether registered or not, which carries on whether for purposes of gain or not, any business, trade or profession or

work in connection with or incidental or ancillary thereto but does not include a factory, shop, residential hotel, restaurant, eating house, theatre or

other place of public amusement or entertainment.

7. It may at once be stated that the amending Maharashtra Act. LXIV of 1977 sought to enlarge the definition by including establishment of any

legal practitioner, medical practitioner, architect, engineer, accountant, tax-consultant or any technical or professional consultant within the

definition of "commercial establishment". But Ss. 6 and 7 define "employee" and "employer". Under S. 4, the State Government is empowered to

exclude some of the provisions of this Act in its application to certain categories of establishments by issuing a notification. Under S. 6 the State

Government is authorised to apply the Act to other establishments and persons with such modifications or adaptations as may be necessary.

Chapter-II deals with the registration of an establishment. Section 7(1) requires the employer of every establishment to send to the Inspector of the

local area concerned a statement in the prescribed forms together with necessary fees, containing the name of the employer and of the

establishment and the category of the establishment. Under S. 7(2), registration certificate is to be granted. Sections 10 and 11 provide for the

opening and closing hours of the shops, while S. 13 deals with opening and closing hours of the commercial establishment. Section 14 provided for

the daily and weekly hours of the work in shops and commercial establishments. This is followed by several regulatory provisions in respect of the

conditions of work of the employees. Section 38 of Chapter-VII provides for the extension of Payment of Wages Act by the State Government by

a notification in the Gazette to all or any class of establishments or to all or any class of employees to which or whom this Act for the time being

applies. Section 38-A provides for the extension of the Workmen's Compensation Act, 1923. Chapter VIII enacts provisions for health and

safety of the workers generally for all establishments, while Chapter-IX enacts provisions of the machinery for enforcement and inspection.

Chapter-X deals with offences and penalties. Section 52 deals with contravention of certain provisions, while S. 62 provides for maintenance of

registers and records and display of notices, as may be prescribed by rules. Section 63 deals with wages for overtime work.

8. In *Sakharam Narayan Kherdekar v. City of Nagpur Corporation* (supra) this Court took the view that a lawyer who carries on his profession as

an advocate is not an "employer" within the meaning of S. 2(7) of the Shops Act, and he is not liable to have any establishment registered under S.

7 of the Act. It was observed that an activity to be a profession must be one carried on by an individual by his personal skill, intelligence and

dependent on individual characteristics, and it is the personal skill, intelligence, study, integrity which is a core of a professional activity. The very

concept of activity which can justly be called a commercial activity, must imply some investment of capital and the activity must run the risk of profit

or loss. It is not every establishment in the sense of premises or buildings where business, trade or profession is carried on that is intended to be

governed by the Act. but only those premises though carrying on one or other kinds of such activities which are of a commercial nature. The

profession of law carried on by any advocate or a legal practitioner in any manner or to any extent cannot be said to partake of a commercial

character or to be a commercial activity. Unless the trade, business or profession carried on also partakes of a commercial nature or venture the

premises in which such activities are carried on will not attract the provisions of shops and Establishments Act. The activity of an Advocate

carrying on profession of law is radically distinguished from any other commercial activity. The role of an Advocate in practising and discharging his

duties is participation in administration of justice, which is a regal function of the State.

9. In *N. E. Merchant v. State* (supra), another Division Bench of this Court held that the office of a Chartered Accountant with an articulated clerk

and one ordinary salaried clerk was not a commercial establishment so as to attract the provisions of the Shops Act. In *Dr. Devendra N. Surti v.*

The State of Gujarat (supra), it was held that private dispensary of a doctor is not a "Commercial Establishment" within the meaning of the Act and

the provisions of the Act do not apply to his dispensary. Their Lordships observed as follows in *Dr. Devendra M. Surti Vs. The State of Gujarat*,

It is true that S. 2(4) of the Act has used words of very wide import and grammatically it may include even a Consulting room where a doctor

examines his patients with the help of a solitary nurse or attendant. But, in our opinion, in the matter of construing the language of S. 2(4) of the Act

we must adopt the principle of *noscitur a sociis*. This rule means that, when two or more words which are susceptible of analogous meaning are

coupled together they are understood to be used in their cognate sense. The words take as it were their colour from each other that is, the more

general is restricted to a sense analogous to less general. Associated words take their meaning from one another under the doctrine of *noscitur a*

sociis the philosophy of which is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it,

such doctrine is broader than the *maxim ejusdem generis*.

