Chief Conservator of Forests and Another

Vs

Jagannath Maruti Kondhare and Others

Civil Appeals No. 4375 of 1990 with Nos. 1085 of 1991, 516 of 1992, SLPs (C) Nos. 5274, 5308, 5324, 5327, 5329, 5341, 5399 To 5401, 5404, 5415, 5451, 5533, 5559, 5602-03, 5603, 5605, 7415-16, 7421 and 7431 of 1989, 12920, 12922, 12925, 12931, 12947, 12952, 12986, 13024, 13038, 13055, 13161, 13284 and 15046 of 1987, I.A. No. 17195 of 1992 in C.A. No. 1084 of 1991, SLP (C) No. 6456 of 1992, I.A. No. 18225 of 1992 in C.A. No. 4376 of 1990 and SLPs (C) Nos. 4301-04 of 1994

(CJI A. M. Ahmadi, B. L. Hansaria, S. C. Sen JJ)

06.12.1995

JUDGMENT

HANSARIA, J. –

1. Two questions in the main need our determination in this batch of appeals which are by the Chief Conservator of Forests, State of Maharashtra. The first and foremost question is whether Forest Department of the State Government is an 'industry' within the meaning of Section 2(j) of the Industrial Disputes Act, 1947 (hereinafter "the Central Act"), which definition has been adopted by the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short "the State Act"). We shall have then to address ourselves to the question whether in the cases at hand the employer, namely the State Government, had indulged in unfair labour practice visualised by Item 6 of Schedule IV of the State Act, as alleged by the respondents before the Industrial Court, Pune/Ahmednagar. If these questions would be answered in the affirmative, we would be required to consider whether the directions given by the aforesaid Industrial Court need our interference.

2. Before applying our mind to the first question, it would be apposite to mention that this point had not been before the Industrial Court and it is because of this that the High Court, on being approached against the award of the Industrial Court, did allow this point to be agitated before it. This Court, however, felt, in view of the importance of the question, that the contention may be gone into as would appear from the order passed on 6-11-1992. But as a contention was advanced for the respondent-workmen that the dispute is fairly old and if the matter were to be remanded to the Industrial Court, the workmen would suffer a second round of litigation causing hardship to them, a direction was given to the counsel for the appellants to place the factual data, on record of this Court itself, on the basis of which it was contended that the Forest Department was not an 'industry'. It was so done.

3. Shri Dholakia, appearing for the appellants, first urged, and persistently, that to decide this question we may not be guided by what was held in this regard by a seven-Judge Bench of this Court in Bangalore Water Supply & Sewerage Board v. A. Rajappa [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207]. According to the learned counsel this decision needs reconsideration and we should so order. As this was not the stand of the appellants even when the

order of 6-11-1992 was passed, we did not permit Shri Dholakia to address us on the need of reconsidering the ratio of the aforesaid decision.

4. We, therefore, propose to examine the first question on the touchstone of what was held by this Court in Bangalore Water Supply case. A perusal of that judgment shows that the main judgment was written by Krishna Iyer, J. (on behalf of self, Bhagwati and Desai, JJ. as would appear from the reporting of this judgment in Bangalore Water Supply [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207]). Beg, C.J. endorsed the opinion and conclusions of Krishna Iyer, J. in a concurrent judgment giving his own reasons. Though Tulzapurkar, J. had stated in the order passed on the day the judgment was delivered (21-2-1978) that reasons for concurrence and divergence, if any, would be given later, no such reasons were given. Chandrachud, J. (as he then was) put on record his reasons on 7-4-1978 by which date he had become Chief Justice. Jaswant Singh, J. also did the same.

5. The aforesaid shows that the conclusions reached by Krishna Iyer, J. had been endorsed fully by two other learned Judges and Beg, C.J. did the same but for different reasons. We would, therefore, confine our attention to the conclusions reached by Krishna Iyer, J. which appear at pp. 282 and 283 of the Report. The one which is relevant for our purpose is what finds place under serial title IV "The dominant nature test", which was spelt out as below : (SCC pp. 283-84, para 143)

> "(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. Ram Nath, (1964) 2 SCR 703 : AIR 1963 SC 1873 : (1963) 2 LLJ 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 Corpn. of Nagpur [Corpn. of the City of Nagpur v. Employees, (1960) 2 SCR 942 : AIR 1960 SC 675 : (1960) 1 LLJ 523], 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.
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> (b) Notwithstanding the previous clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaking by Government or statutory bodies.
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> (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).
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> (d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby."
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> (It may be stated that it is in pursuance to what was stated under (d) above that the aforesaid amendment of 1982 was made which provided for exclusion of some categories, one of which is "any activity of the Government relatable to the sovereign functions of the Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space". This is exception 6 of 9 mentioned in the amended definition.)

