

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

+ **W.P. (C) No. 4814/2003 & CMs. 8414/2003, 12446/2005**

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Reserved on: 20th July, 2012

Decided on: 8th August, 2012

BHARATIYA ADIMJATI SEVAK SANGH

..... Petitioner

Through Mr. Jos Chiramel, Mr. Cecil Sam
Philip, Mr. James Daniel David, Advs.

versus

LT.GOVERNOR OF DELHI & ORS.

..... Respondent

Through Mr. Rama Shankar, Mr. Sivam Garg,
Advs. for R-4 to 6.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By way of the present petition the Petitioner impugnes the award dated 1st May, 2002 whereby the learned Presiding Officer, Labour Court has directed reinstatement of Respondent Nos. 4, 5 & 6 with 40% back wages and continuity of service.

2. Learned counsel for the Petitioner contends that the primary issue raised by the Petitioner that it was not an industry was virtually glossed over by the learned Trial Court and the Petitioner was held to be an industry though the Petitioner is doing charitable work and is wholly dependent on the grants and aids received from Government of India. Reliance is placed on *Banglore Water Supply and Sewerage Board Vs. A. Rajappa and Ors.* (1978) 2 SCC 213. The Petitioner/society is running mostly by voluntary workers who do not charge any money, though a honorarium of Rs. 1200/-

per month is paid for their livelihood. The society is working for the upliftment of tribals and one of the major functions of the society is running crèches for the children of the Tribal women who are working. For the smooth running of the society skeleton staff was engaged at the central office from 11.00 AM to 4.00 PM on temporary and part-time basis and their salaries were to be paid out of grant received from Govt. of India. Since the Govt. of India did not give grant for payment of salaries of staff at Petitioner's central office vide its letter dated 29th March, 1990 for the year 1989-90, the Petitioner was constrained to relieve Respondent No.4 to 6 from their services. They were offered to continue the services on resumption of grant. This could not be termed as retrenchment. When the grant was again provided by the Central Government, Respondent Nos. 4 to 6 refused to join the duties though other similarly placed persons joined the duties. Respondent Nos. 4 to 6 were also asked to do duties in the other establishments of the Petitioner in Delhi, however they did not join those duties. There is no denial of the fact that grant-in-aid was stopped. The Respondents have admitted in their evidence that other employees, who were also relieved along with them, have rejoined duties at other places. Even on 17th March, 1994 when the learned Labour Court asked Respondent No.4 to 6 to rejoin and they rejoined the duties. On 18th March, 1994 at the request of parents of Respondent No.6, the Petitioner transferred him to Robert Ganj/ Son Bhadra close to his village on 20th May, 1994 but he did not report for duty. Respondent No.5 was transferred to Seelampur in East Delhi on 9th September, 1994 but he also did not report for duty. Similarly, Respondent No.4 was directed to report at Pandav Nagar on 9th September, 1994, however she also did not report for duty. A public notice was also issued in

this regard on 24th March, 1995. Since the Petitioner has no source of income and is a charitable trust wholly dependent on the grant from Govt. of India and donations, it cannot bear the burden of back wages as ordered by the learned Tribunal. Further, the Petitioner during the pendency of the present petition has paid substantial amounts to Respondent Nos. 4 to 6 and the learned Trial Court was not justified in granting reinstatement with back wages in view of the law laid down by the Hon'ble Supreme Court. Reliance is placed on *Indian Hydraulic Industries Pvt. Ltd. Vs. Kishan Devi and Bhagwati Devi and Ors.* 2007 (94) DRJ 31 and *Management of Asiatic Air Conditioning and Refrigeration Pvt. Ltd. through Rana Ramnik Singh, Executive Vs. Presiding Officer, Labour Court-X, Karkardoma Court* 2005 (79) DRJ 143.

3. Learned counsel for the Respondent on the other hand relying upon *Banglore Water Supply* (supra) also contends that in view of the law laid down by the Supreme Court, the Petitioner is an industry as besides the grant-in-aid, it also receives donations etc. Further, it derives income from its own sources namely rent from Punjab National Bank, rent from Electric Construction Pvt. Ltd., interests from bank, from the FDs, income from guest rooms, income from museum, income from Khadi Bhandar etc. Further, the contention of the Petitioner that there are no regular posts is also misconceived as the Petitioner has its rules and regulations in relation to service conditions of its employees. Copy of the said rules has been enclosed. The Respondent Nos. 4 & 5 had admittedly worked for more than 240 days continuously. The financial crunch of not receiving the grant-in-aid cannot be a ground for retrenchment of the Respondents. Admittedly,

the management neither paid retrenchment compensation nor held any domestic enquiry before dispensing with their services and thus the termination was illegal and unwarranted. There is no infirmity in the order granting reinstatement with back wages.

