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**‘INDUSTRY,’ ‘INDUSTRIAL DISPUTE,’ AND
‘WORKMAN’: CONCEPTUAL FRAMEWORK
AND JUDICIAL ACTIVISM**

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I Concept of ‘industry’ from *Banerji* to *Jai Bir Singh*

Introductory

THE INDUSTRIAL Disputes Act, 1947 (ID Act) was passed to pre-empt industrial unrest, ensure resolution of industrial disputes in a peaceful manner and protect workers against exploitation and victimization by the employers. The Act contemplates realistic and effective negotiations with the help of conciliation machinery envisaged in the Act. If the conciliation machinery fails to bring about an amicable settlement of dispute between the parties, labour courts and industrial tribunals set up under the Act for adjudication of the industrial disputes are expected expeditiously to dispose of the references made to them with a view to doing justice to both the employer and workman in tune with the overall concept of social justice.

The Act has given the words ‘industry’ and ‘industrial dispute’ a comprehensive import to include varied forms of industrial activities so that disputes in the industry are dealt with in a manner more in tune with conciliation and settlement than determination of the respective rights and liabilities according to strict legal procedure and principles.¹ The conflicts between capital and labour are now required to be determined more from the standpoint of status than of contract.²

Defining ‘industry’ in its widest scope and ‘sovereign functions’ within a limited orbit, industrial adjudication has greatly been influenced by the aforementioned precepts. An enterprise cannot, therefore, be excluded from the ambit of the Act merely because of the individual predilection of a judge.

‘Industry’: Judicial interpretation

The words ‘employer’, ‘industry’, ‘industrial dispute’ and ‘workman’ in section 2(g), (j), (k) and (s) of the ID Act are statutory terms, wider in

1. See *D.N. Banerji v. P.R. Mukherji*, AIR 1953 SC 58 at 60.

2. *Ibid.*

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import than their ordinary meaning. Merely because the employer is a government department or a local body, etc., an enterprise does not cease to be an 'industry'. This is in view of the fact that expansion of the governmental or municipal activities in the fields of productive industry is a feature of developing welfare states with the result that production activities or service sector which were hitherto in the realm of private enterprise are now being undertaken by the state. Ideologically, it ensures overall welfare of the society with least exploitation of the workmen and also makes the production of goods and material services cheaper by eliminating profit motive. Resultantly, what the common man does not consider as 'industry' need not necessarily stand excluded from the statutory concept.

It was not surprising that immediately after the Act came into force, the question whether a dispute between the employees on the one side and the government department or a local body or a statutory board, society or a like entity, in connection with the discharge of their normal activities on the other, is to be regarded as an 'industrial dispute' engaged the attention of the labour courts and tribunals. It was but natural that, after the Supreme Court declared³ that it had jurisdiction to entertain special leave to appeal under article 136 of the Constitution of India against the awards of labour courts and tribunals constituted under the ID Act, these came to be challenged directly before the Supreme Court. In fact, the managements, as a strategy to prolong the adjudication on merits, would challenge before the high courts and the Supreme Court even the findings of labour courts and industrial tribunals on preliminary issues as well. The Supreme Court in a number of cases deprecated the 'unhealthy and injudicious' tactics of the management and held that the industrial adjudicators should decide the preliminary issue along with reference on merit.⁴

A study of the judgments of the Supreme Court from *Banerji*⁵ to *Jai Bir Singh*⁶ brings to the fore a variety of cases where the court had to decide on the question of ambit of 'industry' under the Act. The activities which engaged the attention of the court on the issue of 'industry' were those of municipalities, local bodies, government-run hospitals, educational institutions, liberal professions, clubs, state and central government departments, etc.

3. *Bharat Bank Ltd. v. Employees of Bharat Bank Ltd.*, AIR 1950 SC 188.

4. *National Council for Cement and Building Materials v. State of Haryana*, (1996) 3 SCC 206; also see *Cooper Engineering Ltd. v. P.P. Mundhe*, (1975) 2 SCC 661, 667; *S.K. Verma v. Mahesh Chandra*, (1983) 4 SCC 214; *D.P. Maheshwari v. Delhi Admn.* (1983) 4 SCC 293; *Workmen v. Hindustan Lever Ltd.*, (1984) 4 SCC 392, 394.

5. *Supra* note 1.

6. *State of U.P. v. Jai Bir Singh* (2005) 5 SCC 1.



