Bombay Telephone Canteen Employees' ... vs Union Of India & Anr on 9 July, 1997

Equivalent citations: AIR 1997 SUPREME COURT 2817, 1997 (6) SCC 723, 1997 AIR SCW 2819, (1997) 6 JT 57 (SC), 1997 (4) SCALE 483, 1997 (2) UJ (SC) 171, 1997 (3) SERVLJ 247 SC, 1997 LAB LR 793, 1997 (6) JT 57, 1997 UJ(SC) 2 171, (1997) 3 SERVLJ 247, (1997) 2 LABLJ 647, (1997) 2 LAB LN 1038, (1997) 91 FJR 251, (1997) 77 FACLR 25, (1997) 3 SCT 498, (1997) 4 SERVLR 721, (1997) 6 SUPREME 285, (1997) 2 CURLR 218, (1997) 4 SCALE 483, 1998 SCC (L&S) 386

Bench: K. Ramaswamy, D. P. Wadhwa

PETITIONER:
BOMBAY TELEPHONE CANTEEN EMPLOYEES' ASSOCIATION, PRABHADEVI

Vs.

RESPONDENT:
UNION OF INDIA & ANR.

DATE OF JUDGMENT: 09/07/1997

BENCH:
K. RAMASWAMY, D. P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T K. RAMASWAMYY. J.

This special leave petition has come up directly, from the award of the Central Government Industrial Tribunal No.2, Bombay, made on August 9, 1996 in Reference No.CGIT- 2/26/91.

Delay condoned.

The admitted position is that the petitioner Association, representing five dismissed employees, had sought reference under Section 10(1) of the Industrial Disputes Act, 1947 (for short, the `Act') to the Tribunal. The dispute arose on account of termination by the respondent-Management of the services of the said employe on April 28, 1989; It was alleged that the termination was without any notice and payment of retrenchment compensation under Section 25-f. The reference came to be made on April 19, 1991. The Tribunal has held, that the telephone Nigam Limited, Bombay is not an 'industry'. It, therefore, has no jurisdiction to adjudicate the dispute. Prabhadevi Exchange had a total strength of 3000 employees of the Tele- communication Department, working in three shifts. As per the Administrative Instructions issued by the Government, for the first shift there should be a '3A' type canteen, for the second shift 'A' type canteen and for the third shift there should be `C' type canteen. It was averred that for Type `3A' canteen, there should be 57 employees, but only 24 employees were working on April 27.4.1989. The claim of the petitioner is that the dismissed employees had joined the service in 1987. They are claiming wages as per the directions of this Court, i.e., as per the Fourth Pay Commission's recommendations. Since they were insisting upon payment of the wages, it is alleged, the services of five employees were terminated without giving any notice or giving any retrenchment compensation as enjoined by Section 25-F of the Act. Therefore, they sought reinstatement into service with full back wages and with continuity of service. The respondents, on the other hand. contended that the employees working in the canteen are not 'workmen' within the definition of Section 2(s) of the Act nor is the respondent an `industry' under Section 2(j). They are "treated as holding civil posts in the Central Government". They were paid monthly salaries devised by the Canteen Committee depending upon the increases in the cost of living etc. The provisions of Chapter VI-B of the Act are inapplicable to them. The Tribunal noted the findings as under:

> Prabhadevi Telephone Exchange employed about 4000 employees which is required under the provisions of Administrative Instructions to have one departmental canteen. In `A' type canteen, 19 employees are required per shift. It works from 5 a.m. to 12 midnight. In three shifts, there at the relevant time are 24 employees including the concerned five workmen. In view of a judgment of this Court, non-statutory canteen employees are entitled to the benefits of the recommendations of Third and Fourth Pay Commissions. The Director of Canteen accordingly directed the Department concerned to pay the canteen employees wages as per the recommendations of the Pay Commission. Departmental Canteen, it is contended by the management, is not an `industry' as per the Memorandum dated January 12, 1982 of the Director (Welfare), Indian Posts and Telegraphs Department.
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> Relying upon the judgment of this Court in Sub- Divisional Inspector of Posts Vaikkam & Ors. vs. Theyyam Joseph [(1996) 2 SCC 293], the Tribunal has held that departmental canteen is not an `industry'. However, on merits, it has held that termination of the services of the five employees is bad in law. Calling the decision in question, the above special leave petition has been directly filed under Article 136, contending that the ratio in Theyyam Joseph's case contrary to the judgment of this Court in Bangalore water-supply & Sewerage Board, etc. vs. R. Rajappa & Ors. [(1978) 3 SCR 207]. The judgment, therefore, in Joseph's case is not correct in law.