4. I have heard learned counsel for the parties.

5. The issue “Whether the Petitioner is an industry or not” is required to be considered in the first instance. In *Bangalore Water Supply* (supra) their Lordships held:

“104. The first is one where the enterprise, like any other, yields profits but they are siphoned off for altruistic objects. The second is one where the institution makes no profit but hires the services of employees as in other like businesses but the goods and services, which are the output, are made available, at low or no cost, to the indigent needy who are priced out of the market. The third is where the establishment is oriented on a humane mission fulfilled by men who work, not because they are paid wages, but because they share the passion for the cause and derive job satisfaction from their contribution. The first two are industries, the third not. What is the test of identity whereby these institutions with eleemosynary inspiration fall or do not fall under the definition of industry?

109. We now move on to economic activities and occupations of an altruistic character falling under the third category.

110. The heart of trade or business or analogous activity is organisation with an eye on competitive efficiency, by hiring employees, systematising processes, producing goods and services needed by the community and obtaining money's worth of work from employees. If such be the nature of operations and employer-employee relations which make an enterprise an industry, the motivation of the employer in the final disposal of products or profits is immaterial. Indeed the activity is

patterned on a commercial basis, judged by what other similar undertakings and commercial adventures do. To qualify for exemption from the definition of “industry” in a case where there are employers and employees and systematic activities and production of goods and services, we need a totally different orientation, organisation and method which will stamp on the enterprise the imprint of commerciality. Special emphasis, in such cases, must be placed on the central fact of employer-employee relations. If a philanthropic devotion is the basis for the charitable foundation or establishment, the institution is headed by one who whole-heartedly dedicates himself for the mission and pursues it with passion, attracts others into the institution, not for wages but for sharing in the cause and its fulfilment, then the undertaking is not “industrial”. Not that the presence of charitable impulse extricates the institution from the definition in Section 2(j) but that there is no economic relationship such as is found in trade or business between the head who employs and the others who emotively flock to render service. In one sense, there are no employers and employees but crusaders all. In another sense, there is no wage basis for the employment but voluntary participation in the production, inspired by lofty ideals and unmindful of remuneration, service conditions and the like. Supposing there is an Ashram or Order with a guru or other head. Let us further assume that there is a band of disciples, devotees or priestly subordinates in the Order, gathered together for prayers, ascetic practices, bhajans, meditation and worship. Supposing, further, that outsiders are also invited daily or occasionally, to share in the spiritual proceedings. And, let us assume that all the inmates of the Ashram and members of the Order, invitees, guests and other outside participants are fed, accommodated and looked after by the institution. In such a case, as often happens, the cooking and the cleaning, the bed-making and service, may often be done, at least substantially by the Ashramites themselves. They may chant in spiritual ecstasy even as material goods and services are made and served. They may affectionately look after the guests, and, all this they may do, not for wages but for the chance to propitiate the Master,

work selflessly and acquire spiritual grace. It may well be that they may have surrendered their lucrative employment to come into the holy institution. It may also be that they take some small pocket money from the donations or takings of the institution. Nay more; there may be a few scavengers and servants, a part-time auditor or accountant employed on wages. If the substantial number of participants in making available goods and services, if the substantive nature of the work, as distinguished from trivial items, is rendered by voluntary wage-less *sishyas*, it is impossible to designate the institution as an industry, notwithstanding a marginal few who are employed on a regular basis for hire. The reason is that in the crucial, substantial and substantive aspects of institutional life the nature of the relations between the participants is non-industrial. Perhaps, when Mahatma Gandhi lived in Sabarmati, Aurobindo had his hallowed silence in Pondicherry, the inmates belonged to this chastened brand. Even now, in many foundations, centres, monasteries, holy orders and Ashrams in the East and in the West, spiritual fascination pulls men and women into the precincts and they work tirelessly for the Maharishi or Yogi or Swamiji and are not wage-earners in any sense of the term. Such people are not workmen and such institutions are not industries despite some menials and some professionals in a vast complex being hired. We must look at the predominant character of the institution and the nature of the relations resulting in the production of goods and services. Stray wage-earning employees do not shape the soul of an institution into an industry.

