Dr. Devendra M. Surti vs State Of Gujarat on 2 May, 1968

Equivalent citations: 1969 AIR 63, 1969 SCR (1) 235, AIR 1969 SUPREME COURT 63, 1969 LAB. I. C. 245, (1968) 2 SCWR 519, 1968 KER L J 949, (1969) 2 LAB L J 116, 1969 MAH L J 391, 1969 S C D 219, 1969-1 S C J 252, 34 F J R 376, 10 GUJ L R 156, 1969 MADLJ(CRI) 310, 17 FAC L R 370, 71 BOM L R 93

Author: V. Ramaswami

Bench: V. Ramaswami, C.A. Vaidyialingam

PETITIONER:
DR. DEVENDRA M. SURTI

Vs.

RESPONDENT:
STATE OF GUJARAT

DATE OF JUDGMENT:
02/05/1968

BENCH:
RAMASWAMI, V.
BENCH:
RAMASWAMI, V.
VAIDYIALINGAM, C.A.

CITATION:
1969 AIR 63 1969 SCR (1) 235

ACT:
Bombay Shops and Establishments. Act, 79 of 1948, s. 2(4) Rule, 23(1)-Doctor's dispensary whether a commercial establishment as defined in s. 2(4)-Non-maintenance of register of employees under r. 23(1)whether an offence.

HEADNOTE:
The appellant, a medical practitioner who also maintained a dispensary was prosecuted for non-maintenance of a register of employees as required by r. 23(1) of the rules made under the Bombay Shops and Establishments Act, 1948. He contended that he could not be prosecuted because his dispensary was not a 'commercial establishment' as defined in s. 2(4) of the Act. He was acquitted by the trial magistrate but the High Court, on appeal by the State convicted him. In appeal

by special leave to this Court,
HELD : Section 2(4) has used words of very wide import and' grammatically it may even include the consulting room where a doctor examines his patients with the help of a solitary nurse or attendant. But the language of s. 2(4) must be construed on the principle noscitur a sociis. i.e. when two or more words susceptible of analogous meaning are coupled together the words take their colour from each other and the more general are restricted to 'a sense analogous to less general. [240 A--C]
The words 'commercial establishment' and 'profession' in s. 2(4) are used along with the words 'business 'and trade' and must therefore be restricted to activity analogous to business or trade. Professional activity cannot be treated as within the definition of s. 2(4) unless it is organised as trade and business are organised i.e. the activity as 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 such an activity generally involves cooperation of the employer and the employees. [244 C-E]
Tested in the light of these principles the appellant did not fall within. the purview of the Act and his conviction was illegal. [244 E-F]
The National Union of Commercial Employees, and Anr. v. M. R. Mehr, Industrial Tribunal, Bombay, [1962] Supp. 3 S.C.R. 157, relied On.
Reed v. Ingham, 3 E-B 889, Scales v. Pickering. (1828) 4 Bing. 448, 452, 453, McKay v. Rutherfurd, 6 Moore P.C. 425, Commissioners of Inland Revenue v. Maxse, [1919] 1 K.B. 647, 657 and William Esplen, Son, and Swainston Ld. v. Inland Revenue Commissioners, [1919] 2 K.B. 73 1, referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 102 of 1966.

Appeal from the judgment and order dated February 14, 1966 of the Gujarat High Court in Criminal Appeal No. 208 of' 1964.

5. Parliament was aware of the fact that employees in establishments other than those to which, the Act applies were getting bonus under adjudication provided by the Industrial Disputes Act and other similar Acts. If it intended to deprive them of such bonus surely it would have expressed so in the Act;

6. Sec. 39 in clear terms saves the right to claim bonus under the Industrial Disputes Act or any corresponding law by providing that the provisions of this Act shall be in addition to and not in derogation of the provisions of those Acts.

It is true that the preamble states that the Act is to provide for payment of bonus to persons employed in certain establishments and sec. 1(3) provides that the Act is to apply, save as otherwise provided therein, to factories and every other establishments in which 20 or more persons are employed. Sub-sec. (4) of sec. 1 also provides that the Act is to have effect in relation to such factories and establishments from the- accounting year commencing on any day in 1964 and every subsequent accounting year. But these provisions do not, for that reason, necessarily mean that the Act was not intended to be a comprehensive and exhaustive law dealing with the entire subject of bonus and the persons to whom it should apply. Even where an Act deals comprehensively with a particular subject-matter, the Legislature can surely provide that it shall apply to particular persons or groups of persons or to specified institutions only. Therefore, the fact that the preamble states that the Act shall apply to certain establishments does not necessarily mean that it was not intended to be a comprehensive provision dealing with the subject-matter of bonus. While dealing with the subject-matter of bonus the Legislature can lay down as a matter of policy that it will exclude from its application certain types of establishments and also provide for exemption of certain other types of establishments even though such establishments would otherwise fall within the scope of the Act. The exclusion of establishments where less than 20 persons are employed in sec. 1(3) therefore is not a criterion suggesting that Parliament has not dealt with the subject-matter of bonus comprehensively in the Act.