When its correctness was questioned in another case, notice was issued. It is, therefore, contended that the ratio of the Constitution Bench judgment of seven Judges in Bangalore Water Supply Case applies to the facts herein. The judgement in Josph's case, was rendered without reference to the former and hence the matter needs fresh examination. The question is whether the view taken is correct in law? This Court is aware of the decision in Bangalore Water Supply case in which this Court had held the test to determine whether an establishment is an `industry' within the meaning of the Act. Therein, the employees of the appellant Board were fined for misconduct and the fine was recovered from them. They filed an application under Section 33 C(2) of the Act? The question was whether the Tribunal has jurisdiction under Section 33-C(2) of the Act? The High Court had held it to be an industry and, therefore, the application was maintainable. On appeal, this Court laid down the tests as under:

"The term "analogous to the trade of business" could not cut down the scope of the term "industry". The said words can reasonably mean only activity which results in goods made and manufactured or service rendered which are capable of being converted into saleable ones. They must be capable of entering the word of "res commercium", although they may be kept out of the market for some reason. It is not the motive of an activity in making goods or running a service but the possibility of making them marketable if one who makes goods or renders service so desires, that should determine whether the activity lies within the domain or circle of industry. But even this may not be always a satisfactory test. By this test the type of services which are rendered purely for the satisfaction of spiritual or psychological urges of persons rendering those services would be excluded. Whenever an industrial dispute would arise between either employers and their workmen or between workmen and workmen, it should be considered an area within the sphere of "industry' but not otherwise. In other words, the nature of the activity will be determined by the conditions which give rise to the livelihood of the occurrence of such disputes and their actual occurrence in the sphere.

The term "sovereign should be reserved technically and more correctly for the sphere of ultimate decisions. Sovereignty operates on a sovereign place of its own. Only those services which are governed by separate rules and constitutional provisions such as Articles 310 and 311 should, strictly speaking be excluded from the sphere of industry by a necessary implication.

The special excludes the applicability of the general. Certain public utility services which are carried out by governmental agencies or Corporations are treated by the Act itself as within the sphere of industry. If express rules under other enactments govern the relationship between the State as an employer and its servants as employees, it may be contended on the strength of such provisions that a particular set of employees are outside the scope of the Industrial Disputes Act.

> The State today increasingly undertakes commercial functions and economic activities and services as part of its duties in a welfare state. Hence to artificially exclude state-run industry from the sphere of the Act, unless the statutory provisions expressly or by necessary implication have that effect, would not be correct. Section 2(j) of the Industrial Disputes Act (1947) which defines "industry" contains words of wide import, as wide as the Legislature could have possibly made them. The problem of what limitations could and should be reasonably read in interpreting the wide words used in Section 2(j) is far too policy oriented to be satisfactorily settled by judicial decisions. The Parliament must step in the legislate in a manner which will leave no doubt as to its intention.
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> That alone can afford a satisfactory solution to the question which has agitated and perplexed the judiciary at all levels.
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> Hospital Mazdoor Sabha was correctly decided in so far as it held that the JJ Group of hospitals was an industry but the same cannot be said in regard to the view of the Court that certain activities ought to be treated as falling outside the definition clause. There is no justification for excepting the categories of public utility activities undertaken by the Government in the exercise of its inalienable functions under the constitution, call it regal or sovereign or by any other name, from the definition of "industry".

