SUPREME COURT OF INDIA

Seelan Raj

Vs.

Presiding Office, 1st Addl. Labour Court, Chennai

C.A.Nos.1300-1301 of 1998

(S. Rajendra Babu and Y.K. Sabharwal JJ.)

16.03.2001

ORDER

Rajendra Babu, J.

1. The facts arising in the case which led to the present dispute are in brief as follows:-

> "The respondent company [respondent No. 2 herein] was formed in the year 1982 with the object of rendering computer services to its customers relating to collection and maintenance of information and to develop company software application to suit the special requirements of the customers; that in March 1983, the second respondent set up a data processing division which undertook data processing services such as preparation of pay rolls, financial accounting and inventory control related statements; that subsequently there was a decline in the demand for the services of the data processing division of the second respondent on account of availability of indigenously manufactured computer and in the year 1989, the division became non-viable and, therefore, the second respondent was forced to close down the same. As on 4.1.1989, 46 persons were employed in the data processing division and they were informed of the decision to close down the unit. On 30.1.1989, a notice under Section 25 FFA of the industrial Disputes Act, 1947 [hereinafter referred to as `the ID Act'] was sent to the State Government intimating the Government that the data processing operations would be closed down with effect from 3.4.1989. The services of the workmen in the data processing division were terminated on account of closure of the unit and by October, 1989, the software division of the second respondent also was closed and the services of 71 workmen had been terminated after paying the closure compensation in terms of the provisions of the ID Act."

2. Disputes were raised which were referred to the Labour Court on the question whether the closure of the data processing division rendering the appellants unemployed is justified or not. Before the Labour Court, three issues were raised, viz.,

> "(i) whether the second respondent establishment is a factory.

(ii) whether on the date of closure of the establishment, the second respondent was employing more than 100 workmen requiring protection from the specified authority for closure of the establishment; and
(iii) to what relief the workmen are entitled."

3. Before the Labour Court, it was contended on behalf of the second respondent that it manufactures software and thereafter sells the same and, therefore, it is not an establishment as defined under Section 25L of the ID Act much less a factory as defined under Section 2(m) of the *Factories Act, 1948* [hereinafter referred to as `the Act'] and, thus the dispute referred to the Labour Court cannot be an industrial dispute in terms of Section 2(a) of the ID Act. The Labour Court overruled the objections raised by the second respondent and held that the ID Act covers the establishment of the second respondent and directed reinstatement of the workmen with back wages. The Labour Court also rejected the argument that the second respondent is not a factory; that the second respondent employed more than 100 persons at the time of the services of the workmen were terminated and was, therefore, required to comply with the provisions of Chapter V-B of the ID Act inasmuch as prior permission of the State Government had not been obtained as required under Section 25-O of the ID Act; that the closure was unjustified; that the establishment of the first respondent and the second respondent and inter-connected as they belong to the same group of companies.

4. A writ petition filed against the award made by the Labour Court, is allowed by a learned Single Judge setting aside the award made by the Labour Court. The learned Single Judge held that an establishment solely engaged as electronic data processing unit or computer unit, though may be a factory, yet would be exempted from the application of labour laws by virtue of Explanation II and such establishment cannot be held as a factory. On writ appeal, the Division Bench held that an electronic data processing unit or a computer unit installed in any premises or part thereof and such activities, though may amount to manufacturing process, bringing within the ambit of the word `factory' as defined under Section 2(m) of the Act, would get out of the same because of Explanation II thereto, which grants an exemption or immunity to an electronic processing or computer unit from being brought within the purview of the welfare legislation, namely, the labour laws. In the view of the High Court, the object of bringing Explanation II to the Act is to march in step together with the industrial modernisation and electronic innovation in industrial field and in that view of the matter, the High Court dismissed the writ appeal. Hence this appeal.

