SUPREME COURT OF INDIA

Devendra M. Surti, Dr.

Vs.

State of Gujarat

Crl.A.No.102 of 1966

(V. Ramaswami and C. A. Vaidialingam, JJ.)

02.05.1968

JUDGEMENT

RAMASWAMI, J.:-

1. The question involved in this appeal is as to whether a Doctor's dispensary is a "Commercial Establishment" within the meaning of the Bombay Shops and Establishments Act, 1948 (Bombay Act LXXIX of 1948), hereinafter referred to as the 'Act'.

2. The case of the prosecution is that the appellant was a doctor having his dispensary situated near Jakaria Masjid at Ahmedabad. The dispensary is registered as a 'Commercial Establishment' under the provisions of the Act. The complainant Shri Patel visited the dispensary on June 13, 1963 at about 9.50 A. M. and found that though the dispensary was registered as 'Commercial Establishment under the Act, the Register produced before him at the time of his visit was not maintained as required under Rule 23 (1) of the Rules framed under the Act. Necessary remarks were made by the complainant in the Visit Book of the dispensary. Thereafter, a complaint was filed against the appellant after obtaining sanction for his prosecution under Section 52 (e) of the Act read with

Section 62 of the Act and Rule 23 (1) of the Rules. The case was contested by the appellant on the ground that the doctor's dispensary was not a "Commercial Establishment' within the meaning of the Act and the provisions of the Act did not therefore apply to his dispensary and the appellant had not committed any offence. The City Magistrate (First Court), (Municipal), Ahmedabad held that the appellant was not guilty and acquitted him. The State of Gujarat took the matter in appeal to the High Court of Gujarat in Criminal Appeal No. 208 of 1964. The appeal was allowed by the High Court by its judgment dated February 14, 1966 and the appellant was convicted for an offence under Section 52 (e) read with Sec. 62 of the Act and R. 23 (1) of the Rules and sentenced to pay a fine of Rs. 25, in default to undergo simple imprisonment for a week.

3. This appeal is brought by certificate from the judgment of the High Court.

4. Before considering the rival contentions of the parties it is necessary to examine the scheme of the Act. The preamble to the Act states that it is an Act "to consolidate and amend the law relating to the regulation of conditions of work and employment in shops, commercial establishments, residential hotels, restaurants, eating houses, theatres, other places of public amusement or entertainment and other establishments". Section 2(4) of the Act defines "Commercial establishment" as follows:-

"'Commercial establishment' means an establishment which carries on, any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession and includes a society registered under the Societies Registration Act, 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."

Section 2 (8) states:

'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."

Section 2 (6) and Section 2 (7) read as follows:

"(6) Employee' means a person wholly or principally employed, whether directly or through any agency, and whether for wages or other consideration, in or in connection with any establishment; and includes an apprentice, but does not include a member of the employer's family."

"(7) Employer' means a person owning or having ultimate control over the affairs of an establishment."

Section 2 (3) and 2 (18) define the expression "closed" and "opened" as meaning "closed or opened for the service of any customer, or for any business, of the establishment, or for work, by or with the help of any employee, of or connected with the establishment'. Section 4 states:

"Notwithstanding anything contained in this Act, the provisions of this Act mentioned in the third column of Schedule II shall not apply to the establishments, employees an other persons mentioned against them in the second column of the said Schedule:

Provided that the State Government may, by notification published in the Official Gazette, add to, omit or alter any of the entries of the said Schedule subject to such conditions, if any, as may be specified in such notification and on the publication of such notification, the entries in either column of the said Schedule shall be deemed to be amended accordingly."

Section 5 provides as follows:

"(1) Notwithstanding anything contained in this Act, the State Government may by notification in the Official Gazette, declare any establishment or class of establishments to which, or any person or class of persons to whom, this Act or any of the provisions thereof does not for the time being apply, to be an establishment or class of establishments or a person or class of persons to which or whom this Act or any provisions thereof with such modifications or adaptations as may in the opinion of the State Government be necessary shall apply from such date as may be specified in the notification.