If it be true hat one must have regard to the nature of the activity and not to who engages in it, it is beside the point to enquire whether the activity is undertaken by the State, and further, if so, whether it is undertaken in fulfilment of the State's constitutional obligations or in discharge of its constitutional functions. In fact, to concede the benefit of an exception to the State's activities which are in the nature of sovereign functions is really to have regard not s much to the nature of the activity as to the consideration who engages in that activity: for, sovereign function can only be discharged by the State and not by a private person. If the State's inalienable functions are excepted from the sweep of the definition contained in section 2(j), one shall, have unwittingly rejected the fundamental test that it is the nature of the activity which ought to determine whether the activity is an industry.

Indeed, in this respect, it should make no difference whether on the one hand, an activity is undertaken by a corporate body in the discharge of its statutory functions or, on the other. by the State itself in the exercise of its inalienable functions. If the water supply and sewerage schemes of fire fighting . establishments run by a Municipality can be industries, so ought to be the manufacture of coins and currency, arms and ammunition and the winning of oil and uranium. The fact that these latter kinds of activities are, or Can only be, undertaken by the State does not furnish any answer to the question whether these activities are industries. When undertaken by a private individual they are industries, therefore, when undertaken by the State, they are industries. The nature of the activity is the determining factor and that does not change according to who undertakes it. Items 8, 11, 12, 17 and 18 of the First Schedule read with Section, 2(n)(vi) of the Industrial Disputes Act render support to this view. These provisions which were described in

Hospital Mazdoor Sabha as 'very significant, at lease show that, conceivably, a Defence Establishment, Mint or a Security Press can be an industry even though these activities are, ought to be and can only be undertaken by the State in the discharge of its constitutional obligations or functions. The State does not trade when it prints a currency note or strikes a coin. And yet, considering the nature of the activity, it is engaged in an industry when it does so.

A systematic activity which is organised or arranged in a manner in which the trade or business is generally organised or arranged would be an industry despite the fact that it proceeds from charitable motives. It is in the nature of the activity that one has o consider and it is upon the application of that test that the State's inalienable functions fall within the definition of industry. The very same principles must yield the result that just as the consideration as to who conducts the activity, is irrelevant for determining whether the activity is an industry so is the fact that the activity is charitable in nature or is undertaken with a charitable motive. The status or capacity corporate or constitutional, of the employer would have, if at all, closer nexus, than his motive on the question whether the activity is an industry. The motive which propels the activity is yet another step removed and ex hypothesis can have no relevant on the question as to what is the nature of the activity. It is never true to say that the nature of the activities is charitable. The subjective motive force of an activity can be charity but for the purpose of deciding whether an activity is an industry one has to look at the process involved in the activity, objectively. The jural foundation of any attempt to except charitable enterprises from the scope of the definition can only be that such enterprises are not undertaken for profit. out then, that clearly, is to introduce the profit concept by a side wind, a concept which has been rejected consistently over the years. If any principle can be said to be settled law in this vexed field it is this ; the twin consideration of profit motive and capital investment it irrelevant for determining whether an activity is an industry. Therefore activities which are dominated by charitable motives either in the sense that the profit, which they yield are diverted to charitable purposes are not beyond the ; pale of the definition of section 2(j). It is much beside the point to inquire who is the employer as it to inquire, why is the activity undertaken and what the employer does with the profits, if any, By this test a Solicitor's establishment would be an industry. A Solicitor is undoubtedly does not carry on a trade or business when he acts for his client or advises him or pleads for him, If and when pleading is permissible to him. He pursues a profession which is variously and justifiably described as learned, liberal or noble. But it is difficult to infer from the language of the definition in section 2(j) that the Legislature could not have intended to bring in a liberal profession like that of an Attorney within the ambit of the definition of 'industry '.

In Hospital Mazdoor Sabha the Court while evolving a working principle stated that an industrial activity. generally involved, inter alia, the cooperation of the employer and the employees, That the production of goods or the rendering of material services to the community must be the direct and + proximate result of such cooperation is a further extension of that principle and it is broadly, by the application thereof that a Solicitors establishment is held not to attract the definition clause.