6. Shri Dholakia being required to address us as to whether the Forest Department can be said to be

an 'industry' as per the ration in Bangalore Water Supply case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207], urges that it cannot be, because the function discharge by the department, more particularly the one relatable to the scheme in question, named Pachgaon Parwati Scheme undertaken in Pune District, is sovereign in nature, which would as per the aforesaid decision itself qualify for exemption. This is also the contention advanced by Shri Bhandare, appearing for the appellants in the cases relatable to Ahmednagar District. This stand of the learned counsel for the appellants is strenuously challenged by Ms. Jaising, appearing for the respondent-workmen.

7. As per the Bangalore Water Supply case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207] sovereign functions "strictly understood" alone qualify for exemption, and not the welfare activities or economic adventures undertaken by the Government. This is not all. A rider has been added that even in the departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to be an industry. As to which activities of the Government could be called sovereign functions strictly understood, has not been spelt out in the aforesaid case.

8. Ms. Jaising, however, urges that as the majority had accepted the test explained in the Corpn. of the City of Nagpur v. Employees [Corpn. of the City of Nagpur v. Employees, (1960) 2 SCR 942 : AIR 1960 SC 675 : (1960) 1 LLJ 523], we should note what was stated about sovereign functions in that decision. In that judgment this aspect has been dealt at pp. 953 to 955 of the Report. The Bench of that case first noted the rival contention advanced in this regard, which by the learned counsel for the Corporation was to enlarge the scope of these functions as to comprehend all the welfare activities of a modern State, whereas the learned counsel for the respondents sought to confine them to what are aptly termed "the primary and inalienable functions of a constitutional government". In support of the contention advanced reference was made to Holland's Jurisprudence as to which it was observed by the Bench that the same had no relevance. The Bench then referred to what was stated by Lord Watson in Coomber v. Justices of Berks [(1883-84) 9 AC 61 : 1883 All ER Rep Ext 1457 : 53 LJ QB 239], in which the functions such as administration of justice, maintenance of order and repression of crime were described among the primary and inalienable functions. Reference was then made to the dissenting judgment of Isaacs, J. in Federated State School Teachers' Assn. of Australia v. State of Victoria [(1929) 41 CLR 569], in which the learned Judge stated as below at p. 585 :

> "Regal functions are inescapable and inalienable. Such are the legislative power, the administration of laws, the exercise of the judicial power. Non-regal functions may be assumed by means of the legislative power. But when they are assumed the State acts simply as a huge corporation, with its legislation as the charter. Its action under the legislation, so far as it is not regal execution of the law is merely analogous to that of a private company similarly authorised."

The Bench thereafter observed that the aforesaid clearly mark out the ambit of the regal functions as distinguished from the other powers of a State. This shows that as per the Corpn. of Nagpur case [Corpn. of the City of Nagpur v. Employees, (1960) 2 SCR 942 : AIR 1960 SC 675 : (1960) 1 LLJ 523] those functions alone which are inalienable can be called sovereign. Ms. Jaising would like us to take the same stand.

9. Shri Dholakia and Shri Bhandare, however, urged that in view of the constitutional duty imposed on States, to undertake many activities including preservation of environment, a la Article 48-A of the Constitution, the extent of sovereign functions may not be confined to the aforesaid three

inasmuch as other functions could also be inalienable : and protection of environment in the present state of pollution is one such function, which cannot be, and would not be, undertaken by any private agency in a meaningful way.

10. In support of the aforesaid contention, the learned counsel for the appellants have relied on a decision of a Division Bench of the Gujarat High Court rendered by one of us (Ahmadi, J. as he then was) in the case of J. J. Shrimali v. Distt. Development Officer [(1989) 1 Guj LR 396]. This aspect of the matter has been dealt with at pp. 405 to 410 of the judgment, reference to which shows that keeping in view the special facts and circumstances of the case (paragraph 11), namely, undertaking of famine and drought relief works by the State Government by introducing certain schemes to provide relief and succour works to the affected people, instead of distributing doles which may hurt the dignity, self-respect and sentiments of those receiving the same, it was held that it would be difficult to hold the undertaking to be an 'industry'. What really follows from this judgment is that apart from the aforesaid three functions, there may be some other functions also regarding which a view could be taken that the same too is a sovereign function. We accept this.