(2) On such declaration under sub-section (1), any such establishment or class of establishments or such person or class of persons shall be deemed to be an establishment or class of establishments to which, or to be an employee or class of employees to whom, this Act applies and all or any of the provisions of this Act with such adaptation or modification as may be specified in such declaration, shall apply to such establishment or class of establishments or to such employee or class of employees." Chapter II deals with the registration of establishments. Under Section 7 (1) within the

period specified the employer of every establishment is required to send to the Inspector of the local area concerned a statement in the prescribed form together with necessary fees, containing the name of the employer and of the establishment, the category of the establishment, whether it was a shop, commercial establishment, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment and, such other particulars. Under S. 7 (2) a "registration certificate" is to be granted. Chapter III deals with shops an commercial establishments. Sections 10 and 11 provide for the opening and closing hours of the shop. Section 13 deals with the opening and closing hours of a commercial establishment. Section 14 provides for the maximum limit at the daily and weekly hours of work of the employees in strops and commercial establishments. Section 15 provides for rest interval, and Section 17 provides for spread-over of hours of work in commercial establishments. Section 18 provides for weekly holidays in shops and commercial establishments. Chapter VI deals with employment of children, young persons and women, and applies to all establishments. Section 32 provides that no child should be required or allowed to work in any establishment, notwithstanding that such child is a member of the family of the employer. Similarly, Section 33 provides that no young person or woman shall be required or allowed to work whether as an employee or otherwise in any establishment before 6 A. M. and after 7 P. M. notwithstanding that such young person or woman is a member of the family of the employer. Section 34 prescribes daily hours of work for young persons. The next Chapter, i. e., Chapter VII deals with leave pay and payment of wages for such leave. Section 38 provides for the extension of the Payment of Wages Act by the State Government by a notification in the Gazette to all or any class of establishments or to any class of employees to which the Act applies. Similarly, Section 38-A provides for the extension of the Workmen's Compensation Act, 1923 Chapter VIII enacts provisions for health and safety of the workers generally for all establishments. Chapter IX enacts provisions for setting up of the machinery for enforcement and inspection. Chapter X deals with offences and penalties. Section 52 deals with contravention of certain provisions and Clause (e) of that section provides for the penalty if the employer contravenes the provisions of Section 62 by not maintaining the prescribed register. Section 62 provides for maintenance of registers and records and display of notices as any be prescribed by Rules, Section 63 deals with wages for overtime work.

5. On behalf of the appellant Mr. Mehta put forward the argument that under Section 2 (4) of the Act which defines 'Commercial Establishment' as an establishment which carries on any business, trade or profession, the emphasis was not on the place from which the trading or professional activity was carried on but the emphasis was really on the nature of the activity which must be a commercial activity. In other words, the contention was that the intention of the legislature in enacting Section 2 (4) was to include only those professions which are carried on in a commercial manner. It was therefore contended that in the present case the dispensary of the appellant does not fall within the definition of Commercial Establishment' under Section 2 (4) of the Act. In our opinion, the argument addressed on behalf of the appellant is well founded and must prevail.

6. Under Section 2 (8) of the Act an 'establishment' is defined as meaning 'a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment to which this Act applies'. Section 2 (24) again defines a "Residential hotel", Section 2 (25) a "Restaurant or eating house" and Section 2 (27) similarly defines a "Shop". Section 2 (29) defines a "Theatre". It is clear therefore that the legislature has taken care separately to define