It is further observed that the correct test of finding whether a professional activity falls within S. 2(4) of the Act is whether the activity is

systematically and habitually undertaken for production or distribution of goods or for rendering material services to the community or any part of

the community with the help of employees in the manner of a trade or business in such an undertaking. It is also necessary in this connection to

construe the word "profession" under S. 2(4) of the Act. It was then held that a professional activity must be an activity carried on by an individual

by his personal skill and intelligence. There is a fundamental distinction, therefore, between a professional activity and an activity of a commercial

character and unless the profession carried on by a person also partakes of the character of a commercial nature, he cannot fall within the ambit of

S. 2(4) of the Act.

10. The position of the law as it stood in respect of the Shops Act, until the President's assent was received on 29th November, 1977, to the

Maharashtra Act LXIV of 1977 and it was published on 3rd December, 1977, was that the professional activity of a legal practitioner was not

such as could be included in the definition of "Commercial Establishment". The learned counsel for the respondents, however, urged that the

exclusion of a profession, such as legal practitioner or medical practitioner, was made by the Courts on the principle of interpretation, but these

two categories have now been included in the definition of "Commercial Establishment" under S. 2(4) of the Shops Act. In his submission, no

question of legislative competency to amend the definition would arise, if it is a matter upon which the State Legislature could legislate. As the

object of the Shops Act shows, it was an Act to consolidate and amend the law relating to the regulation of conditions of work and employment in

shops, commercial establishments, etc., there can be no question of the competency of the State Legislature to legislate on this subject and that

was also not the ground taken by the petitioners in respect of the Shops Act as it originally stood. The challenge was only to the inclusion of the

establishment of a legal practitioner in the definition of the "Commercial Establishment", and apart from the wide power available to the State

Legislature under Entries 23 and 24 which deal respectively with social security and social insurance, simple employment and unemployment and

welfare of labour, including conditions of work, provident funds, employer's liability, workmen's compensation, invalidity and old age pensions

and maternity benefits, under Entry 26, the State Legislature could also legislate on legal, medical and other professions. The mere fact that a

Central Legislation, viz. the Advocates Act, 1961, had already been passed by the Parliament, would not render the provisions of the amending

Act invalid, as the amending Act had been made on one of the matters enumerated in the concurrent list and had been reserved for the

consideration of the President and had received his assent. It is clear that in view of the provisions of Art. 254(2) of the Constitution, the amending

Act would prevail in this State, even if some of its provisions may run contrary to the provisions of the Advocates Act, 1961. We are, therefore,

clear that the amending Act cannot be invalidated either on the ground of incompetency of the State Legislature to pass it or on the ground of its

repugnancy with the Advocates Act, 1961.

11. The learned counsel for the State urged that in view of the enlargement of the definition of "Commercial Establishment" by including the

establishment of a legal practitioner and certain other categories, the view taken by the Courts that these professions were not included in the

unamended definition of "Commercial Establishment" would be of no assistance to the petitioners. As observed by the Supreme Court in the

Commissioner of Income Tax, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad, the word "includes" is often used in interpretation clauses in

order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used, these words and phrases must be

construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation

clause declares that they shall include. We are satisfied that there can be no challenge merely on the ground of enlargement of the meaning of the

work ""Commercial Establishment"", once the competency of the State Legislature is conceded. However, in none of the cases on which reliance

was placed on behalf of the respondents, did the question of violation of Art. 14 of the Constitution come up for consideration, as has been argued

before us.

12. We must, however, advert to another submission on behalf of the respondents that the observations in Sakharam Narayan Kherdekar's case

(supra) came to be made on the basis of the position as it was set out in The National Union of Commercial Employees and Another Vs. M.R.

Meher, Industrial Tribunal, Bombay and Others, that the work of Solicitors was not an industry within the meaning of S. 2(j) of the Industrial

Disputes Act, 1947, and, therefore, any dispute raised by the employees of the solicitors against them cannot be made the subject of reference to

the Industrial Tribunal, and the very basis of those observations has been taken away as the Supreme Court in Bangalore Water Supply and

Sewerage Board Vs. A. Rajappa and Others, held that the solicitors' case was wrongly decided and must, therefore, be overruled. What the

Supreme Court observed in para-81 of its judgment was as follows at page 388 :

The result of this discussion is that the solicitors' case The National Union of Commercial Employees and Another Vs. M.R. Meher, Industrial

Tribunal, Bombay and Others, is wrongly decided and must, therefore, be overruled. We must hasten, however, to repeat that a small category,

perhaps large in numbers in the mufasil, 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 a plurality of workmen,

not an isolated or single little assistant or attendant. The later category is more or less personal avocation for livelihood taking some paid or part-

time job from another.

