IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE VINAY SARAF

ON THE 24th OF APRIL, 2024

MISC. PETITION No. 2064 of 2020

BETWEEN:-

CHAIRMAN, INSTITUTION OF ENGINEERS JABALPUR LOCAL CENTER, VISVESHWARYA MARG, CIVIL LINE, JABALPUR (MADHYA PRADESH)

.....PETITIONER

(BY SHRI KAPIL JAIN - ADVOCATE)

AND

KAILASH SEN S/O RAMBAHORE SEN, AGED ABOUT 34 YEARS, OCCUPATION: SERVICE R/O SIDDHNATH REWA COLONY, YADAV KA BADA RAMPUR, JABALPUR (MADHYA PRADESH)

.....RESPONDENT

(BY SHRI MANOJ CHANDURKAR - ADVOCATE)

This petition coming on for admission this day, the court passed the following:

ORDER

Order passed by the Presiding Officer, Labour Court, Jabalpur in Case No.39/2015/I.D.R. on 06.08.2019 is assailed by the petitioner in the present petition by which, the reference referred by the appropriate government under the provision of Industrial Dispute Act, 1947 (in short '**the Act**'), was answered by Labour Court in favour of respondent/employee, with a direction to the petitioner for reinstatement of the respondent with 50% back wages.

2. Respondent/employee approached to the Conciliator with a grievance that he was working in the petitioner organization since 2008 at the post of

watchman. However, his services were terminated orally on 31.12.2014 and his retrenchment is illegal. Before termination, no inquiry was conducted, no charges were framed and straightway, he has been retrenched. After failure of the conciliation proceedings, appropriate government referred the matter under Section 10 of the Act to Labour Court as in the opinion of the appropriate government, an Industrial Disputes exists. The appropriate government has formulated the question of the reference that whether the termination of the respondent from the service was valid and justified? If not, for which relief he is entitled and what direction should be issued to the employer.

3. Labour Court, after issuance of notice to the petitioner organization and after recording the statement of respondent and authorized officer of the petitioner organization, passed the award on 06.08.2019, whereby the questions were answered in favour of the respondent by holding that the termination of respondent from the services was in violation of the provision of Section 25(F) of the Act and therefore, employees is entitled for the reinstatement and as the employee was not doing any other work, 50% of the back wages were awarded, which is under challenge before this Court in the instant petition.

4. Learned counsel for petitioner submits that petitioner is a non-profitable professional unit of an institute incorporated with an object and purpose to promote the general advancement of engineering and engineering science and their application in India and the petitioner institute is having Head Quarter at Kolkata and several branches in India including branch at Jabalpur. The petitioner institute is not engaged in any trade or business or any transaction for pecuniary gains or profits. It is purely an institute engaged to provide educational, scientific research to provide professional acumen to the engineers. He further submits that the petitioner institute is not covered under the definition

of Industry and/or Industrial Establishment as provided in Section 2(j) and 2(ka) of the Act and therefore, no reference could be made to Labour Court and Labour Court had no authority to pass the impugned order.

5. He further submits that the respondent was appointed as daily wager employee on the post of Chowkidar/Peon and he never worked continuously for more than 240 days and he was not a regular employee of the institute, therefore, provision of Section 25(F) of the Act are not applicable. He further submits that award passed by the Labour Court suffers from perversity and the same is not based on proper appreciation of evidence, therefore, the same is liable to be set aside.

6. Learned counsel for petitioner heavily relied upon the judgment delivered by the Constitutional Bench of Apex Court reported as **1978 (2) SCC 213 (Bangalore Water Supply & Sewerage Board vs. A. Rajappa and others)**, wherein the Apex Court after considering the entire scheme of Industrial Dispute Act and considering the definition of Industry provided under Section 2(j) of the Act, has framed some guidelines for determination of the fact that whether any institute falls under the definition of Industry or not. The relevant paras of the judgment are extract as under:-

> "**140**. "Industry', as defined in Section 2(j) and explained in Banerji, has a wide import. "
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> (a) Where (i) systematic activity, (ii) organized by co-operation between employer and employee (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g. making, on a large scale prasad or food), prima facie, there is an 'industry' in that enterprise.
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> (b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.
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> (c) The true focus is functional and the decisive test is the nature of the

activity with special emphasis on the employer-employee relations.

(d) If the organization is a trade or business it does not cease to be one because of philanthropy animating the undertaking."

