

Board of Trustees of the Port of Bombay Vs State of Maharashtra and others

Court: Bombay High Court

Date of Decision: Oct. 16, 1989

Acts Referred: Factories Act, 1948 " Section 2

Citation: (1990) 1 BomCR 123 : (1989) 91 BOMLR 900 : (1990) 2 LLJ 280

Hon'ble Judges: V.S. Kotwal, J

Bench: Single Bench

Judgement

1. The applicability or otherwise of the rigour of the relevant provisions of the Bombay Labour Welfare Fund Act of 1953 is the question that is

posed in this proceeding for being answered in the context of the rival contentions. The question so posed no doubt falls in a narrow field, though

the contentions canvassed on behalf of both the sides fall in a comparatively expanded field, in it is. The petitioners herein are the Board of

Trustees of the Port of Bombay which is a statutory Corporation constituted under the provisions of the Major Port Trusts Act of 1963. The

second respondent is the Welfare Commissioner being the Officer of the first respondent-State of Maharashtra and exercises powers and functions

under the provisions of the Bombay Labour Welfare Fund Act (shortly the Act). The third respondent has also been joined being the Maharashtra

Labour Welfare Board. The petitioners are undertaking certain activities which according to the respondents got the label of business or trade

activities and thereby all the wings annexed thereto are being styled as Commercial Establishments and therefore according to the respondents the

petitioners are liable to make their contributions even in respect of such wings or Departments which were not specifically covered prior to the year

1971 when there has been amendment to the relevant provisions and thus would not be restricted only to those main Departments where

manufacturing activities are effected. The dispute, therefore, pertains essentially to those other wings where no manufacturing activities as such are

carried out with the further question that is being posed which harmoniously flows out of this controversy as to whether such other wings can be

said to be carrying out some work which is incidental or ancillary to the activities of the main Department which carries on the manufacturing work.

The petitioners would have it that though they are accepting their obligation to pay the contribution under the Act in so far as the Departments

which carry on the manufacturing activities, still the other wings unconnected with the process of manufacture cannot be saddled with the similar

responsibility to make the payment of contributions. Since this has not been accepted by the respondents in spite of the repeated correspondence

exchanged between the parties as also the representations made from time to time, they ultimately issued notice to the petitioners to comply with

their obligation under the Act. An endeavour was made once again on behalf of the petitioners to claim exemption from the rigour of those

provisions as contemplated by Section 22 of the Act. That representation was also considered by the respondents and ultimately a demand notice

came to be issued by the Welfare Commissioner of the Maharashtra Labour Welfare Board on August 2, 1982 intimating to the petitioners that

their request for exemption from the provisions of the Act was declined and further intimating that in view of the Government decision and as

intimated earlier the petitioners were requested to remit to the said Welfare Board an amount of Employees' and Employer's contribution, fines

and unpaid accumulations in respect of all the Employees of Bombay Port Trust. The said notice is annexed at Exh. "R" to this petition. It is the

challenge that is levelled to this notice which forms the subject matter of this petition under Article 226 of the Constitution of India.

2. Shri Bhabha, the learned counsel for the petitioners, mainly contended that in so far as the main Department where the manufacturing activities

are in progress the Port Trust has been regularly paying their contributions and they are not shirking their responsibility nor are they challenging the

validity of such such very in this petition. However, according to him, in so far as the Departments other than those are concerned, the provisions

of the Act are obviously not applicable and therefore the demand for levy of the contributions is unsustainable in law. He also endeavoured to

submit that exemption claimed u/s 22 of the Act has been unjustifiably denied though according to him some other public bodies have been granted

such exemption. The main thrust of the contentions is that these other wings of the Port Trust in respect of which contributions are now sought to

be levied do not entail in any manner into any manufacturing activities nor they can be styled also as being incidental or ancillary or being in

connection with any business or trade or profession that may have been carried out in respect of the main Departments. A list is annexed to the

petition at Exh. "A" in respect of which the petitioners do not dispute their liability to pay the contributions because in those Departments the

manufacturing activities or other activities which can legitimately be called as business or trade are going on. It is excluding those wings that have

generated the entire controversy about the liability to pay be contributions and those wings for instance comprise such as Accounts Department,

Medical Department, Legal Department, etc. which list is obviously not exhaustive.