each one of the categories of the establishments mentioned in Section 2 (8) of the Act. It is true that Section 2 (4) of the Act has used words of very wide import and grammatically it may include even a Consulting room where a doctor examines his patients with the help of a solitary nurse or attendant. But, in our opinion, in the matter of construing the language of Section 2 (4) of the Act we must adopt the principle of noscitur a sociis. This rule means that when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. The words take as it were their colour from each other that is, the more general is restricted to a sense analogous to a less general. "Associated words take their meaning from one another under the doctrine of noscitur a sociis the philosophy of which is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim Ejusdem Generis". (Words and Phrases, Vol. XIV, p. 207). For instance, in Reed v. Ingham, (1854) 3 E and B 889 it was held upon the principle of the maxim noscitur a sociis, that a steam tug of eighty-seven tons burden engaged in moving another vessel was not a craft within the meaning of the statute. Again, in Scales v. Pickering, (1828) 4 Bing 448 at pp. 452, 453 the question was what was the meaning of the word "footway" when used in a private Act which empowered a water company to break up the soil and pavement of roads, highways, footways, commons, streets, lanes, alleys, passages, and public places, provided they did not enter upon any private lands without the consent of the owner. It was contended that this authorised the company to break up the soil of a private field in which there was a public footway, but it was held otherwise. "Construing the word 'footway', " said Best, C. J. "from the company in which it is found..... the legislature appears to have meant those paved footways in large towns which are too narrow to admit of horses and carriages". And Park, J. added: "The word 'footway' here noscitur a sociis". In the present case, certain essential features or attributes are invariably associated with the words "business and trade" as understood in the popular and conventional, sense, and it is the colour of these attributes which is taken by the other words used in the definition of Section 2 (4) of the Act, though their normal import may be much wider. We are therefore of opinion that the professional establishment of a doctor cannot come within the definition of Sec. 2 (4) of the Act unless the activity carried on was also commercial in character. As to what exactly is meant by "Commerce" it may be difficult to define but in an early case-Mckay v. Rutherford, (1848) 6 Moo PC 413 at p. 425, Lord Campbell gave a useful definition: "Commerce is that activity where a capital is laid out on anywork and a risk run of profit or loss; it is a commercial venture". It is true that the definition of Lord Campbell is the conventional definition attributed to trade or commerce but it cannot be taken to be wholly valid for the purpose of construing industrial legislation in a modern welfare State. It is clear that the presence of the profit motive or the investment of capital tradition associated to the notion of trade and commerce cannot be given an undue importance in construing the definition of 'Commercial establishment' under Section 2 (4) of the Act. In our opinion, the correct test of finding whether a professional activity falls within Section 2 (4) of the Act is whether the activity is systematically and habitually undertaken for production or distribution of goods or for rendering material services to the community or any part of the community with the help of employees in the manner of a trade or business, in such an undertaking. It is also necessary in this connection to construe the word "profession" under Section 2 (4) of the Act. In Commrs. of Inland Revenue v. Maxse, 1919-1 KB 647 at p. 657, Scrutton, L. J. stated as follows:-

"I am very reluctant finally to propound a comprehensive definition. A set of facts not present to the mind of the judicial propounder and not raised in the case before him, may immediately arise to confound his proposition. But it seems to me as at present advised that a 'profession' in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of

manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production of sale of commodities. The line of demarcation may vary from time to time. The word 'profession' used to be confined to the three learned professions, the Church, Medicine and Law. It has now, I think, a wider meaning."

The matter was again considered in another case where the question was whether a company doing the work of naval architect could be said to be carrying on a profession in a naval architecture. The case was William Esplen, Son and Swainston, Ld. v. Inland Revenue Commrs., 1919-2 KB 731 where Rowlatt, J. observed as follows:-

". . .. . . but in my opinion the company is not carrying on the profession of navul architects within the meaning of the section, because for this purpose it is of the essence of a profession that the profits should be dependent mainly upon the personal qualifications of the person by whom it is carried on, and that can only be an individual."

7. It is therefore clear that a professional activity must be an activity carried on by an individual by his personal skill and intelligence. There is a fundamental distinction therefore between a professional activity and an activity of a commercial character and unless the profession carried on by the appellant also partakes of the character of a commercial nature, the appellant cannot fall within the ambit of Section 2 (4) of the Act. In National Union of Commercial Employees v. M. R. Meher, Industrial Tribunal, Bombay, 1962 Supp (3) SCR 157 = (AIR 1962 SC 1080) it was held by this Court that the work of solicitors is not an industry within the meaning of Section 2 (j) of the Industrial Disputes Act, 1947 and therefore any dispute raised by the employees of the solicitors against them cannot be made the subject of reference to the Industrial Tribunal. In dealing with this question, Gajendragadkar, J., speaking for the Court, observed as follows at p. 163 of the Report (SCR Supp) = (at p. 1083 of AIR):