111. It now remains to make a brief survey of the precedents on the point. One case which is germane to the issue is *Bombay Panjrapole* [*Bombay Panjrapole, Bhuleshwar v. Workmen*, (1971) 3 SCC 349 : (1972) 1 SCR 202] . A Bench of this Court considered the earlier case-law, including the decisions of the High Courts bearing on humane activities for the benefit of sick animals. Let there be no doubt that kindness to our dumb brethren, especially invalids, springs from the highest motives of fellow feeling. In the land of the Buddha and Gandhi no one

dare argue to the contrary. So let there be no mistaking our compassionate attitude to suffering creatures. It is laudable and institutions dedicated to amelioration of conditions of animals deserve encouragement from the State and affluent philanthropists. But these considerations have no bearing on the crucial factors which invoke the application of the definition in the Act as already set out elaborately by us. “The manner in which the activity in question is organised or arranged, the condition of the cooperation between the employer and the employee necessary for its success and its object to render material service to the community” is a pivotal factor in the activity-oriented test of an “industry”. The compassionate motive and the charitable inspiration are noble but extraneous. Indeed, medical relief for human beings made available free by regular hospitals, run by Government or philanthropists, employing doctors and supportive staff and business-like terms, may not qualify for exemption from industry. Service to animals cannot be on a higher footing than service to humans. Nor is it possible to contend that love of animals is religious or spiritual any more than love of human beings is. A panjrapole is no church, mosque or temple. Therefore, without going into the dairying aspects, income and expenditure and other features of *Bombay Panjrapole* [*Bombay Panjrapole, Bhuleshwar v. Workmen*, (1971) 3 SCC 349 : (1972) 1 SCR 202] one may hold that the institution is an industry. After all, the employees are engaged on ordinary economic terms and with conditions of service as in other business institutions and the activities also have organisational comparability to other profit-making dairies or Panjrapoles. What is different is the charitable object. What is common is the nature of the employer-employee relations. The conclusion, notwithstanding the humanitarian over tones, is that such organisations are also industries. Of course, in *Bombay Panjrapole* the same conclusion was reached but on different and, to some extent faulty reasoning. For, the assumption in the judgment of Mitter, J. is that if the income were mostly from donations and the treatment of animals were free, perhaps such charity, be it a hospital for humans or animals, may not be an industry. We agree with the holding, not

because Panjrapoles have commercial motives but because, despite compassionate objectives, they have business-like orientation and operation. In this view, Section 2(j) applies.”

6. There is no dispute that as per the memorandum of association of the Petitioner, the primary object is to work for the social, economic and educational advancement of tribal communities in India with a view to enable them to take their legitimate place in the national life of the country as equal citizens. The predominant object of the Petitioner being charitable for the purposes of upliftment of the tribals, most of its workers are working on honorarium and the Petitioner is primarily dependent on the grant-in-aid. It has been the consistent case of the Petitioner before the Tribunal in its written statement as well as in evidence that in case for a particular service no grant-in-aid is provided by the Government of India, the Petitioner cannot utilize such service. However, this is in contra-distinction to the service rules framed by the Petitioner. A perusal of the service rules of the Petitioner shows that the Secretary of the Petitioner is empowered to employ staff on such salary and emoluments as may be fixed in the prescribed scale subject to the approval by the Executive Committee. The rules provides for pay-scales for office secretary, accountant, typist, clerk, peon, chaukidar, daftris and sweepers. The rules clearly provide for the terms and conditions of their services besides dearness allowance, travelling allowance, provident fund, leave rules, age of retirement and retiral benefits. These rules nowhere state that the conditions of service of the workers would be subject to the grant-in-aid. Though learned counsel for the Petitioner laid stress on the fact that the Respondent No.4 to 6 have admitted that the grant-in-aid was not

provided, however there is no reference to the grant-in-aid in the service rules.