3. All these contentions are countered by Shri Singhvi and Shri Dixit, the learned counsel for the respondents, who have mainly contended that

having regard to the scheme of the Act and the terminology used in various relevant provisions, not only in the Act in question but also in different

statutes which are relevant, it would leave no manner of doubt that even in respect of these wings which are sought to be excluded the activities

must get the label of business or trade and if that be so, then the liability to make the contributions by the petitioners cannot be wiped out. The

contention that exemption has been unjustifiably denied has also been contested and so also a rather vague plea taken by the petitioners about

discrimination violating of Article 14 is also seriously contested.

4. This in short is the field of contest.

5. To appreciate the thrust and dimensions of 45 this contest a few aspects relating to the provisions of the Act and the allied statute would be

necessary to be examined to find out their applicability or otherwise to the factual structure which has already been indicated.

6. The Act in question came into force in 1953 by Act No. XL of 1953 and it is to provide for the constitution for the financing of activities to

promote welfare of labour in the State of Maharashtra for conducting such activities and for certain other purposes. Certain definition are

incorporated in the Act though we are mainly concerned with the definition of establishment (as definition) as embedded in Section. 2(4). It would

be better if it is reproduced verbatim because much of the controversy revolves around the same.

Section 2(4). "Establishment" means -

(i) a factory :

(ii) A tramway or motor omnibus service or a motor transport undertaking to which the Motor Transport Workers Act, 1961, applies; and

(iii) any establishment within the meaning of the Bombay Shops and Establishments Act, 1948 (Bom. LXXIX of 1948), which employs, or on any

working employed, five or more persons :

Provided that, any such establishment shall continue to be an establishment for the purposes of this Act, notwithstanding a reduction in the number

of persons to less than five at any subsequent time :

Provided further that, where for a continuous period of not less than three months the number of persons employed therein has been less than five,

such establishment shall cease to be an establishment for the purposes of this Act with effect from the beginning of the month following the expiry of

the said period of three months, but the employer shall, within one month from the date of such cessation, intimate by registered post the fact

thereof to such authority as the State Government may specify in this behalf;

Explanation. - For the removal of doubt, it is hereby declared that where an establishment has different branches or departments, all such branches

or departments, whether situated in the same premises, or different premises shall be treated as parts of the same establishment.

7. Item No. (iii) of this definition regarding the establishment has been introduced in the year 1971 by Maharashtra Act No. 16 of 1971 by section

2(3). This would indicate that prior thereto the definition of establishment lay within the narrow compass of only two items as prescribed in Items

Nos. (i) and (ii), No. (i) being the "Factory" as defined u/s 2(m) of the Factories Act, 1948 and which definition, in addition to the number of

workers actually employed and working, envisages and stipulates the effecting of manufacturing process though it is not necessary to reproduce the

said definition in details because that part being made applicable to the main Departments is not disputed. It would thus be clear that by reason of

this amendment in the year 1971 the concept of establishment has been very much expanded so as to take within its fold certain other

establishments which are not covered by the first two clauses meaning thereby that those may cover if permissible under the statute even such an

establishment where no direct process of manufacturing is carried though no doubt it should have some connection with the same. The explanation

which is obviously annexed to sub-clause (iii) as is apparent from the amendment makes it clear that when an establishment has different branches

or departments, all such branches or departments, whether situated in the same premises or different premises, shall be treated as parts of the same

establishment. This explanation, therefore, covers the case of such wings or Departments, or branches of the main establishment, whether located

in the same premises or not, to be part and parcel of the main establishment for the purposes of this Act and consequently it would not be open for

anyone to contend that the wings or different branches can be excluded from the rigour of this provision. This definition, however, by itself does not

answer the issue involved because it will have to be supplemented to complete the circuit by the relevant provisions of the Bombay Shops and