The definition of the term 'industry' in section 2(j) is both exhaustive and inclusive. It is in two parts. The first part lays down that industry "means any business, trade, undertaking, manufacture or calling of employers" and the second part specifies that it "includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen." Thus, while the first part defines it from standpoint of the employer, the second part visualises it from that of the employees. Discussing both these parts, the Supreme Court, in *Madras Gymkhana Club Employees' Union v. Madras Gymkhana Club*,⁷ attempted to keep the two notions concerning employers and employees apart and expressed the view that denotation of the term 'industry' is to be found in the first part relating to the employers and the connotation of the term is intended to include the second part relating to workmen. Later on, the court in *Safdarjung Hospital v. Kuldeep Singh*⁸ held that the definition had to be read as a whole and when so read it denoted a collective enterprise in which employers and employees were associated. It did not exist by the employers or by the employees alone. It existed only when there was a relationship between employers and employees, the former engaged in 'business, trade, undertaking, manufacture or calling of employers' and the latter engaged in 'calling, service, employment, handicraft or industrial occupation or avocation'.

Historically, the definition of the term 'industry' under the Act has its beginning in Australia,⁹ even though the "bulk of the *corpus juris* is a replica of English law." It is not surprising that the Indian courts have been influenced by Australian decisions¹⁰ in interpreting the contours of industry, although in *Bangalore Water Supply & Sewerage Board v. A. Rajappa*,¹¹

7. AIR 1968 SC 554.

8. (1970) 1 SCC 735.

9. The definition is based on the Australian statute i.e. section 4 of Commonwealth Conciliation and Arbitration Act, 1904 which defines 'industry' as:

"(i) Any business, trade, manufacture, undertaking or calling of employees on land or water.

(ii) Any calling, service, employment, handicraft or industrial occupation or avocation of employees on land or water; and

(iii) A branch of any industry and a group of industries."

10. E.g. *Federated Engine-Drivers & Firemen's Association of Australasia v. Broken Hill Proprietary Co. Ltd.*, (1912-13) 16 C.L.R. 245 (HCA); *Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation* (1918-19) 26 C.L.R. 508 (HCA); *Federated State School Teachers' Association of Australia v. State of Victoria*, (1928-29) 41 C.L.R. 569 (HCA), cited with approval by the Supreme Court in *Corporation of City of Nagpur v. Its Employees*, AIR 1960 SC 675, per Subba Rao J.; *State of Bombay v. Hospital Mazdoor Sabha*, AIR 1960 SC 610, per Gajendragadkar, J.; *Ahmedabad Textile Industry's Research Association v. State of Bombay*, AIR 1961 SC 484, per Wanchoo J.

11. (1978) 2 SCC 213.



the court emphasised that statutory construction of the definition of 'industry' must be homespun even if hospitable to alien thinking. It is pertinent to state that most of the decisions in India have centered around the meaning of the word 'undertaking' used in the definition. According to the *Webster's Dictionary*, 'undertaking' means "anything undertaken or any business, work or project which one engages in or attempts as an enterprise." The word 'undertaking' in the context of the definition has been understood to mean any business or any work or project which one engages in or attempts as an enterprise *analogous to business or trade*.

The earliest case on the construction of the definition of 'industry' decided by the Supreme Court was *Banerji*.¹² In this case, the court held that though municipal activity cannot be truly regarded as 'business' or 'trade', yet the definition in the ID Act includes also disputes that might arise between municipalities and their employees in branches of work that can be said to be *analogous* to carrying out of a 'trade' or 'business', though they are carried on with the aid of taxation and no immediate material gain by way of profits is envisaged. The court further held that neither profit motive nor investment of capital is a *sine qua non* or necessary element in the modern conception of industry. Accordingly, the court held that a dispute espoused by the workers' union regarding non-employment of a head-clerk and a sanitary-inspector in the municipality was an 'industrial dispute'. However, the court did not elaborate as to what *analogous* to carrying out 'trade' and 'business' meant.

In *Baroda Borough Municipality v. Its Workmen*,¹³ relying on *Banerji*, the court reiterated that the branches of work that could be regarded as '*analogous to trade or business*' would fall within the meaning of 'industry' in section 2(j) of the ID Act. Yet another case pertaining to the activities of the municipal corporation was *Corporation of City of Nagpur v. Its Employees*,¹⁴ where the court had to consider whether a municipal corporation would be an 'industry' within the meaning of section 2(14) of the C.P. and Berar Industrial Disputes and Settlement Act, 1947. Under that Act, unlike the definition of 'industry' in the ID Act, the word 'undertaking' in the definition was qualified by the words 'manufacturing' or 'mining'. Therefore, the court could not press the expression 'undertaking' into service. The court in this case, however, brought municipal activity within the ambit of the word 'business' or 'trade' and a distinction was drawn between regal and municipal functions of the municipal bodies. In coming to the conclusion that municipal functions were '*analogous to trade or business*', the court observed that the activity was organised and

12. *Supra* note 1.