11. As to which function could be, and should be, taken as regal or sovereign function has been recently examined by a Bench of this Court, to which one of us (Hansaria, J.) was a party, This was in N. Nagendra Rao & Co. v. State of A.P. [(1994) 6 SCC 205 : 1994 SCC (Cri) 1609 : JT (1994) 5 SC 572], in which case Sahai, J. speaking for the Bench examined this question in detail in the background of the stand of the respondent-State pleading absence of vicarious liability because of the doctrine of sovereign immunity. This aspect has been dealt in paras 21 to 24. Para 21 opens by saying that the old and archaic concept of a sovereignty does not survive as sovereignty now vests in the people. It is because of this that in the aforesaid Australian case the distinction between sovereign and non-sovereign functions was categorised as regal and non-regal. In some cases the expression used in State function, whereas in some, governmental function.

12. We may not go by the labels. Let us reach the hub. And the same is that the dichotomy of sovereign and non-sovereign functions does not really exist - it would all depend on the nature of the power and manner of its exercise, as observed in para 23 of Nagendra Rao case [(1994) 6 SCC 205 : 1994 SCC (Cri) 1609 : JT (1994) 5 SC 572]. As per the decision in this case, one of the tests to determine whether the executive function is sovereign in nature is to find out whether the State is answerable for such action in courts of law. It was stated by Sahai, J. that acts like defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. They are, therefore, not amenable to the jurisdiction of ordinary civil court inasmuch as the State is immune from being sued in such matters. But then, according to this decision the immunity ends there. It was then observed that in a welfare State, functions of the State are not only the defence of the country or administration of justice or maintaining law and order but extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. Because of this the demarcating line between sovereign and non-sovereign powers has largely disappeared.

13. The aforesaid shows that if we were to extend the concept of sovereign function to include all welfare activities as contended on behalf of the appellants, the ration in Bangalore Water Supply case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207] would get eroded, and substantially. We would demur to do so on the face of what was stated in the aforesaid case according to which except the strictly understood sovereign function, welfare activities of the State would come within the purview of the definition of industry; and, not only this, even within the

wider circle of sovereign function, there may be an inner circle encompassing some units which could be considered as industry if substantially severable.

14. This is not all, as Shri Dholakia has submitted that the Pachgaon Parwati Scheme (and for that matter the social forestry work undertaken in Ahmednagar District, in appeals relating to which Shri Bhandare has addressed us) being meant for preservation of forests and environment has to be regarded, in any case, as part of inalienable function inasmuch as the type of work which was undertaken under that scheme could not have been done by a private individual or entity.

15. A perusal of the affidavit filed by the Chief Conservator of Forests on 5-12-1992, pursuant to our order of 6-11-1992, shows that the Pachgaon Parwati Scheme was framed as per the Government Resolution based on the policy decision taken in April 1976. The Scheme was to be initially for a period of 5 years and an area of about 245 hectares situated on a hill plateau on the southern outskirts and within easy access of Pune City was selected for creation of a park under bioaesthetic development for the benefit of the urban population. It is further stated that the scheme was "primarily intended to fulfil bioaesthetic, recreational and educational aspirations of the people which will have inestimable indirect benefit of producing enlightened generation of conservationists of nature inclusive of forests and wild life for the future". (p. 137) The affidavit goes on to state (at p. 138) that the Pune Forest Division is also doing afforestation for soil/moisture conservation under various State-level schemes as well as Employment Guarantee Schemes all of which are for a period of 5 years.

16. The aforesaid being the crux of the scheme to implement which some of the respondents were employed, we are of the view that the same cannot be regarded as a part of inalienable or inescapable function of the State for the reason that the scheme was intended even to fulfil the recreational and educational aspirations of the people. We are in no doubt that such a work could well be undertaken by an agency which is not required to be even an instrumentality of the State.