These refinements are, with respect not warranted by the words of the definition, apart from the consideration that in practice they make the application of the definition to Concrete Case;

dependent upon a factual assessment so highly subjective as to, lead to confusion and uncertainty in the understanding of the true legal position. Granting that the language of the definition is so wide that some limitation ought to be read into it, one must stop at a point beyond which the definition will skid into a domain too rarefied to be realistic. Whether the cooperation between the employer and the employee is the proximate cause of the ultimate product and bears direct with it is a test which is almost impossible of application with any degree of assurance or certitude. It will be as much true to say that the solicitor's Assistant, Managing Clerk, Librarian and the Typist do not directly contribute to the intellectual and product which is a creation of his personal professional skill, as that, without their active assistance and cooperation it will be impossible for him to function effectively.

The unhappy state of affairs in which the law is marooned will continue to baffle the skilled professional and his employees alike as also the Judge who has to perform the unenviable task of sitting in judgment over the directness of the cooperation between the employer and the employee, until such time as the legislature decides to manifest its intention by the use of clear and indubious language. Beside the fact that this Court has so held in National Union of Commercial Employees the legislature will find a plausible case for exempting the learned and liberal professions of Lawyers, Solicitors, Doctors, Engineers, Chartered Accountants and the like from the operation of industrial laws. But until that happens, in the present state of the law it difficult by judicial interpretation to create exemptions in favour of any particular class. The case of the clubs on the present definition is weaker still. The definition squarely covers them and there is no justification for amending the law so as to exclude them from the operation of the industrial laws. The fact that the running of clubs is not a calling of the club or its managing committee, that the club has no existence apart from its members that it exists for its members though occasionally strangers take the benefit of its services and that even after the admission of guests, the club remains a members' self-serving institution does not touch the core of the problem.

(1) `Industry' as defined in Sec.

2(j) and explained in Banerji's case has a wide import.

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1.(a)    Where    (i)    systematic
activity,   (ii)    organised    by
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cooperation 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.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(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 organisation is a trade or business it does not cease to be one because of philanthropy animating the undertaking.

II. 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 interference that all organised activity possessing the triple elements in I (supra), 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 take into the fold of 'industry' undertakings, calling and services, adventures' analogous to the carrying on of trade or business'. All features, other than the methodology of carrying on the activity viz. in organizing the cooperation between employer and ; employee, may be dissimilar. It does not, matter, if on the employment terms there is analogy.

III. 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 of 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) cooperatives, (v) research institutes (vi) charitable projects and (vii) other kindred adventures, if they fulfil the triple tests listed in (supra), cannot be exempted from the scope of section 2(j)

(b) A restricted category of professions, clubs, cooperatives and even gurukulas an 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 on asramites 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. IV. 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 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.
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> (b) Notwithstanding the previous clauses sovereign functions, strictly understood, (alone), qualify for exemption, not the welfare activities of economic adventures undertaken 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 sec. 2(j).
>
> (d) Constitutionally and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby."

It is not necessary to refer to the dissenting judgments Beg, C.J in his concurring judgment, at page 221, placitum E to G, has held thus:

> "I would also like to make a few observations about the so called "sovereign" functions which have been placed outside the field of industry. I do not feel happy about the use of the term "sovereign"

here. I think that the term `sovereign' should be reserved, technically and more correctly, for the sphere of ultimate decisions. Sovereignty operates on a sovereign plane of its own as I suggested in Keshavananda Bharati's case supported by a quotation from Ernest Barker's "Social and Political Theory". Again the term a "Regal", from which the term "sovereign" functions appears to be derived, seems to be a misfit in a Republic where the citizen shares the political sovereignty in which he has even a legal share, however small in as much as he exercises the right to vote. What is meant by the use of the term "sovereign", in relation to the activities of the State, is more accurately brought out by using the term "governmental" functions although there are difficulties here also in as much as the Government has entered largely now fields of industry. Therefore, only those services which are governed by separate rules and constitutional provisions, such as Article 310 and 311 should, strictly speaking, be excluded from the sphere of industry by necessary implication."