Establishments Act because this amended provision makes it clear that any establishment within the meaning of this other Act is to be treated as

establishment under the provisions of the main Act. It would, therefore, be proper to consider on the parallel track the provisions of the Bombay

Shops and Establishments Act of 1948. There are two relevant provisions which fall for consideration in the context of the controversy regarding

the definition of an establishment and those are covered by Section 2(8) and Section 2(4). Since these provisions are very much contributory to

give complete meaning to the provisions of Section 4 of the Act, it would not burden the record if these two provisions are also reproduced

verbatim. Section 2(8) of the Bombay Shops and Establishments Act reads as -

Section 2(8) : ""Establishment"" 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 establishment as the State Government may, by notification in the

Official Gazette, declare to be an establishment for the purposes of this Act.

8. Merely referring to this provision also would be incomplete and would be in a truncated form and the circuit would be complete only after

reading Section 2(4) which reads as -

Section 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 establishment of any legal practitioner, medical practitioner,

architect, engineer accountant, tax consultant or any other technical or professional consultant and also includes a society registered under the

Societies Registration Act, 1860, 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.

9. The combined reading of these two provisions spell out certain features in a harmonious manner. The establishment as envisaged u/s 2(8)

includes a commercial establishment and the concept of commercial establishment is expanded and defined in Section 2(4). Consequently,

therefore, if an establishment can be covered by the label of commercial establishment as contemplated in Section 2(4) then it obviously would be

an establishment even u/s 2(8) of this Act. Therefore, the main search will have to be as to whether these wings in respect of which contribution is

now sought to be levied are covered by the concept of commercial establishment so as to become an establishment within the meaning of Shops

and Establishments Act and thereby so as to be transplanted into the provisions of Section 4, sub-clause (iii) of the main Act. This is obviously

divided into two parts, the first being the establishment which actually and directly does or carries the business or trade or profession. While the

second part deals with such Department or such main Establishment which is engaged in a work in connection with or incidental or ancillary to such

business or trade or profession. As stated at the outset the petitioners do not dispute that the main Departments as mentioned under the Act though

according to them all the other wings such as Accounts Department, Medical Department. Legal Department, etc. cannot be said to be having any

connection or doing any work incidental or ancillary to any business or trade and Shri Bhabha. The learned counsel, sought to submit that those are

unconnected with any such concept of business or trade and those being totally independent cannot be tagged with the main Departments.

10. This proposition has been contested by Shri Singhvi, the learned counsel, and in my opinion, with full justification. It is for that purpose that a

further exercise would be necessary to find out as to what is really meant by "business" so as to cover the case of all other wings or branches of the

main Departments. Further reliance is placed by Shri Singhvi on some of the ratios most of which no doubt deal with the concept of industry as

defined under the Industrial Law and in particular the Industrial Disputes Act, though in my opinion the basic foundation or concept can well be

equated with that of business or trade in order to find out the real meaning of these terms used in Section 2(4) of the Bombay Shops and

Establishments Act. Consequently, therefore, though the ratios relate to the concept of Industry, still the analogy can well be extracted which would

be relevant to the facts of this case also. Apart from that the ratios relied upon by themselves clarify the concept of business which has a broad

connotation and cannot be examined in a restricted field.

11. Reference to a few of those decisions would serve the purpose. It has been observed in the case of The Corporation of the City of Nagpur

Vs. Its Employees, , as -

If a service rendered by a corporation is an industry, the employees in the departments connected with that service, whether financial,

administrative or executive, would be entitled to the benefits of the Act.

In Secretary, Madras Gymkhana Club Employees" Union Vs. Management of the Gymkhana Club, it is observed while considering the concept of

business as -

Business means an enterprise which is an occupation as distinguished from pleasure".