5. On behalf of the appellants, it is contended that the second respondent manufactures software and, therefore, comes within the definition of a `factory'; that when the finding of the Labour Court is that the process in making the software and selling the same involves manufacturing process is a finding of fact, the same should not have been interfered with by the High Court; that the construction placed by the High Court on Explanation II to Section 2(m) of the Act is that the Explanation II does not take within its sweep all activities, it is only in case if no manufacturing process is carried on then the meaning attributed by the High Court would be correct; that the High Court interpreted the expression *"if no* manufacturing process is carried on" as meaning that *"no other* manufacturing process is carried on"; that the view of the High Court would lead to anomalous situation that the unit

would be a factory under the Act only if it is solely engaged in electronic data processing and not if such activities are carried on along with other manufacturing process would defeat the very purpose of the amendment to the Act by which Explanation II was introduced to Section 2(m).

6. The contention put forth is that the computer processing unit involves manufacture of software like floppy, cartridges, chips, diskette, etc. as well as process of feeding through manpower and those recorded mediums are goods and are sold in the market as goods after being fed and such duly prepared floppy or cassettes are sold in the market as valuable commodity. The intrinsic value thereof includes the cost of blank medium as well as instructions or knowledge recorded thereon through the intellectual process of manpower. Thus, the manpower deployed for data processing is required to use its expertise to convert a blank medium into a valuable commodity. Therefore, the entire value of blank medium is changed by manufacturing process adopted. Thus it results in a manufacturing process. It was strongly contended that the preparation of software is a manufacturing process.

7. Section 2(m) of the Act defines what a factory means. That would be any premises including the precincts thereof in which a manufacturing process is being carried on, if it is with the aid of power, whereon 10 or more workmen are employed and if it is without the aid of power whereon 20 or more workmen are employed for the period mentioned therein. Explanation II thereto sets out that the mere fact that an electronic data processing unit or a computer unit is installed in any premises or part thereof would not render a unit into a factory if no manufacturing process is carried on in such premises or part thereof. Mere circumstance of installing a computer unit or an electronic data processing unit would not convert it into a factory. This explanation does not control the main provision. On the other hand, it merely sets out an exception to make certain things clear like installation of an electronic data processing unit or a computer unit in an establishment will not convert it into a factory if it is otherwise not so. Therefore, the key question to be determined still is whether the activity carried on by the second respondent in its activities of data processing and preparation of software would constitute a manufacturing process. "Manufacturing process" for the purposes of the Act has been defined under Section 2(k) as follows:

> "(k) "manufacturing process" means any process for -
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> (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or
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> (ii) pumping oil, water, sewage or any other substance; or
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> (iii) generating, transforming or transmitting power; or
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> (iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or

(vi) preserving or storing any article in cold storage;"

8. In order to understand whether data processing or software preparation would involve a manufacturing process, it is necessary to know the legal nature of a software and which is elusive in computer law. Computer software is a term used to describe progammes that cause the computer to operate in a particular way. The other non-hardware parts of computer system such an manuals are, sometimes, regarded as software. Commercially an important distinction is drawn between standard package software and custom built software. The former is marketed as standard product to meet requirements of a large number of users, while the latter is written to meet particular requirement of the user. A hybrid form of software also exists : the standard package is altered so that if fits customers' needs more clearly, adopting a process of customisation. A distinction of technical nature is also drawn between system software, which organises the way in which the hardware operates and application software which performs the functions required by user of the computer system. Software comprises the instructions that cause the hardware to work in a particular manner, for example, to process the payroll of an office. From that angle, software is intangible and difficult to classify in legal terms. It appears to be pure information enjoying no physical form except that of magnetic notation on a tape or disk. Since it appears that information is not goods one might conclude neither is software. This approach is flawed with because it draws a distinction between software and the medium on which software is supplied.

9. In *Civil Appeal No. 2582 of 1998 - Tata Consultancy Services v. State of Andhra Pradesh, decided on March 13, 2001***,** we have noticed the debate on various aspects of this question and, after adverting to a large number of decisions referred the matter to a Larger Bench for consideration. For identical reasons, we think this matter should also be referred to a Larger Bench. Ordered accordingly.