In State of Bombay & ors, vs. The Hospital Mazdoor sabha & ors. [(1960) 2 SCR 866], this Court had given wider interpretation to the word "industry", with a view to achieve the scope and object of the Act, so as to make the remedy available to the workmen. Similarly, in The Corporation of the city of Nagpur vs. Its Employees [(1960) 2 SCR 942] this Court had pointed out that the definition of the word `industry' is very comprehensive. It is in two parts. It is not necessary that an activity of the Corporation must share the common characteristics of an industry before it can come within the

statutory definition. The words of Section 2(14) of the City of Nagpur Corporation Act which is equivalent to Section 2(j) of the Act, are clear and unambiguous. The wide definition, however, cannot include the regal, primary and inalienable functions of the State, though statutorily delegated to a Corporation and the ambit of such functions cannot be extended so as to include the welfare activities of a modern State, and must be confined to legislative power, administration of law and judicial power. "The real test as to whether a service undertaken by a Corporation is an industry must be whether that service, if performed by an individual or a private person, would be an industry. Monetary consideration cannot be an essential characteristic of an industry in a modern State. It was, therefore, incorrect to say that only such activities as were analogous to trade or business could come within Section 2(14) of the Act". "When a service rendered by a Corporation as an industry, the employees of the departments connected with the service, whether financial, administrative or executive, would be entitled to the benefits of the Act".

In 1960's and 1970's, there was parallel stream of thinking being developed by this Court to engulf the service conditions of the employees of a Corporation either registered under the Companies Act or under the Societies Act or under a statute, vis-a-vis the Government employees. In Heavy Engineering Mazdoor Union vs. The State of Bihar & Ors. [(1969) 3 SCR 995], this Court held that the Government Company is distinct from Government. In Praga vs. Tools Corporation vs. C.V. Imanual [(1969) 3 SCR 773], the employees were held not entitled to availed the remedy under Article 226 of the Constitution. In Sukhdev Singh & Ors. vs. Bhagatram Sardar Singh Raghuvanshi & Anr. [(1975) 3 SCR 619], a break-through was effected by a Constitution Bench in considering whether the Oil and Natural Commission, the Industrial Financial Corporation or the Life Insurance Corporation is an `authority' within the meaning of Article 12 of the Constitution and whether the employees working in the Corporation are entitled to the protection of judicial review under Article 14. It was answered it favour of the employees. In separate but concurrent judgment, Mathew, J. laid the foundation demolishing the autonomous status and non-amenability to judicial review of the actions of corporate sector and held that when a Corporation was created by a statute, its rules or instructions partake the statutory character like a subordinate legislation. Therefore, they are to act consistently with the Rules or Regulations made under the Act or by the statutory authority.

The power of statutory authority is controlled and restricted by the statute which created r them and the rules and regulations framed thereunder. Any action of such bodies in excess of their power or in violation of restrictions placed on that power is ultra vires. Thus, the corporate veil given in Praga Tools case was torn apart and their actions were made amenable to judicial review. In Ajay Hasia etc. vs. Khalid Mujib Sehravardi & Ors. etc. [(1981) 2 SCR 79], another Constitution Bench had held that having regard to the Memorandum of Association and the Rules of the Society, the respondent-College was a State within the meaning of Article 12. The composition of the Society is dominated by the representatives appointed by the Central Government and the Governments of Jammu and Kashmir, Punjab, Rajasthan and Uttar Pradesh with the approval of the Central Government. Accordingly, it was held to be an instrumentality of the State. In R.D. Shetty vs. The International Airport Authority of India & Ors. [(1979) 1 SCR 1042] and U.P. Warehousing Corporation & Anr. vs. Narain Vajpayee [(1980) 3 SCC 459] this Court laid the test to determine as to when a Corporation can be said to be instrumentality or agency of the Government. The test of deep and permissive control was laid down thereunder. It was held that the statutory authorities are