7. Keeping in view the fact that though charity may be the main object, however as regards the category of persons for which service rules have been framed to my mind the Petitioner falls within the definition of “industry”. Hence, I find no infirmity in the order of the learned Tribunal holding the Petitioner an industry.

8. As regards the consequential relief of reinstatement of Respondent Nos. 4 to 6 with 40% back wages and continuity of service, it may be noted that admittedly Respondent Nos. 4 to 6 had worked more than 240 days in the preceding 12 months. Thus, their termination in view of non-compliance of provisions of Sections 25F and 25G was rightly held to be illegal and unjustified. The case of the Petitioner is that Respondent Nos. 4 to 6 were asked to join duties in other establishments of the Petitioner but they did not join and further when grant-in-aid was received, they were again offered to rejoin the duties. Though the other similarly persons rejoined the duties, however, Respondent Nos. 4 to 6 refused to rejoin the duties. Respondent No.5 has stated in his cross-examination that on 9th September, 1994, he was issued letter of joining at Seelampur office but he did not join there because that office had nothing to do with the management and it was a different organization. Similarly, Respondent No.6 in his cross-examination has stated that he was transferred to Sonbhradh Rawarsganj, he did not join because that was not the branch of management. Thus, I am of the view that the order directing reinstatement of Respondent Nos. 4 to 6 with 50% back wages is illegal. The only order that can be passed in favour of Respondent

Nos. 4 to 6 is award of compensation. Learned counsel for the Petitioner contends that during the pendency of the present petition, the Petitioner has been paying wages to Respondent Nos. 4 to 6 under Section 17B of the ID Act and substantial amount has been paid to them.

9. In *Jagbir Singh vs. Haryana State Agriculture Marketing Board and another*, 2009 (15) SCC 327 the workman was engaged as a daily wager. He was paid consolidated monthly wages. He worked with the Respondent upto 18th July, 1996. Thereafter his services came to an end. He raised an industrial dispute contending that his services were retrenched illegally in violation of Section 25F of the ID Act. He claimed reinstatement with continuity of service with full back wages. The Industrial Tribunal-cum-Labour Court held that the workman had worked for more than 240 days and the Respondent violated Section 25-F by not giving him notice, pay in lieu of notice and retrenchment compensation before his termination. The Labour Court, accordingly, declared that the workman was entitled to reinstatement with continuity of service and full back wages from the date of demand notice i.e. 27th January, 1997. The Respondents challenged the award before the High Court which set aside the award holding that the workman was neither entitled to be reinstated nor could he be granted back wages. In this backdrop of the matter, the Hon'ble Supreme Court held that High Court

erred in not awarding compensation to the workman while upsetting the award of reinstatement and back wages and granted compensation of Rs.50,000/- to the workman. The relevant paras of the Report reads as under:-

7. It is true that earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention to the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.

8-13. xx xx xx xx xx

14. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.

15. Therefore, the view of the High Court that the Labour Court erred in granting reinstatement and back wages in the facts and circumstances of the present case cannot be said to

suffer from any legal flaw. However, in our view, the High Court erred in not awarding compensation to the appellant while upsetting the award of reinstatement and back wages.

16. As a matter of fact, in all the judgments of this Court referred to and relied upon by the High Court while upsetting the award of reinstatement and back wages, this Court has awarded compensation.

17. While awarding compensation, a host of factors, inter alia, manner and method of appointment, nature of employment and length of service are relevant. Of course, each case will depend upon its own facts and circumstances.

18. In a case such as this where the total length of service rendered by the appellant was short and intermittent from 1-9-1995 to 18-7-1996 and that he was engaged as a daily wager, in our considered view, a compensation of Rs 50,000 to the appellant by Respondent 1 shall meet the ends of justice. We order accordingly. Such payment should be made within six weeks from today failing which the same will carry interest @ 9% per annum.”

10. Keeping in view the peculiar facts of the present case that Respondent Nos.4 to 6 were offered to join services at other establishments of the Petitioner and after they received grant-in-aid, they were asked to rejoin the Petitioner, however, they did not join, it would be appropriate to award compensation of Rs.1 lakh each to Respondent Nos. 4 to 6 in lieu of reinstatement with 40% back wages. Ordered accordingly. The impugned award is modified to the aforesaid extent.

11. Petition and applications are disposed of.

(MUKTA GUPTA)
JUDGE

AUGUST 08, 2012/‘ga’