141. Although Section 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself.

"(a) 'Undertaking' must suffer a contextual and associational shrinkage as explained in Banerji and in this judgment; so also, service, calling and the like. This yields the inference that all organized activity possessing the triple elements in I, although not trade or business, may still be 'industry' provided the nature of the activity, viz. the employer-employee basis, bears resemblance to what we find in trade or business. This takes into the fold of 'industry' undertakings, callings and services, adventures 'analogous to the carrying on the trade or business'. All features, other than the methodology of carrying on the activity viz. in organizing the co-operation between employer and employee, may be dissimilar. It does not matter, if on the employment terms there is analogy."

142. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults or inner sense of incongruity or outer sense of motivation for or resultant of the economic operations. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between employer and workmen, the range off this statutory ideology must inform the reach of the statutory definition. Nothing less, nothing more.

"(a) The consequences are (i) professions, (ii) clubs, (iii) educational institutions, (iv) co-operatives, (v) research institutes, (vi) charitable projects, and (vii) other kindred adventures, if they fulfil the triple tests listed in I, cannot be exempted from the scope of Section 2(j).

(b) A restricted category of professions, clubs, co-operatives and even gurukulas and little research labs, may qualify for exemption if, in simple ventures, substantially and, going by the dominant nature criterion, substantively, no employees are entertained but in minimal matters, marginal employees are hired without destroying the non-employee character of the unit.

(c) If, in a pious or altruistic mission many employ themselves, free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause, such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre or ashramites working at the bidding of the holiness, divinity or like central personality, and the services are supplied free or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then, the institution is not an industry even if stray servants, manual or technical, are hired. Such eleemosynary or like undertakings alone are exempt — not other generosity, compassion, developmental passion or project."

143.The dominant nature test:

"(a) Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not 'workmen' as in the University of Delhi case [University of Delhi v. Ramlfath, (1964) 2 SCR 703 : AIR 1963 SC 1873 : (1963) 2 Lab LJ 335] or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur will be the true test. The whole undertaking will be 'industry' although those who are not 'workmen' by definition may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2(j).

(d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby."

7. He further relied on the judgment of Apex Court delivered in the matter of **Physical Research Laboratory vs. K.G. Sharma,** reported in **(1997) 4 SCC 257**, wherein after relying the judgment of Bangalore Water Supply (supra), it is held that the research industry run by government is not an industry and the provision of I.D. Act are not applicable to the same. The relevant paras of the judgment are extracted as under:-

"**12**. PRL is an institution under the Government of India's Department of Space. It is engaged in pure research in space science. What is the nature of its research work is already stated earlier. The purpose of the research is to acquire knowledge about the formation and evolution of the universe but the knowledge thus acquired is not intended for sale. The Labour Court has recorded a categorical finding that the research work carried on by PRL is not connected with production, supply or distribution of material goods or services. The material on record further discloses that PRL is conducting research not for the benefit or use of others. Though the results of the research work done by it are occasionally published they have never been sold. There is no material to show that the knowledge so acquired by PRL is marketable or has any commercial value. It has not been pointed out how the knowledge acquired by PRL or

> the results of the research occasionally published by it will be useful to persons other than those engaged in such type of study. The material discloses that the object with which the research activity is undertaken by PRL is to obtain knowledge for the benefit of the Department of Space. Its object is not to render services to others nor in fact it does so except in an indirect manner.
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> **13**. It is nobody's case that PRL is engaged in an activity which can be called business trade or manufacture. Neither from the nature of its organisation nor from the nature and character of the activity carried on by it, can it be said to be an "undertaking" analogous to business or trade. It is not engaged in a commercial industrial activity and it cannot be described as an economic venture or a commercial enterprise as it is not its object to produce and distribute services which would satisfy wants and needs of the consumer community. It is more an institution discharging governmental functions and a domestic enterprise than a commercial enterprise. We are, therefore, of the opinion that PRL is not an industry even though it is carrying on the activity of research in a systematic manner with the help of its employees as it lacks that element which would make it an organisation carrying on an activity which can be said to be analogous to the carrying on of a trade or business because it is not producing and distributing services which are intended or meant for satisfying human wants and needs, as ordinarily understood."