amenable to writ jurisdiction being an instrumentality or an authority under the State within the meaning or Article 12 of the Constitution. It was further held that the Corporation may be an authority and, therefore, a State within the meaning of Article 12. Yet, it may not be elevated to the position of State for the purpose of Articles 309, 310 and 311 which find place in Part XIV. For the purpose of Part III it has separate jurisdictional entity, though it would not be so for the purpose of Part XIV or another provisions of the Constitution. In U.P. Warehousing corporation case, the respondent, on the basis of the complaints after preliminary enquiry, was charged with certain allegations and his explanation was sought and to indicate his evidence, if any. He had expressed his intention to cross-examine certain witnesses as also to examine some others in defence. Without taking any action on the respondent's request, the appellant passed an order dismissing him from service w.e.f. the date of his suspension. In the writ petition filed by him the High Court quashed the order and directed his reinstatement with full back-wages. This Court, on these facts, had held that "in cases where there is an element of public employment and service or support by statute or something in the nature of an office or a status, which is capable of protection, then irrespective of the terminology used, and even though in some inter parties aspects the relationship may be called that of master and servant, there may be essential procedural requirement to be observed on grounds of natural justice". The Warehousing Corporation was held to be an authority and the dismissal, without conducting an enquiry and without an opportunity to lead evidences for the proposed punishment given to the respondent, was bad in law. Therefore, the appeal was dismissed and the judgment of the High Court was upheld. Chinappa Reddy, J. in his concurring judgment had held that there is hardly any distinction, on the principle, between a person directly under the employment of the Government and a person under the. employment of an agency or instrumentality of the Government or a Corporation set up under a statute or incorporated but wholly owned by the Government. Therefore, there is no good reason, why, if Government is bound to observe the equality clauses of the Constitution in the matter of employment and in its dealings with the employees, the Corporations should not be equally bound. Some elements of public employment is all that is necessary. to take the employee beyond the reach of the rule which denies him access to a court to enforce a contract of employment and denies him the protection of Articles 14 and 16 of the Constitution. Rajasthan State Electricity Jaipur vs. Mohan Lal & Ors. [(1967) 3 SCR 377] is also a case of the Rajasthan State Electricity Board questioning whether it is an authority under Article 12 of the Constitution. It was held by a Constitution Bench that it is an authority under Article 12 or instrumentality of the State. In D.T.C. vs. D.T.C. Mazdoor Congress & Ors. [1991 Supp.(l) 600], the question arose whether D.T.C. is an instrumentality under the State and whether it is entitled to dismiss the employee by issuing one month notice or pay in lieu thereof in terms of Regulation 9 of the Regulations. A Constitution Bench, per majority had held that it is a State within the meaning of article 12 of the Constitution. It has no power to dismiss an employee with one month's notice or salary in lieu thereof, In Moti Ram Deka vs. General Manager, NEF [(1964) 5 SCC 683], another Constitution Bench had held that the service of an employee of the Railway establishment cannot be dispensed with except in accordance with the procedures established and unless the essential steps of procedural fairness are adhered to. Central Inland Water Transport Corporation Ltd, & Anr. vs. Brojonath Ganguli & Anr. [(1986) 3 SCR 156], a Bench of two Judges of this Court reiterated the same view giving extended interpretation and making available the constitutional remedy under Article 226 of the Constitution. In Air India Statutory Corporation etc. vs. United Labour Union & Ors. etc.[1996 (9) SCALE 70], the Air India statutory Corporation, on

abolition of the contract labour, had not absorbed employees working on contract labour basis after contract labour system was abolished. They filed the writ petition in the High Court. The High Court gave the directions to absorb them on regular basis. On appeal, this Court considered the entire case law and laid down the following principles in para 26 thus:

> "(1) The constitution of the Corporation or instrumentality or agency or Corporation aggregate or Corporation sole is not of sole material relevance to decide whether it is by or under the control of the appropriate Government under the Act.
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> (2) If it is a statutory Corporation, it is an instrumentality or agency of the State. If it is a company owned wholly or partially by a share capital. floated from public exchequer, it gives indicia that it is controlled by or under the authority of the appropriate Government.
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> (3) In commercial activities carried on by a Corporation established by or under the control of the appropriate Government having protection under Articles 14 and 19(2), it is an instrumentality or agency of the State.
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> (4) The State is a service Corporation. It acts through its instrumentalities, agencies or persons - natural or judicial. (5) The governing power, wherever located, must be subject to the fundamental constitutional limitations and abide by the principles laid in the Directive Principles.
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> (6) The framework of service regulations made in the appropriate rules of regulations should be consistent with and subject to the same public law principles and limitations.
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> (7) Though the instrumentality, agency or person conducts commercial activities according to business principles and are separately accountable under their appropriate bye-laws or Memorandum of Association, they become the arm of the Government.
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> (8) The existence of deep and pervasive State control depends upon the facts and circumstances in a given situation and circumstances in a given situation and in the altered situation it is not the sole criterion to decide whether the agency or instrumentality or persons is, by or under the control of the appropriate Government.
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> (9) Functions of an instrumentality, agency or persons are of public importance following public interest element.
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> (10) The instrumentality, agency or person must have an element of authority or ability to effect the relations with its employees or public by virtue of power vested in it by law, memorandum of association or bye-laws or articles of association.

(11) The instrumentality, agency or person renders an element of public service and is accountable to health and strength of the workers, men and women, adequate means of livelihood, the security for payment of living wages, reasonable conditions of work, decent standard of life and opportunity to enjoy full leisure and social and cultural activities to the workmen.

(12) Every action of the public authority, agency or instrumentality or the person acting in public interest or any act that gives rise to public element should be guided by public interest in exercise of public power or action hedged with public element and is open to challenge.

It must meet the test of reasonableness, fairness and justness.

(13) If the exercise of the power is arbitrary, unjust and unfair, the public authority, instrumentality, agency or the person acting in public interest, though in the field of private law, is not free to prescribe any unconstitutional conditions or limitations in their actions.

It was directed that since the workman were employed by the contractor, on abolition of the contract labour system, the appellant-Corporation being an instrumentality even in the private field of contract, was bound by the essential principles justice, equity and fair procedure and equality. In Bangalore Water Supply Board case, the Board was held to be an `industry and the action was amenable to adjudication under the Contract Labour (Regulation & Abolition) Act.

It is, therefore clear that there have been two streams of thinking simultaneously in the process of development to give protection to the employees of the Corporation. Its actions are controlled as an instrumentality of the State and the rules are made amenable to judicial review. Where there exists no statutory or analogous rules/instructions, the provisions of the Act get attracted. The employees are entitle to avail constitutional remedy under Article 226 or 32 or 136, as the case may be. The remedy of judicial review to every citizen or every person has expressly been provided in the Constitution. It is a fundamental right of every citizen. In the absence of statutory/administrative instruction in operation, the remedy of reference under Section 10 of the Act is available. Therefore, two streams, namely, remedy under the Act by way of reference and remedy of judicial redressal by way of proceedings under Article 226 or a petition filed before the Administrative Tribunal to the aggrieved persons are co-existing. If the doctrine laid in Bangalore Water Supply Board case is strictly applied, the consequence is catastrophic and would give a carte blanche power with laissez fair legitimacy which was burried fathom deep under the lethal blow of Article 14 of the Constitution which assures to every person just, fair and reasonable procedure before terminating the service of an employee. Instead, it gives the management/employer the power to dismiss the employee/workman with one month's notice or pay in lieu thereof, and/or payment of retrenchment compensation under the Act. The security of tenure would be in great jeopardy. The employee would be at the beck and call of the employer always keeping his order of employment in a grave uncertainty and in a fluid state like demorcus's sword hangs over the neck. On the other hand if the interpretation of providing efficacious remedy under Article 226 gives protection to the workmen/employee the speedy remedy under Article 226/Section 19 of the Administrative Tribunal

