

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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W.P.(C) No.7206/2004

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Date of decision: 17th March, 2010

SH. LALIT BHASIN

..... Petitioner

Through: Mr. Y.P. Narula, Sr. Advocate, Ms. Shreya
Sharma & Mr. Jitender Bhatla, Advocates.

Versus

**THE APPELLATE AUTHORITY UNDER
PAYMENT OF GRATUITY ACT, 1972 & ANR.**

... Respondents

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. The question for adjudication in this petition is as to whether the office of an advocate is an establishment within the meaning of Section 1(3)(b) of the Payment of Gratuity Act, 1972 so as to attract the applicability of the said Act. The Controlling Authority and the Appellate Authority under the Gratuity Act, whose orders are impugned in this writ petition have held the Act applicable to the office of an advocate.

2. The respondent No.2 who was employed in the office of the petitioner advocate as a clerk for about 23 years, submitted his resignation on 2nd March, 2002. He claimed to be entitled to gratuity and made an application under Section 4 of the Act to the Controlling Authority under the Act. The petitioner controverted the applicability of the Act. The Controlling Authority held the provisions of the Act applicable to the office of the petitioner advocate and directed the payment of Rs.61,879.20p by way of gratuity to the respondent No.2.

The petitioner preferred an appeal before the Appellate Authority. The Appellate Authority held that though the enforcement of the Delhi Shops & Establishments Act 1954 (hereinafter referred to as Delhi Shops Act) is exempted for the establishment of a legal practitioner, nevertheless, business/profession of the legal practitioner is an establishment/commercial establishment under the provisions of the Delhi Shops Act. It was further held that exemption of establishment of a legal practitioner under the Delhi Shops Act did not amount to an exemption of the said establishment from the Gratuity Act also. The appeal was accordingly dismissed. Aggrieved therefrom the present petition was filed. This Court vide *ex parte* order dated 19th May, 2004 while issuing notice of the petition stayed the operation of the orders aforesaid. The counsel for the respondent No.2 appeared before this Court on 9th September, 2009 and thereafter but has failed to appear today and address arguments. The senior counsel for the petitioner has also informed that the petitioner has already settled the dispute with the respondent No.2 and the present petition is being pursued to have an adjudication on the applicability of the Gratuity Act to the office of an advocate, for the sake of future guidance.

3. The Gratuity Act, as per Section 1(3) thereof applies to:-

- (a) every factory, mine, oilfield, plantation, port and railway company;
- (b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;
- (c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on, any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf.

The orders impugned in this petition have held the office of the petitioner to be covered by Clause '(b)' supra. It was not in dispute that the office of the petitioner was employing more than 10 persons.

4. It would be seen that Clause '(b)' supra makes the Gratuity Act applicable to a shop or establishment within the meaning of the law in relation to shops & establishments in a state. In the City of Delhi with which we are concerned, the

said law is contained in the Delhi Shops & Establishments Act, 1954. The same defines an establishment in Section 2(9) thereof as including a shop, a commercial establishment, residential hotel, restaurant, eating house, theatre or other places of public amusement or entertainment. Section 2(5) of the Delhi Shops Act defines a commercial establishment as –

"Commercial Establishment" means any premises wherein any trade, business or profession or any work in connection with, or incidental or ancillary thereto is carried on and includes a society registered under the Societies Registration Act, 1860 (XXI of 1860), and charitable or other trust, whether registered or not, which carries on any business, trade or profession or work in connection with, or incidental or ancillary thereto, journalistic and printing establishments, contractors and auditors establishments, quarries and mines not governed by the Mines Act, 1952 (35 of 1952), educational or other institutions run for private gain, and premises in which business of banking, insurance, stocks and shares, brokerage or produce exchange is carried on, but does not include a shop or a factory registered under the Factories Act, 1948 (LXIII of 1948), or theatres, cinemas, restaurants, eating houses, residential hotels, clubs or other places of public amusement or entertainment.

5. Section 4 of the Delhi Shops Act *inter alia* provides as under:-

“4. Exemption.

Notwithstanding anything contained in this Act, the provisions of this Act mentioned in the third column of the Schedule shall not apply to the establishment, employees and other persons mentioned against them in the second column of the said Schedule.”