8. Learned counsel for the petitioner further relied upon the judgment of Apex Court reported in **(2002) 9 SCC 652 (Som Vihar Apartments Owners Housing Maintenance Society Ltd. vs Workmen)**, wherein the Apex Court considering the judgment of Bangalore Water Supply (supra) held that, association or society of apartment owners employing persons were honorary personal services to its owners is not covered under the definition of industry for the purpose of 2(j) of the Act. The relevant praras of the judgment are extracted as under:-

> **"7.** Indeed this Court in Rajappa case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207] noticed the distinction between such classes of workmen as domestic servants who render personal service to their masters from those covered by the definition in Section 2(j) of the Industrial Disputes Act. It is made clear that if literally interpreted these words are of very wide amplitude and it cannot be suggested that in their sweep it is intended to include service however rendered in whatsoever capacity and for whatsoever reason. In that context it was said that it should not be understood that all services and callings would come within

> the purview of the definition; services rendered by a domestic servant purely in a personal or domestic matter or even in a casual way would fall outside the definition. That is how this Court dealt with this aspect of the matter. The whole purpose of the Industrial Disputes Act is to focus on resolution of industrial disputes and the regulation will not meddle with every little carpenter or a blacksmith, a cobbler or a cycle repairer who comes outside the idea of industry and industrial dispute. This rationale, which applies all along the line to small professions like that of domestic servants would apply to those who are engaged by a group of flat-owners for rendering personal services even if that group is not amorphous but crystallised into an association or a society. The decision in Rajappa case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207] if correctly understood is not an authority for the proposition that domestic servants are also to be treated to be workmen even when they carry on work in respect of one or many masters. It is clear when personal services are rendered to the members of a society and that society is constituted only for the purposes of those members to engage the services of such employees, we do not think its activity should be treated as an industry nor are they workmen. In this view of the matter so far as the appellant is concerned it must be held not to be an "industry". Therefore, the award made by the Tribunal cannot be sustained. The same shall stand set aside."

9. On the strength of above pronouncement, learned counsel for the petitioner submits that no proceedings were maintainable before the Labour Court and without deciding the objection raised by the petitioner regarding the applicability of Industrial Dispute Act, the Labour Court has passed the impugned award, which is liable to be set aside.

10. Learned counsel appearing on behalf of respondent supported the award passed by the Labour Court and submits that this is a case wherein the reference was made to the Labour Court by appropriate government, after satisfying that Industrial Dispute exists between the employer and employee. The said decision of appropriate government was not challenged by the petitioner organization and therefore, petitioner organization has no right to raise the issue that provision of I.D.Act are not applicable. He further submits that Labour Court cannot go behind the question referred by the appropriate

government and therefore, int he present case also Labour Court could not have entertained the issue that provision of I.D. Act are not applicable and the petitioner organization is not covered under the definition of industry or industrial organization. He relied on the judgment of Apex Court delivered in the matter of **Pottery Mazdoor Panchayat vs. The Perfect Pottery Co. Ltd. & Another, (1979) 3 SCC 762**, whereby the Apex Court has held that, the Labour Court can't go behind the question referred by the appropriate government and therefore, the issue raised by the petitioner in the present case could not be decided by the Labour Court. The relevant paras of the judgment are as under:

> **"16**. We are, therefore, of the view that the High Court was right in coming to the conclusion that the two Tribunals had no jurisdiction to go behind the references and inquire into the question whether the closure of business, which was in fact effected, was decided upon for reasons which were proper and justifiable. The propriety of or justification for the closure of a business, in fact and truly effected, cannot raise an industrial dispute as contemplated by the State and Central Acts.
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> **17**. It is unnecessary to consider the second question as regards the payment of retrenchment compensation and we will, therefore, express no opinion as to whether the Tribunals had jurisdiction to go into that question. Happily, the parties have arrived at a settlement on that question under which, the respondent agrees to fix within a period of six months from today the retrenchment compensation payable to the retrenched workers in accordance with the provisions of Section 25-FFF of the Central Act, namely, the Industrial Disputes Act, 1947, without the aid of the proviso to that section. After the retrenchment compensation is so fixed, a copy of the decision fixing the compensation payable to each of the workers will be sent by the respondent to the appellant Union. The workers or their legal representatives, as the case may be, will then be entitled to receive the retrenchment compensation from the respondent, which agrees to pay the same to them. The respondent will be entitled to set off of the amounts of retrenchment compensation already paid to the workers against the amounts found due to them under this settlement. On receiving the retrenchment compensation the workers concerned shall withdraw the applications, if any, filed by them for relief in that behalf.

> **18**. We would only like to add that the compensation which will be paid to the workers will be without prejudice to their right, if any, to get employment from the respondent in the new business as and when occasion arises."

11. He further relied on the judgment of Apex Court delivered in the matter of **Oshiar Prasad and others Vs. The Employers in relation to Management of Sudamdih Coal Washery of M/s BCCL, Dhanbad, Jharkhand,** reported in **(2015) 4 SCC 71**, wherein similar observations were made by the Apex Court that:-

> "**25**. It is a settled principle of law that absorption and regularisation in service can be claimed or/and granted only when the contract of employment subsists and is in force inter se employee and the employer. Once it comes to an end either by efflux of time or as per the terms of the contract of employment or by its termination by the employer, then in such event, the relationship of employee and employer comes to an end and no longer subsists except for the limited purpose to examine the legality and correctness of its termination."