13. AIR 1957 SC 110.

14. AIR 1960 SC 675 decided on February 10, 1960 by the same bench which decided *Hospital Mazdoor Sabha*, see *infra* note 15.



service was rendered and they were not regal. In discerning the import of the words '*analogous to trade or business*', the court took the view that the emphasis was more on "the nature of the organised activity implicit in trade or business than to equate the other activities with trade or business." Filling the gaps in *Banerji*, the court attempted an authoritative elucidation of the fluid phrase '*analogous to trade and business*' in *State of Bombay v. Hospital Mazdoor Sabha*,¹⁵ and *Corporation of Nagpur*.¹⁶ It is these twin decisions which spread the canvas wide and illumine the expression '*analogous to trade or business*'.

In *Hospital Mazdoor Sabha*, the court noted that not only the words used in the definition were very wide in their import, but even its latter part purported to provide an inclusive definition. It pointed out that if all the words used were given their widest meaning, all services and all callings would come within the purview of the definition; even services rendered by a servant purely in a personal or domestic matter, or even in a casual way, would fall within the definition and that could not have been the intention of the legislature. Hence, domestic, personal and casual services were excluded from the definition. Although the court rejected the application of the principle *noscitur a sociis* in interpreting the words of wide amplitude used in the definition of 'industry', in reality it applied this principle to constitute the rationale to the exceptions carved out by it. The court held that activities of the government which could be properly described as 'regal' or 'sovereign' must be excluded from the definition as these were functions which could and must be undertaken for governance by a constitutional government and which no private citizen could undertake. The court, however, was clear that sovereign functions could not be confused with welfare functions of the state. The court laid down that the true test to distinguish regal or sovereign functions from welfare functions was whether the activity in question could be undertaken by private individuals. Thereafter, the court laid down working principles explaining the attributes of the phrase '*analogous to trade or business*' the presence of which made an activity an undertaking within section 2(j). As a working principle, it may be stated that an activity systematically or habitually undertaken for the production or distribution of goods or for the rendering of material services to the community at large or a part of such community with the help of employees is an undertaking. Such an activity generally involves the co-operation of the employer and the employees; and its object is the satisfaction of material human needs. It must be organised or arranged in a manner in which trade or business is generally organised or arranged. It must not be casual nor for oneself or for pleasure. Thus, the manner in

15. AIR 1960 SC 610.

16. *Supra* note 14.



which the activity in question is organised or arranged, the condition of the co-operation between employer and the employee necessary for its success, and its object to render material service to the community can be regarded as some of the features which are distinctive of activities to which section 2(j) applies.

Applying the aforesaid test, which later on came to be described as 'triple tests', to the case at hand which related to a group of hospitals run by the state, the court held that there was no doubt that if a hospital was run by private citizens for profit or no profit it would nevertheless be an 'undertaking' within the meaning of section 2(j) and merely because such activity was undertaken by government it could not take the activity out of the definition of 'industry'. The fact that the state did not conduct this activity for profit made no material difference. Likewise, the doctrine of *quid pro quo* had no application for determining the question as to whether an activity was 'industry' or not. The court held that it had no difficulty in holding that the state was carrying on an 'undertaking' within the meaning of the Act when it ran the group of hospitals.

In the next case, *Ahmedabad Textile Industry's Research Association v. State of Bombay*,¹⁷ the issue was whether an association for research, setup and maintained by the textile industry and employing technical and other staff, was an 'industry'. Applying the test laid down in *Hospital Mazdoor Sabha*, the court held that the activity of the association was an 'industry' because it was providing material services to a part of the community, carried on with the help of the employees, organised in a manner similar to a 'trade' or 'business' and there was cooperation between the employers and the employees. A fresh test was added that the partnership should only be an association between employers and employees and the employees may have no rights in the results of their labour or in the nature of the business or trade. This case was followed by the *Solicitor's case*,¹⁸ which satisfied the tests so far enumerated. However, a new test was added that the association of labour must be direct and essential. On this ground, it was held that the service of a solicitor was individual depending upon his personal qualification and ability to which employees did not contribute. The contribution of the employees in the case of a solicitor's firm, it was held, had no direct or essential nexus with the advice or service rendered by the solicitor. Resultantly, the liberal professions were excluded from the scope of the definition. Thus, the court started adopting different approaches depending on the activity it was dealing with as is evident from subsequent cases that came before it.

17. AIR 1961 SC 484.

18. *National Union of Commercial Employees v. M.R. Meher*, AIR 1962 SC 1080 (*Solicitor's case*).



In *Hari Nagar Cane Farm v. State of Bihar*,¹⁹ where a sugar factory purchased a cane farm and worked it as a department for agricultural operations of the firm, it was held to be 'industry' on the facts of the case, but it was made clear by the court that agriculture could not under all circumstances be called an 'industry'. In *University of Delhi v. Ram Nath*,²⁰ the court narrowed the concept of service. It held that educational institutions would not fall within the meaning of 'industry' because their aim was education and the teachers' profession was not to be equated with industrial workers. The work in the university was primarily carried on with the help of teachers who were not covered by the definition of "workman" and, therefore, educational institutions like the University of Delhi were not 'industry'.