17. This being the position, we hold that the aforesaid scheme undertaken by the Forest Department cannot be regarded as a part of the sovereign function of the State, and so, it was open to the respondents to invoke the provisions of the State Act. We would say the same qua the social foresting work undertaken in Ahmednagar District. There was, therefore, no threshold bar in knocking the door of the Industrial Courts by the respondents making a grievance about adoption of unfair labour practice by the appellants.

18. This takes us to the second main question as to whether on the facts of the present case it could be held that the appellants were guilty of adopting unfair labour practice. As already pointed out, the respondents alleged the aforesaid act by relying on what has been stated under Item 6 of Schedule IV of the State Act which reads as below :

> "To employ employees as 'badlis', casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees."

19. The Industrial Court has found the appellants as having taken recourse to unfair labour practice in the present cases because the respondents-workmen who had approached the Court had admittedly been in the employment of the State for 5 to 6 years and in each year had worked for a period ranging from 100 to 330 days. Ms. Jaising draws our attention in this context to the statement filed by the appellants themselves before the Industrial Court, a copy of which is at pp. 75 to 76 of

CA No. 4375 of 1990. A perusal of the same shows that some of the respondents had worked for a few days only in 1977 and 1978, though subsequently they themselves had worked for a longer period, which in case of Gitaji Baban Kadam, whose name is at Serial No. 4 went up to 322 in 1982, though in 1978 he had worked for 4-1/2 days. (Similar is the position qua some other respondents.)

20. According to Ms. Jaising the lesser number of days worked by say Gitaji in 1978, could have been because of his having sought employment in that year towards the fag-end or it may also be because of the fact that to start with, a large number of persons were engaged, which by 1981-82 got settled around 60, as would appear from the statement at p. 66 of the aforesaid appeal. It is brought to our notice that only 25 such persons had approached the Industrial Court of Pune (this number is 15 in the other batch) and as regards these 25, there should not be any doubt that they had worked for long despite which they were continued as casuals, which fact is enough to draw the inference that the same was with the object of depriving them of the status and privileges of permanent employees. Learned counsel urges that on these facts it was the burden of the employer to satisfy the Industrial Court that the object was not as was alleged by the workmen.

21. Shri Dholakia would not agree to this submission as, according to him the item in question having not stopped merely by stating about the employment of persons as casuals for years being sufficient to describe the same as unfair labour practice, which is apparent from what has been in the second part of the item, it was the burden of the workmen to establish that the object of continuing them for years was to deprive them of the status and privileges of permanent employees. Ms. Jaising answers this by contending that it would be difficult for any workman to establish what object an employer in such a matter has, as that would be in the realm of his subjective satisfaction known only to him. She submits that we may not fasten a workman with such a burden which he cannot discharge.

22. We have given our due thought to the aforesaid rival contentions and, according to us, the object of the State Act, inter alia, being prevention of certain unfair labour practices, the same would be thwarted or get frustrated if such a burden is placed on a workman which he cannot reasonably discharge. In our opinion, it would be permissible on facts of a particular case to draw the inference mentioned in the second part of the item, if badlis, casuals or temporaries are continued as such for years. We further state that the present was such a case inasmuch as from the materials on record we are satisfied that the 25 workmen who went to the Industrial Court of Pune (and 15 to the Industrial Court, Ahmednagar) had been kept as casuals for long years with the primary object of depriving them of the status of permanent employees inasmuch as giving of this status would have required the employer to pay the workmen at a rate higher than the one fixed under the Minimum Wages Act. We can think of no other possible object as, it may be remembered, that the Pachgaon Parwati Scheme was intended to cater to the recreational and educational aspirations also of the populace, which are not ephemeral objects, but par excellence permanent. We would say the same about environment-pollution-care work of Ahmednagar, whose need is on the increase because of increase in pollution. Permanency is thus writ large on the face of both the types of work. If even in such projects, persons are kept in jobs on casual basis for years the object manifests itself; no scrutiny is required. We, therefore, answer the second question also against the appellants.

23. The final point which needs our determination is regarding the reliefs granted by the Industrial Court, which is to make the workmen, in both the matters, permanent with all the benefits of a permanent worker, which would include payment of wages etc. at the rate meant for a permanent worker.