12. He further relied on the judgment of Delhi High Court in **AIR OnLine 2018 DEL 2438** in the matter of **Vinod Singh Yadav vs. M/s. Securitans India Pvt. Ltd.**, wherein an order referring an Industrial Dispute to a Labour Court, Tribunal or National Tribunal under Section 10 or in a subsequent order, the appropriate government has specified the points of dispute for adjudication, the Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confined its adjudication to those points and matter incidental thereto and cannot go behind the points of reference and is mandatorily required to confines its adjudication to the points of reference and the matters incidental thereto.

13. Considered the arguments advanced by the rival parties and perused the documents available on record.

14. It is not in dispute that the respondent employee was in employment of

petitioner institute and was working as Watchman/Peon on daily wages. The employee has claimed that, he was working continuously since 2008 whereas the petitioner institute denied this fact that he worked for more than 240 days in a calendar year. Similarly, the petitioner institute claimed that the petitioner institute is non-profitable institute whereas the employee stated that the petitioner institute is indulged in charging the amount from the participants. The petitioner institute was having sufficient documentary evidence to demonstrate that petitioner is not a profit making institute as well as the proof that the employee has not worked for more than 240 days in a calendar year. An application was moved on behalf of employee before the Labour court by which he prayed for issuance of direction to the institute to produce the documents in respect of attendance register and payment register. However, the same were not produced by the institute despite directions issued by the Labour Court, therefore, it shall be presumed that the documents were not in favour of institute and adverse influence ought to have been drawn against the institute.

15. The Apex Court in the matter of **Gopal Krishnaj Ketkar vs. Mohamed Haji Latif and others, AIR 1968 SC 1413** has held that, if a party in possession of best evidence, which would throw a light on the issue in controversy withheld the same, Court ought to draw an adverse inference against the party notwithstanding that onus of proof does not lie on him. The party who is in possession of best evidence cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce it.

16. It is not in dispute that the employee has worked with the institute. The dispute was in respect of how many days he worked in a calendar year and whether he worked since 2008 continuously or not. It is also not in dispute that on 31.12.2014, his services were terminated orally, and when the employee

moved an application for demanding attendance register and payment register, the institution was under obligation to produce the same but despite the order of Labour Court, the same were not produced. Therefore, Labour Court correctly drawn the adverse inference against the institute by holding that employee was working for more than 240 days in a calendar year and therefore, provision of Section 25(F) of the Act are applicable.

17. Similarity, the institute could have produced the documents including profit and loss accounts, balance sheet etc. to demonstrate that the institute is not engaged in any business activity but the same were not filed by the institute before Labour Court. Despite accepted in the cross examination by the witness appeared on behalf of the institute that the documents are available. The objection raised by the institute that it does not cover under the definition of Industry as defined under Section 2(j) or Industrial Establishment defined under Section 2(ka) of the Act could not be considered because relevant materials were withheld by the institute and therefore, its contention was not acceptable, in view of the judgment passed by the three Judges Bench of Apex Court in the matter of Gopal Krishnaj Ketkar (supra).

18. Though, it is settled law that the Labour Court can't go behind the points of the reference but apart from that, the institute has failed to brought the relevant documents on record to bolster its argument that the institute is not engaged in the profitable business and there are only few employees in the institute.

19. The Apex Court in the matter of **Bangalore Water Supply** (supra) has issued some guidelines to ascertain whether the institute covers under the definition of Industries or not, but for the purpose of testing the petitioner

institute, no relevant material was produced by the institute, either before Labour Court or before this Court and therefore, the judgments of Apex Court relied by the counsel for the petitioner are not helpful.

20. It is trite law that, if any issue raised by the party to a lis, the same should be proved by cogent evidence and merely raising the issue is not sufficient. Herein the present case, the institute raised the issue that provision of Industrial Dispute Act are not applicable but no evidence was produced. Even otherwise, the Labour court was not empowered to go behind the point of reference and therefore, the Labour Court has not committed any error in passing the award as it is also not in dispute in the present case that the services of the respondent/employee was terminated without issuance of any notice or charge-sheet and no inquiry was conducted and his services were terminated orally, without making payment of any amount as required to be paid. Therefore, the case of respondent/employee squarely falls under Section 25(F) of the I.D. Act for retrenchment.

21. In view of above prospectus, the present petition fails and the award passed by the Labour court is upheld. Petition is dismissed. No order as to costs.

(VINAY SARAF)
JUDGE

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