Serial No.3 of the Schedule 1 of the Delhi Shops Act makes the establishments of legal practitioners exempt from all the provisions of the Delhi Shops Act.

6. The senior counsel for the petitioner has contended that the establishment of a legal practitioner as the petitioner is, being exempted from all provisions of the Delhi Shops Act is thus not an establishment within the meaning of Section 1(3)(b) of the Gratuity Act. Attention is also invited to ***V. Sasidharan Vs. M/s. Peter and Karunakar*** (1984) 4 SCC 230 where the Supreme Court held that an office of a lawyer or a firm of lawyers is not a commercial establishment within

the meaning of the Kerala Shops & Commercial Establishments Act, 1960 which was under consideration in that case. The Supreme Court by reference to other provisions of the Kerala Shops Act also held that a lawyers office cannot possibly be comprehended within the meaning of the expression commercial establishment as defined in the Kerala Shops Act.

7. The senior counsel for the petitioner also refers to ***M.P. Electricity Board Vs. Shiv Narayan*** (2005) 7 SCC 283, wherein also the question for consideration was whether the legal profession is a commercial activity or not. The Electricity Board wanted to charge the electricity consumption in the lawyer's office at the rates applicable for commercial consumers. The Supreme Court carved out the distinction between commercial activity and profession. It was held that a professional activity involves a certain amount of skill as against commercial activity which is a matter of business. The two were held to be distinct concepts; while in commercial activity one works for gain or profit, as against this, in profession, one works for his livelihood. It was further held that there is a fundamental distinction between a professional activity and an activity of a commercial character. However in view of certain observations in ***N.D.M.C. v. Sohan Lal Sachdev*** (2000) 2 SCC 494 the matter was referred to a larger bench.

8. I find the definition of a commercial establishment under the Kerala Shops Act in consideration in ***V. Sasidharan*** (supra) to be distinct from the definition of a commercial establishment under the Delhi Shops Act. While the Kerala Shops Act does not refer to any 'profession', the Delhi Shops Act while defining commercial establishment expressly refers to premises wherein any profession or any work in connection therewith is being carried on. It is therefore felt that this petition cannot be decided on the basis of the said judgment of the Supreme Court.

9. I find that the Division Bench of the Bombay High Court in ***Sakharam Narayan Kherdekar Vs. City of Nagpur Corporation*** AIR 1964 Bom. 200 was also faced with the question of applicability of the Bombay Shops & Establishments Act, 1948 to the office of an advocate. The Bombay Shops Act defined a commercial establishment as meaning 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. The Division Bench of the Bombay High Court after a lengthy discussion and noticing the functioning of a lawyer's office held the office of an advocate to be not covered by the provisions of the Act.

10. Another single judge of the Bombay High Court in ***R.S. Deshpande v. Municipal Corporation of Greater Bombay*** MANU/MH/0044/1973 while dealing with the same issue relied on ***Dr. Devendra M. Surti v. State of Gujarat*** AIR 1969 SC 63. In that case, relating to the private dispensary of a doctor the Supreme Court held that the Bombay Shops Act while defining commercial establishment had 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 the matter of construing the language of the definition of the commercial establishment the principle of *noscitur a sociis* has to be adopted. It was held that the correct test of finding whether a professional activity falls within the definition of 'profession' in the definition of a commercial establishment is whether the activity is systematically and habitually undertaken for production or distribution of goods or for rendering material service to the community with the help of employees in the manner of a trade or business in such an undertaking. It was further held that unless the profession carried on by a person also partakes of the character of a commercial nature, he cannot fall within the ambit of the Bombay Shops Act. Only when the professional activity is carried on in such a manner that the condition of the co-operation between the employer and the employee is necessary for its success and its object is to render material service to the community, can it fall within the definition of a commercial establishment under the Bombay Shops Act. It was further held that a doctor does not carry on his profession in any intelligible sense with the active co-operation of his employees. Hence the professional establishment of a doctor was held not to fall within the definition of commercial establishment in the Shops Act. The learned single judge of the Bombay High Court held, and rightly so, that what was observed by the Supreme Court qua a doctor is applicable to an advocate also.