Act. They would protect the employee/workman from arbitrary action of the employer subserving the constitutional scheme and philosophy. The Court would, therefore, strike a balance between the competing rights of the individual and the state/agency or instrumentality and decide the validity of action taken by the Management. Necessarily, if the service conditions stand attracted, all the conditions laid therein would become applicable to the employees with a fixity of tenure and guarantee of service, subject to disciplinary action. His removal should be in accordance with the just and fair procedure envisaged under the Rules or application of the principles of natural justice, as the case may be, in which event the security of the tenure of the employee is assured and the whim and fancy and vagory of the employer would be detered and if unfair and unjust action is found established it would be declared as an arbitrary, unjust or unfair procedure. On the other hand, if the finding is that there exist no statutory rules or certified standing orders exist or they are not either made or are inapplicable, the remedy of reference under section 10 of the Act would always be available and availed of as it is an industry and indicia laid in Bangalore Water Supply Board case gets attracted.

From this perspective, this Court had approached the problem in T. Joseph's case. T Joseph's case was a case relating to the departmental employee whose services was dispensed with. Considering the rules in operation in that behalf, it was held that the telephone department is not an industry. The appointment orders were given under the rules. In that behalf, it was held that India is a Sovereign, Socialist, Secular Democratic Republic. It has to establish an egalitarian social order under the rule of law. The welfare measures partake the character of sovereign functions and the traditional duty to maintain law and order is no longer the concept of the State, Directive Principles of the State Policy enjoin the State to undertake diverse duties envisaged under Part IV of the Constitution. One of the duties of the State is to provide tale-communication services to the general public an amenity; so, it is an essential part of the sovereign functions of the State as a welfare States In Physical Research Laboratory vs. K.G. Sharma [CA No. 2663/97] decided on April 8, 1997, the question was whether the appellant who conducted research in a scientific laboratory was a 'workman' and the institution an `industry', Since the service conditions regulate conditions of employment, the Tribunal was devoid of jurisdiction to entertain the application under the Act for deciding the dispute. following the judgment in T. Joseph's case and distinguishing a judgment of three Judge bench, it was held that research institute was a State within the meaning of Article 12. It is not an industry attracting the provisions of the Act. So, in Chief Conservator of Forests & Anr. vs. Jagannath Maruti Kandhara [(1996) 2 SCC 293], this Court referred with approval the Bangalore Water Supply Board case. In K.G. Sharma's case, the industrial Tribunal had observed that the Physical Research Laboratory is an industry but this Court reversed lt. The Telecommunication Department is not an industry and the Rules governing the conditions of service of the employees stand attracted and there by the remedy under Article 226 would be available. To that area, the Act does not stand attracted. The respondents admit that the dismissed workmen who were holding civil post, by necessary implication, were excluded as workmen under Section 2(s). Even though the activities of the Corporation partake the character of a private enterprise, since the workmen engage themselves in rendering services, It is not an industry. If there exists no statutory rules binding standing orders, necessarily, the reference under Section 10(1) would be valid and the Tribunal has jurisdiction to go into or the employee may avail of judicial review or common law review.

On an overall view, we hold that the employees working in the statutory canteen, in view of the admission made in the counter-affidavit that they are holding civil posts and are being paid monthly salary and are employees, the necessary conclusion would be that the Tribunal has no jurisdiction to adjudicate the dispute on a reference under Section 10(1) of the Act. On the other hand, the remedy to approach the constitutional court under Article 226 is available. Equally, the remedy under Section 19 of the Administrative Tribunal Act is available. But, generally, the practice which has grown is to direct the citizen to avail, in the first instance, the remedy under Article 226 or under Section 19 of the Administrative Tribunal Act and then avail the right under Article 136 of the Constitution by special leave to this court etc. Thus, in view of the admission made by the respondents in their counter-affidavit that the workmen of the appellant-Association are holding civil posts and are being paid monthly wages and benefits and are considered to be employees, the jurisdiction of the Industrial Tribunal stands excluded. It is open to the aggrieved party to approach appropriate authority in accordance with law. In that view, the finding of the Tribunal in the impugned judgment is legal and warrants no interference. It is open to the respondents to avail of such remedy as is available to a regular employee including the right to approach the Central Administrative Tribunal or the High Court or this Court thereafter for redressal of legal injury.

The Special Leave Petition is accordingly dismissed.