"When in the Hospital case, (1960) 2 SCR 866 = (AIR 1960 SC 610) this Court referred to the organisation of the undertaking involving the co-operation of capital and labour or the employer and his employees, it obviously meant the cooperation essential and necessary for the purpose of rendering material service or for the purpose of production. It would be realised that the concept of industry postulates partnership between capital and labour or between the employer and his employees. It is under this partnership that the employer contributes his capital and the employees their labour and the joint contribution of capital and labour leads directly to the production which the industry has in view. In other words, the co-operation between capital and labour or between the employer and his employees which is treated as a working test in determining whether any activity amounts to an industry, is the co-operation which is directly involved in the production of goods or in the rendering of service. It cannot be suggested that every form or aspect of human activity in which capital and labour co-operate or employer and employees assist each other is an industry. The distinguishing feature of an industry is that for the production of goods or for the rendering of

service, co-operation between capital and labour or between the employer and his employees must be direct and must be essential."

Again, at p. 166 of the Report (SCR Supp) = (at p. 1084 of AIR) Gajendragadkar, J. proceeds to state:

"Does a solicitors' firm satisfy that test? Superficially considered, the solicitors' firm is no doubt organised as an industrial concern would be organised. There are different categories of servants employed by a firm, each category being assigned separate duties and functions. But it must be remembered that the service rendered by a solicitor functioning either individually or working together with partners is 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. For his own convenience, a solicitor may employ a clerk because a clerk would type his opinion; for his convenience, a solicitor may employ 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 solicitors' firm is not directly concerned with the service which the solicitor renders to his client 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 he no doubt that for carrying on the work of a solicitor efficiently, accounts have to be kept and correspondence carried on and this work would need the employment of clerks and accountants. But has the work of the clerk who types correspondence or that of the accountant who keeps accounts any direct or essential nexus or connection with the advice which it is the duty of the solicitor to give to his client? The answer to this question must in our opinion, be in the negative. There is, no doubt, a kind of co-operation between the solicitor and his employees, but that co-operation has no direct or immediate relation to the professional service which the solicitor renders to his client.

....

Looking at this question in a broad and general way, it is not easy to conceive that a liberal profession like that of an attorney could have been intended by the Legislature to fall within the definition of 'industry' under Section 2 (j). The very concept of the liberal professions has its own special and distinctive features which do not readily permit the inclusion of the liberal professions into the four corners of industrial law. The essential basis of an industrial dispute is that it is a dispute arising between capital and labour in enterprises where capital and labour combine to produce commodities or to render service. This essential basis would be absent in the case of liberal professions. A person following a liberal profession does not carry on his profession in any intelligible sense with the active co-operation of his employees and the principal, if not the sole, capital which he brings into his profession is his special or peculiar intellectual and educational

equipment. That is why on broad and general considerations which cannot be ignored, a liberal profession like that of an attorney must, we think, be deemed to be outside the definition of 'industry' under Section 2 (j)."

Applying a similar line of reasoning, we are of opinion that the dispensary of the appellant would fall within the definition of S. 2 (4) of the Act if the activity of the appellant is organised in the manner in which a trade or business is generally organised or arranged and if the activity is systematically or habitually undertaken for rendering material services to the community at large or a part of such community with the help of the employees and if such an activity generally involves co-operation of the employer and the employees. To put it differently, the manner in which the activity in question is organised or arranged, the condition of the co-operation between the employer and the employees being necessary for its success and its object being to render material service to the community can be regarded as some of the features which render the carrying on of a professional activity to fall within the ambit of Section 2 (4) of the Act. Tested in the light of these principles, we hold that the case of the appellant does not fall within the purview of the Act and the conviction of the appellant of the offence under Section 52 (c) of the Act read with Section 62 of the Act and Rule 23 (1) of the Rules is illegal.

8. For these reasons we allow this appeal and set aside the judgment of the Bombay (Gujarat) High Court dated February 14, 1966 convicting and sentencing the appellant.

Appeal allowed.