It may be noted that the Supreme Court was considering the purpose of the Industrial Disputes Act which is to focus on resolution of industrial

disputes and regulation of industrial relations and not to meddle with every little carpenter in a village or blacksmith in a town who sits with his son

or assistant to work for the customers who trek in. In contract, as already observed, the object of the Shops Act is to consolidate and amend the

law relating to the regulation of conditions of work and employment in shops, commercial establishments and other establishments.

13. We may not treat the same ground which has been covered by this Court in Sakharam Narayan Kherdekar's case (supra), which distinguishes

the law practice from other commercial ventures. The nature of the law practice, contracted with other commercial ventures, is distinguished by

four features, according to Henry S. Drinker in his book "Legal Ethics", page 5. The primary characteristics which distinguish the legal profession

from business are : (1) a duty of public service in which one may attain the highest eminence without making much money, (2) a relation as an

officer of Court"" to administration of justice involving through sincerity, integrity and reliability, (3) a relation to clients in the highest degree

fiduciary, and (4) a relation to colleagues at the bar characterised by candor, fairness and unwillingness to resort to current business methods of

advertising and encroachment on their practice, or dealing directly with their clients. The part a lawyer plays in the administration of justice partakes

to some extent or participation in sharing sovereign or regal functions of the State. The discussion in Bangalore Water Supply case (supra) does

not touch any of these aspects as it was not necessary there to decide these other questions, in view of the point that fell for decision there, as to

the scope of the definition of "industry" in S. 2(j) of the Industrial Disputes Act. We find that the concept of commercial establishment is very much

different from the concept of industry and whatever may have been said in respect of "industry" cannot be imported while considering the width,

nature and the extent for the concept of "commercial establishment. In this view which we are taking, we are supported by the observations made

by the Kerala High Court in Sasidharan v. Peter and Karunakaran 1978 Lab. I.C. 1614.

14. That brings us to the challenge that Amendment Act (Maharashtra Act LXIV of 1977), in so far as it includes the establishment of a legal

practitioner in the category of "commercial establishment", violates Art. 14 of the Constitution. We have already pointed out how the definition of

"commercial establishment", as explained by judicial opinion while taking in profession or any work in connection with, or incidental, or ancillary to

it, could not take in the establishment of a legal practitioner, as it obtained prior to the coming into force of the amending Act. The establishment of

a legal practitioner could not be included in the category of commercial establishment, for the reasons already stated, as the establishment of a legal

practitioner could not conceptually be included in "commercial establishment". This is not to say that the Legislature was not competent to make a

law in respect of legal, medical and other professions, as comprised in Entry No. 26 of List III of the Seventh Schedule of the Constitution,

consistently with the nature of legal profession and the functions which it had to perform and the special characteristics of its activity. The question

is whether, while purporting to consolidate and amend the law relating to the regulation of conditions of work and employment in shops,

commercial establishments and other establishments, the legal profession or the establishment of a legal practitioner, could be brought in for

identical treatment with commercial establishment without taking note of the difference.

15. It was observed in the The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., , that if the words "Sale of goods" have to be

interpreted in their legal sense, that sense can only be what it has in the law relating to sale of goods. The ratio of the rule of interpretation that

words of legal import occurring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise

sense, and that, accordingly, the Legislature must be taken to have intended that they should be understood in that sense. In interpreting an

expression used in a legal sense, therefore, we have only to ascertain the precise connotation which it possesses in law. There, their Lordships

were considering whether there is implicit in the building contract a sale of materials as understood in law. We find that though the Legislature was

competent to enlarge the definition of "commercial establishment", it could not bring it for equal treatment along with other commercial

establishments an entity which was not a commercial establishment, as previously understood by the judicial opinion in this country.

16. The learned counsel for the respondents contended that there could be no violation of Art. 14 of the Constitution in the present case, which

guarantees equality before the law or equal protection of the laws within the territories of India. In *Ram Krishna Dalmia Vs. Shri Justice S.R.*

Tendolkar and Others, while holding that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon

him who attacks it to show that there has been a clear transgression of the constitutional principles, it was observed that while good faith and

knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law of the surrounding

circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of

constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain

individuals or corporations to hostile or discriminating legislation.