24. On the relief part, it is Shri Bhandare who principally addressed us. His contention in this regard is that the relief of making the workmen permanent, that is, to regularise them was not justified inasmuch as some of them had been employed under the Maharashtra Employment Guarantee Act, 1977. In any case the drain on the State Exchequer which would follow if all workers like the respondents are to be paid as permanent employees would be so enormous that the State would find it difficult to engage in other welfare activities.

25. To bring home his submission regarding the unjust nature of the relief relating to regularisation, Shri Bhandare sought to rely on the decision of this Court in Delhi Development Horticulture Employees' Union v. Delhi Admn. [(1992) 4 SCC 99 : 1992 SCC (L&S) 805 : (1992) 21 ATC 386 : JT (1992) 1 SC 394] We do not think that the ratio of this decision is applicable to the facts of the present case inasmuch as the employment of persons on daily-wage basis under Jawahar Rozgar Yojna by the Development Department of Delhi Administration, whose claim for regularisation was dealt with in the aforesaid case was entirely different from that of the scheme in which the respondents-workmen were employed. Jawahar Rozgar Yojna was evolved to provide income for those who are below the poverty line and particularly during the periods when they are without any source of livelihood and, therefore, without any income whatsoever. It is because of this that the Bench observed that the object of the Scheme was not to provide right to work as such even to the rural poor, much less to the unemployed in general. As against this, the workmen who were employed under the schemes at hand had been so done to advance objects having permanent basis as adverted to by us.

26. Therefore, what was stated in the aforesaid case cannot be called in aid at all by the appellants. According to us, the case is more akin to that of State of Haryana v. Piara Singh [(1992) 4 SCC 118 : 1992 SCC (L&S) 825 : (1992) 21 ATC 403] in which this Court favoured the State Scheme for regularisation of casual labourers who continued for a fairly long spell - say two or three years, (paragraph 51). As in the cases at hand the workmen concerned had, by the time they approached the Industrial Courts worked for more or less 5 years continuously, no case for interference with this part of the relief has been made out.

27. We may also meet the contention that some of the workmen had been employed under the Maharashtra Employment Guarantee Act, 1977. As to this, we would first observe that no factual basis for this submission is on record. Indeed, in some of the cases it has been pointed our that the employer had not even brought on record any order of appointment under this Act. This apart, a perusal of this Act shows that it has not excepted the application of the Industrial Disputes Act, 1947. This is apparent from the perusal of Section 13 of this Act. It may be further pointed out that this Act having been brought into force from 1978, could not have applied to the appointments at hand most of whom are of the year 1977.

28. Insofar as the financial strain on the State Exchequer is concerned, which submission is sought to be buttressed by Shri Dholakia by stating that in the Forest Department itself the casual employees are about 1.4 lakhs and if all of them were to be regularised and paid at the rate applicable to permanent workmen, the financial involvement would be in the neighbourhood of Rs. 300 crores - a very high figure indeed. We have not felt inclined to bear in mind this contention of Shri Dholakia as the same has been brought out almost from the hat. The argument relating to financial burden is one of despair or in terrorem. We have neither been impressed by the first nor frightened by the second inasmuch as we do not intend that the view to be taken by us in the appeals should apply, proprio vigore, to all casual labourers of the Forest Department or any other Department of the Government.

29. We wish to say further that if Shri Bhandare's submission is taken to its logical end, the justification for paying even minimum wages could wither away, leaving any employer, not to speak of model employer like the State, to exploit unemployed persons. To be fair to Shri Bhandare it may, however, be stated that the learned counsel did not extend his submission this far, but we find it difficult to limit the submission of Shri Bhandare to payment of, say fair wages, as distinguished from minimum wages. We have said so, because if a pay scale has been provided for permanent workmen that has been done by the State Government keeping in view its legal obligations and must be one which had been recommended by the State Pay Commission and accepted by the Government. We cannot deny this relief of permanency to the respondents-workmen only because in that case they would be required to be paid wages meant for permanent workers. This right flows automatically from the relief of regularisation to which no objection can reasonably be taken, as already pointed out. We would, however, observed that the relief made available to the respondents is not one which would be available ipso facto to all the casual employees either of the Forest Department or any other Department of the State. Claim of casual employees for permanency or for higher pay shall have to be decided on the merits of their own cases.

30. For the reasons aforesaid, we find no ground to interfere with the impugned order of the Industrial Courts. The appeals are, therefore, dismissed. In the facts and circumstances of the case, we, however, make no order as to costs.