In the The Bombay Panjrapole, Bhuleshwar Vs. The Workmen and Another, various activities of Panjrapole were considered in details and it was

indicated that the main fact that the Panjrapole never purchased milch cows and never purchased stud bulls except once, made no difference to the

question as to whether their activity of maintaining cows and bulls could only be considered as an investment and that it was certainly carried on a

business although it was not pursued in the same way as astute businessmen, only out to make profit would, namely, get rid of the animals which

were no longer fit for any use and the activities of the Panjrapole thus constituted an "industry". In that context it is well considered that "the

"business" is a word of too wide import". The Supreme Court had an occasion to have a survey of all those cases that are available in the field

when they were considering the activities of the Indian Chamber of Commerce in Management of The Federation of Indian Chambers of

Commerce and Industry Vs. Their Workman, Shri R. K. Mittal, . The Supreme Court considered as to what is meant by trade or business or

manufacture or calling and they have reiterated that business means an enterprise which is an occupation as distinguished from pleasure. This was in

the context of analysing the definition of "Industry" which falls in two parts. In the course of judgment it was indicated that various items show that

the Federation of Indian Chamber of Commerce and Industry which carries on systematic activities to assist its members and other businessmen

and industrialists and even to non-members as for instance in giving them the right to subscribe to their bulletin; in taking up their cases and solving

their difficulties and in obtaining concessions and facilities for them from the Government and these activities are "business activities" and as stated it

has been specifically observed (p. 637) as -

Business means an enterprise which is an occupation as distinguished from pleasure.

The nature of these activities is a pointer in respect of the respondents' case that even such activities can be styled as business activities which

ostensibly may tend to do service like services rendered to the members. In Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and

Others, the Supreme Court had an occasion to consider the nature of activities of the Bangalore Water Supply and Sewerage Board to find out the

business in the context of the rival contentions that these are merely services rendered though it was with reference to an Industry. It is in that

context observed as (p. 404) :

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

Reliance is also placed by Shri Singhvi, the learned counsel, on the ratio of President, Agricultural Produce Market Committee. *Tumsar v. Murari*

Kapurchand Yadav. 1986 Mh. L.J. 258, to suggest that even such activities of market committee have been brought under the clutches as those

having concern or connection even incidental or ancillary with the business and in fact those have been styled as business or trade and all those

activities are prescribed in Section 29 of the Maharashtra Agricultural Produce Marketing (Regulation) Act. The provisions of other Acts in that

context were also considered and in fact the relevant provisions of the Shops and Establishments Act as contemplated in Section 2(4) about the

commercial establishment were also referred to suggesting that it is not only an establishment which itself carries on business, trade or profession

but also includes an establishment which carries on any work in connection with, or incidental or ancillary to, any business, trade or profession. It is

in that context that it was ultimately held that basically speaking these activities do amount to business but even assuming otherwise, still the traders

or businessmen who carry on their activity within the market establishment carry on business or trade in the normal sense and the market

committee does carry on work which is obviously in connection with such business and therefore by virtue of Section 2(4) of the Bombay Shops

and Establishments Act the said activities have also been held to be falling within the concept of "commercial establishment".

12. *Shri Bhabha*, the learned counsel, however, sought to place reliance on the ratio in *The Trustees of the Port of Madras Vs. Aminchand*

Pyarelal and Others, , and wanted to rely on a few observation wherein it is indicated especially in paragraph 24 that Port Trusts are bodies of a

public representative character who are entrusted by the Legislature with authority to frame a scale of rates and statement of conditions subject to

which they shall or may perform certain service. Consequently Port Trust are not commercial organisations which carry on business for their own

profit, and it is also observed that the rates which the Board levies are a consolidated charge for the various services it renders and the liability

which it is compelled by statute to undertake. I am afraid, this construction sought to be placed on this ratio and a few observations torn out of

context would not justify the submission of the learned counsel *Shri Bhabha* that there is no establishment nor any commercial establishment nor

any business activity carried on by the Port Trust. The most prominent premises in this part is missed, namely that this decision exclusively related

to the scale of rates that are sought to be levied by the Port Trust and it is in that context only that these observations are made and therefore it

does not mean that the so-called services rendered by the Port Trust are absolutely alien or unconnected with any business activities. A proper

analysis on this ratio therefore does not justify such a construction.