As already seen, there was until the enactment of this Act no statute under which payment of bonus was a statutory obligation on the part of ,in employer or a statutory right therefore of an employee. Under the Industrial Disputes Act, 1947 and other corresponding Acts, workmen of industrial establishments as defined therein could raise an industrial dispute and demand by way of bonus a proportionate share in profits and Industrial Tribunals could under those Acts adjudicate such disputes and oblige the employers to pay bonus on the principle that both capital and S. T. Desai, Arun H. Mehta and I. N. Shroff, for the appellant.

R. H. Dhebar and M. S. K. Sastri, for the respondent. The Judgment of the Court was delivered by Ramaswami, J.-The question involved in this appeal is as to whether a Doctor's dispensary is, a "Commercial Establish- ment" within the meaning of the Bombay Shops and Establish- ments Act, 1948 (Bombay Act LXXIX of 1948), hereinafter referred to as the 'Act'.

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 Pale visited the dispensary on Juno 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 -tinder Rule 23(1) of the Rules framed under the Art. 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 s. 52(e) of the Act read with s. 62 of the Act and r. 23(1) of the Rules. The ease 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 got therefore apply to his dispensary and the appellant bad not committed any offence. The City Magistrate (First Court), (Munjipal), 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 s. 52(e) read with s. 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. This appeal is brought by certificate from the judgment of the High Court.

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 establishment". Section 2(4) ,of the Act defined "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 s. 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 em-

ployer'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" an[] "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 It shall not apply to the establishments, employees and 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 S. 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 and commercial establishment. Sections IO and II 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 of the daily and weekly hours of work of the employees in shops and commercial establishments. Section 15 provides for rest interval, and S. 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, s. 33 provides that no young person or women 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. Ch. 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 estab- lishments or to any class of employees to which the Act applies. Similarly, s. 38A 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 cl. (e) of that section provides for the penalty if the employer contravenes the provisions of s. 62 by not maintaining the prescribed register. Section 62 provides for maintenance of registers and records and display of notices as may be prescribed by Rules. Section 63 deals with wages for overtime work.

On behalf of the appellant Mr. Mehta put forward the argu- ment that under s. 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 s. 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 s. 2(4) of the Act. In our opinion, the argument addressed on behalf of the appellant is well-founded and must prevail. Under s. 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", s. 2(25) a "Restaurant or eating house" and s. 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 s. 2(8) of the Act. It is, true:

> that s. 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 s. 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 to-ether 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.
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> "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 broiderthan the maximum Ejusdein Generis."

(Words and Phrases. Vol. XIV, p. 207). For instance, in Reed v. Ingham(1) it was upon the principle of the maxin nosscitur 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(-) 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 contend 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 s. 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 s. 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-McKav v. Rutherfurd(3), Lord Camp-bell gave a useful definition : "Commerce is that activity where a capital is laid out on any work 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 (1) 3 E. & B. 889. (2) (1828)4Sup.448,45.453. (3) 6 M-c P. C. 425.

or commerce but it cannot be taken to be wholly valid for the purpose of construing industrial legislation in a modem 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 s. 2(4) of the Act. In our opinion, the correct test of finding whether a professional activity falls within s. 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 s. 2(4) of the Act. In Commissioner's of Inland Revenue v. Maxse(1), 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 or 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. IL 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 Commissioner's(2) where Rowlatt J. observed as follows :

> "..... but :in my opinion the company is not carry in,-- on the profession of naval 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 who m it is carried on, and that can only be an individual."

(1) [1919] 1 K.B. 647, 657.

(2) [1919]2K.B731 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 appel- lant cannot fall within the ambit of S. 2 (4) of the Act. In The National Union of Commercial Employees and another v. M. R. Meher, Industrial Tribunal, Bombay(1) it was held by this Court that the work of solicitors is not an industry within the meaning of s. 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 page 163 of ,the Report :

> "When in the Hospital case ((1960) 2 S.C.R.
>
> 866) 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 co-operation 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 cooperate 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, cooperation between capital and labour or between the employer and his employees must be direct and must be essential."

Again, at page 166 of the Report Gajendragadkar, J. proceeds 'to state

" Does a solicitor's firm satisfy that test ? Serficially considered, the solicitor's firm is no doubt (1) [1962](3)Supp.S.C.R.157.

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 pros- perous 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 solicitor's 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 cooperation between the employer and the employees which is relevant to the -purpose. There can be no doubt that for carrying on the work of a solicitor effiecently, 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 account,; 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 cooperation between the solicitor and his employees, but that cooperation 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 s. 2 (J). The very concent 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 cooperation 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(1)."

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 S. 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 S. 52(e) of the Act read with S. 62 of the Act and r. 23(1) of the Rules is illegal.

For these reasons we allow this appeal and set aside the judgment of the Bombay High Court dated February 14, 1966 convicting and sentencing, the appellant. G.C. Appeal allowed.

L10Sup.C.1/68 --2,500- 20-8-69Sec.VI- GIPF.