17. The observations of the Supreme Court in *In The Special Courts Bill In Re: The Special Courts Bill, 1978*, , are apposite :

By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in

relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with

the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to

other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and

characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

6. The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can

recognise even degree of evil, but the classification should never be arbitrary artificial or evasive.

7. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which

are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have reasonable

relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded

on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to

the object sought to be achieved by the Act.

8. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a

nexus between them. In short, while Art. 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily

selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be

imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary, in the above mentioned.

18. We have already pointed out here that there are no common properties or characteristics to be found in the other commercial establishments

and the establishment of a legal practitioner which have been herded together. There is no rational basis for herding them together and the

conclusion that they were brought together arbitrarily, is inescapable. The differentia must be intelligible and must be reasonably related to the

object of the law. The herding up, which is done either arbitrarily or irrationally would, ex facie, be unreasonable. We are, therefore, clear that the

inclusion of the establishment of a legal practitioner in the context of the connotation of commercial establishment, to which we have already

adverted, does not answer the test of reasonableness and the inclusion would, therefore, be violative of Art. 14 of the Constitution also on ground

of unreasonableness. In *Bachan Singh, Sher Singh and Another and Ujagar Singh and Another Vs. State of Punjab and Others*, *Bhagwati J.*,

observed as follows :-

It can therefore now be taken to be well-settled that if a law is arbitrary or irrational, it would fall foul of Art. 14 and would be liable to be struck

down as invalid. Now a law may contravene Art. 14 because it enacts provisions which are arbitrary, as for example : They make discriminatory

classification which is not founded on intelligible differentia having rational relation to the object sought to be achieved by the law or they arbitrarily

select persons or things for discriminatory treatment It is plain indisputable that under our Constitution law cannot be arbitrary or

irrational and if it is, would be clearly invalid, whether under Art. 14 or Art. 19 or Art. 21, whichever be applicable.

19. To sum up, find that the amending Act, Maharashtra Act LXIV of 1977, cannot be assailed on the ground of lack of legislative competence, as

such a law could be made by the State Legislature on the subject in view of Entry No. 26 of List-III of the Seventh Schedule and it cannot be

struck down on the ground of its repugnancy to Advocates Act, 1961, since it had been reserved for the consideration of the President and his

assent had been obtained. We are, however, of the view that the amendment, so far as it relates to the establishment of legal practitioner, is liable

to be struck down as it herds together commercial establishments with the establishment of legal practitioner, which herding together is irrational

and arbitrary. We would, however, make it clear that we say nothing in this Judgment about the other categories included within the definition of

"commercial establishment" under S. 2(4) of the Shops Act by the amending Act, viz., the Maharashtra Act No. LXIV of 1977, as the arguments

and submissions in these Special Civil Applications were confined only to the establishment of a legal practitioner, as included by the amending Act

in the Shops Act.

20. In the result, the petitions are allowed and the provisions of the amending Act, viz., the Maharashtra Act No. LXIV of 1977, in so far as they

include the establishment of a legal practitioner in the Bombay Shops and Establishment Act, 1984 (Bombay Act LXXIX of 1948), are struck

down. Rule made absolute. There will be no order as to the costs.

20A. Mr. B. P. Jaiswal for the respondent-state prays for leave to appeal to Supreme Court, under Art 133, Cls. (a) & (b), of the Constitution.

21. We will consider this in the presence of the Counsel for the petitioners. Put up on 30th September, 1984.

22. This relates to the prayer of the respondent State seeking leave to appeal to Supreme Court under Art. 133 of the Constitution.

23. Mr. Jaiswal submitted that there is substantial question of law of general importance and requires and needs to be decided by the Supreme

Court.

24. As against this Mr. Bobde pointed out that there is no such question indeed and this Court merely applied the law that is already laid

down by the Supreme Court. In other words, the judgment does not involve original exercise in laying down proposition of law.

25. We think when the legislation of the type has been considered to be ultra vires by us, it does raise a substantial question of law of general

importance and for that reason we are of the opinion that such a question needs to be decided by the Supreme Court.

26. In view of this, allow the prayer and direct the certification to be made under Art. 133 of the Constitution and upon compliance of the rules

direct that the records be transmitted to the Supreme Court for that purpose. Certificate to issue.

27. Order accordingly.