13. These decisions harmoniously spell out the inescapable conclusion that in some matter there are direct activities which could be called as

business or trade activities and the profit motive or the absence of gaining any profit would be wholly irrelevant while assessing the correct nature

of such activities. Further some of the activities are such which by themselves do not entail in any manufacturing work or the actual business, yet

those are so integrally connected with the main part of business or trade that those can be legitimately styled as being ancillary or incidental or

connected with the said business activities. Consequently, therefore, even accepting the contention raised by Shri Bhabha, the learned counsel, that

the actual manufacturing work is not carried in these wings still the integrated connection with the main work of the business cannot be divorced at

all. Shri Singhvi, the learned counsel, the respondents, has rightly submitted and which argument is adopted by Shri Dixit, the learned counsel for

the other respondent, that when the main department carries some manufacturing process or some other business which is not disputed then can it

be said that the Accounts Department which maintains the accounts of the main department of process of manufacturing, is wholly unconnected

with the said business activities. The question posed will have to be answered in favour of the respondents" interpretation that those are very much

integrally connected with the main business activities of the Department and therefore are either incidental or ancillary or connected with the

business or trade. The same analogy will apply to all such Departments such as Medical Department where welfare of the labour in respect of the

health problem is integrally blended with the business activities and cannot be said to be unconnected with the same Similarly in respect of the main

business activities if any legal problem crops up then can it be said that the Legal Department in question has absolutely no nexus with the main

department because it is through this channel that the legal problem arising out of the business can be resolved. It is not necessary to multiply the

illustrations. In my opinion the contentions raised by Shri Singhvi, the learned counsel, are absolutely unassailable and therefore all these wings

which are sought to be excluded will have to be included within the concept of commercial establishment as envisaged u/s 2(8) of the Bombay

Shops and Establishments Act and therefore by reason of Section 2(8) of the same Act those are bound to be styled as establishments. To

complete the circuit this concept will have to be transplanted to the third item of Section 4(iii) of the main Act which under amendment of 1971

includes within its fold this expanded field of establishment. It is extremely relevant to note that the terminology used in sub-clause (iii) of Section

2(4) of the Act while expanding the field of establishment deliberately used the word "any establishment within the meaning of Bombay Shops and

Establishments Act", and it does not use the word "as defined under the Act". Consequently the provisions of Section 2(4) read with Section 2(8)

of the Bombay Shops and Establishments Act are ipso facto attracted by this definition of Section 2(4)(iii) of the main Act and therefore all these

wings are covered by this provision at least after the year 1971 by reason of this amendment. As stated, the explanation to sub-clause (iii) which is

reproduced earlier also covers all those wings whether those are located in the same premises or elsewhere because those are to be clubbed with

the main establishment in question.

14. Shri Bhabha, the learned counsel, endeavoured to submit that the terminology used in Section 2(8) of the Bombay Shops and Establishment

Act and in particular "includes such other establishment as the State Government may declare ..." and extending the argument the learned counsel

submitted that "such other establishment" as envisaged under this provision must have the direct nexus with the establishment enumerated in Section

2(8) of the said Shops and Establishments Act and could not be dissimilar to those establishment. Consequently he wanted to submit that all these

wings did not fall in the category of those items which are mentioned in sub-clause (8) and thus cannot be said to be establishment. For that

purpose he also wanted to place reliance on the ratio in State of Maharashtra Vs. Dhanalaxmi V. Meisheri, . The argument in my opinion goes on a

wrong track because Section 2(8) also squarely contains the concept of "commercial establishment" and commercial establishment has a specific

and independent definition u/s 2(4) and 2(8) and which definition is complete and itself and if that be so, then the exercise to find out as to whether

the establishment are similar or not with those mentioned in Section 2(8) would be futile. Hardly any comments are necessary in that behalf.