11. I may notice that definition of a commercial establishment in the Bombay Shops Act was amended in 1977 to expressly include the establishment

of any legal practitioner within the definition. However the said amendment was struck down by a Division Bench of the Bombay High Court in ***Narendra Keshrichand Tuladi v. State of Maharashtra*** MANU/MH/0191/1984 in so far it related to the establishment of legal practitioner on the ground that it violated article 14 of the Constitution of India. The said Division Bench judgment was followed by another single judge in ***Dorab Pirojsha Siganporia Vs. The President and Appellate Authority of Industrial Tribunal, Bombay*** MANU/MH/0151/1985.

12. I find that Supreme Court in ***The National Union of Commercial Employees v. M. R. Meher*** AIR 1962 SC 1080 has also held that the services rendered by a solicitor functioning either individually or working together with partners is a service which is essentially individual; it depends upon the professional equipment, knowledge and efficiency of the solicitor concerned; subsidiary work which is purely of an incidental type and which is intended to assist the solicitor in doing his job has no direct relation to the professional service ultimately rendered by the solicitor. The work of the clerk who types correspondence or that of the accountant who keeps accounts has no direct or essential nexus or connection with the advice which it is the duty of the solicitor to give to his client.

13. I respectfully concur with the views aforesaid expressed by the Bombay High Court and hold that notwithstanding the definition of commercial establishment in Section 2(5) of the Delhi Shops Act as meaning, any premises where any profession or any work in connection therewith is being carried on, the same does not apply to the profession of an advocate. For his own convenience an advocate or solicitor may employ a clerk because a clerk would type his opinion; for his convenience, a solicitor may employ a menial servant to keep his chamber clean and in order; and it is likely that the number of clerks may be large if the concern is prosperous and so would be the number of menial servants; but the work done either by the typist or the stenographer or by the menial servant or other employees in a solicitor's firm is not directly concerned with the service which the solicitor renders to his clients and cannot, therefore, be said to satisfy the test of co-operation between the employer and the employees which is relevant to the purpose. There can be no doubt that for efficiently carrying on the work of a

solicitor, accounts have to be kept and correspondence carried on and this work would need the employment of clerks and accountants but the work of the clerk who types correspondence or that of the accountant who keeps accounts does not have any direct or essential nexus or connection with the advice which is the duty of the solicitor to give to his client.

14. I may notice that in *V. Sasidharan* (supra), a plea was raised that *M.R. Meher* (supra) is no longer good law in view of *Bangalore Water Supply & Sewerage Board Vs. A. Rajappa* (1978) 2 SCC 213. However the Supreme Court held that the observations in *M.R. Meher* qua a lawyers office being not a commercial establishment have not been so overruled. The Supreme Court further held:-

“We are quite solicitous about the welfare of those who work in the lawyers' offices. But, there are many other ways in which their welfare can be ensured. If the current trends are any indication and if old memories fail not, the earnings of lawyers' clerks cannot, in reality, bear reasonable comparison with the earnings of employees of commercial establishments, properly so called. They, undoubtedly, work hard but they do not go without their reward. They come early in the morning and go late at night, but that is implicit in the very nature of the duties which they are required to perform and the time they spend is not a profitless pastime.”

15. It will thus be seen that notwithstanding the use of the word “profession” while defining a commercial establishment in Section 2(5) of the Delhi Shops Act, the Supreme Court has held that not all premises where professional activity is carried on are commercial establishments. The orders of the Authority & Appellate Authority under the Gratuity Act, impugned in this petition are thus contrary to the law as declared by the Supreme Court and cannot be sustained.

16. In view of the aforesaid, need is not felt to deal with the other contention of the senior counsel for the petitioner that exemption of legal practitioners from all provisions of the Delhi Shops Act will inure for the purpose of the Gratuity Act also. Though, I must record that the Bombay High Court in *Principal, Bhartiya Mahavidyalaya Vs. Rama Krishna Wasudeo Lahudkar* MANU/MH/0541/1993 & in *O.N.G.C. Vs. Govt. of Maharashtra* MANU/MH/1278/2006 has held that

exemption under the Shops Act is not an exemption under the Gratuity Act/Labour Welfare Act.

17. The petition thus succeeds. The orders impugned in this petition are set aside/quashed. It is held that office of an advocate is not covered by the provisions of the Gratuity Act. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

17th March, 2010
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