15. In this view of the matter the challenge on the ground of non-applicability of the provisions of the Act must completely fail.

16. As regard the further contention that exemption was sought for u/s 22 of the Act and which was unjustifiably denied has also no substance.

Shri Bhabha, the learned counsel, no doubt in that behalf sought to place reliance on Schedule II, Serial No. 4 of the Bombay Shops and

Establishment Act, 1948 under which certain exemptions have been allotted. The establishment of the Bombay Port Trust is at Serial No. 4 and

Column 3 indicates that the provisions of the Bombay Shops and Establishment Act are not applicable and are thus exempted from application to

the Bombay port Trust. Shri Sanghvi, the learned counsel, is justified in submitting that the very foundation of this argument is also this schedule

with reference to Serial. No. 4 pre-supposes the applicability of the provisions of the Act because unless the applicability exists the question of

exemption does not arise. In my opinion, this submission also deserves to be accepted. This line of reasoning gets full support in the decision of

President, Agriculture Produce Market Committee, Tumsar v. Maruti Kapurchand Yadav (cited supra) which has been clearly observed in

paragraph 5 of the said decision. A feeble attempt was made to suggest that there is hostile discrimination since several such public bodies

have been exempted from the applicability of the Act as contemplated by Section 22. A specific statement is made that the same has not been

made applicable to the Bombay Dock Labour Board. It is however made clear in the affidavit filed on behalf of the Respondents that this

provisions has now been made applicable to that Board also. A grievance is made with some justification that this contention relating to the alleged

discrimination has been levelled for the first time in affidavit in rejoinder which has never been reiterated before in any manner and this appears to

be factually correct and if that be so then this is a basic deficiency on account of which this contention can be hardly be considered. Even otherwise

the details thereof are not supplied. In my opinion no further discussion is relevant in that behalf.

17. Incidentally it may be observed that having regard to the various statutory obligations and the provisions of the Major Port Trusts Act it can

hardly be controverted that those very much contain the firm concept of business. Those are not merely the services by themselves because for the

same different rates are charged such as for instance if goods are to be maintained in the warehouse then certain charges are to be paid. Chapter

VII onwards of the Act makes this position quite clear. There is hardly any challenge to this feature and it is not necessary to catalogue all such

activities which are detailed under the said Major Port Trusts Act most of which would obviously get the label and characteristic of trade or

business. Merely because there is a supervision or control of the Central Government of the scale of rate has been so fixed does not wipe out the

character of the said activities being business activities. It is manifest that the concept of "Business" or even of "trade" has undergone substantial

modification along with the increase in variety of activities that are carried out in different fields. Actually as clarified in Legal and Commercial

Dictionary by Mitra as also as per ""Legally Defined Words and Phrases"", "Business" is a wider term than, and not synonymous with, trade, and

means practically anything which is an occupation as distinguished from pleasure and profit or even the intention of making profit may not be

essential part of the legal definition. There can thus be no controversy on this aspect which is also finally concluded a positive admission in the

petition itself which reads as -

The petitioner does not, except in its factory establishment, carry on any trade or business, or commerce.

18. Under the circumstances for the reasons assigned, the challenge to the demand of levy of the contribution by the Welfare Commissioner under

the Bombay Labour Welfare Fund Act, 1953 has no substance and must fail. It may be incidentally observed that the provisions the said Act and

the object behind those provisions are obviously laudable and are in the larger interest and thus their implementation cannot be frustrated on the

basis of such contentions which even otherwise on merits have no substance.

19. Rule discharged with however no order as to costs.

20. Oral motion for stay execution of this order. In the nature of the order there is hardly any ground made out for granting such stay. Motion

rejected.