The concept of 'industry' was thus getting blurred by the innovation of new tests in new fact-situations and, therefore, a fresh look into the matter was attempted in *Gymkhana Club*.²¹ The court revisited the earlier decisions and in the process commented on each of them without bringing any material objectivity or uniformity in the principles laid down earlier. The court in this case was faced with the question whether the activities of the Madras Gymkhana Club which was a members' club fell within the definition of 'industry'. The court, after laying down the principle as to what is 'industry', held that, though the activity of the club might be falling in the second part of the definition inasmuch as the work of the club was conducted with the aid of the employees who followed a 'calling' or an 'avocation', it could not be described as 'trade', 'business', 'manufacture' or 'calling' of the members of the managing committee of the club. It was also held that the activity of the club was not an 'undertaking' 'analogous to trade or business' as this element was completely missing in a members' club. This non-proprietary club, therefore, was held to be not 'industry'. The tests laid down in *Gymkhana Club* were followed by the court in *Cricket Club of India v. Bombay Labour Union*.²²

A sharp bend in the development of law came when *Safdarjung*²³ was decided. Hidayatullah, CJ, after considering the facts of the cases before the court, held that hospitals were not industries. The following abbreviated reasons were given with regard to each institution:²⁴

It is obvious that Safdarjung Hospital is not embarked on an economic activity which can be said to be analogous to trade or business. There is no evidence that it is more than a place where

19. AIR 1964 SC 903.

20. AIR 1963 SC 1873.

21. *Supra* note 7.

22. AIR 1969 SC 276.

23. *Supra* note 8.

24. *Id.* at 747-748



persons can get treated. This is a part of the functions of Government and the hospital is run as a Department of Government. It cannot, therefore, be said to be an industry....

The Tuberculosis Hospital is not an independent institution. It is a part of the Tuberculosis Association of India. The hospital is wholly charitable and is a research institute. The dominant purpose of the hospital is research and training, but as research and training cannot be given without beds in a hospital, the hospital is run. Treatment is thus a part of research and training. In these circumstances the Tuberculosis Hospital cannot be described as industry.

The objects of the Kurji Holy Family Hospital are entirely charitable. It carries on work of training, research and treatment. Its income is mostly from donations and distribution of surplus as profit is prohibited. It is, therefore, clear that it is not an industry as laid down in the Act.

The reasons given for excluding the three institutions are hardly convincing and could not be termed as correct exposition of law. *Safdarjung* accentuated the confused position resulting from obfuscation of the basic concept of 'industry' under the ID Act. To add to it there was no legislative intervention to clarify the position.

In this scenario, on a reference a seven judge bench of the apex court in *Bangalore Water Supply*,²⁵ reexamined all the earlier cases with a view to simplify and clarify the definition of 'industry'.

V.R. Krishna Iyer J, who wrote the leading and epoch making judgment on behalf of himself, Bhagwati and Desai JJ, reviewed the earlier *dicta* on the interpretation of the wide words in the definition and overruled what he regarded as wrong. He, however, did not discard all the tests of 'industry' formulated in the past. He actually restored the tests laid down earlier in *Banerji, Corporation of Nagpur* and *Hospital Mazdoor Sabha*. The court made it clear that its job was not to spring a creative surprise on the industrial community by a stroke of freak originality, but to stabilise the law on the firm principles gatherable from *Banerji* and the later decisions, rejecting erratic excursions. It clarified that the job of the larger bench was not to supplant the *ratio* of *Banerji* but to strengthen it in its application, away from different deviations and aberrations, with a view to narrow down the twilight zone of controversy. The basic approach that the court adopted is explained by the court itself thus:²⁶

An industry is continuity, is an organized activity, is a purposeful pursuit – not any isolated adventure, desultory excursion or casual,

25. *Supra* note 11.

26. *Id.* at 230-31.



fleeting engagement motivelessly undertaken. Such is the common feature of a trade, business, calling, manufacture – mechanical or handicraft-based – service, employment, industrial occupation or avocation... The expression 'undertaking' cannot be torn off the words whose company it keeps. If birds of a feather flock together and *noscitur a sociis* is a commonsense guide to construction, 'undertaking' must be read down to conform to the restrictive characteristic shared by the society of words before and after.... From *Banerji* to *Safdarjung* and beyond, this limited criterion has passed muster and we see no reason, after all the marathon of argument, to shift from this position.

(L)ikewise, an 'industry' cannot exist without co-operative endeavour between employer and employee. No employer, no industry; no employee, no industry – not as a dogmatic proposition in economics but as an articulate major premise of the definition...

(T)his much flows from a plain reading of the purpose and provision of the legislation and its western origin and the ratio of all the rulings. We hold these triple ingredients to be unexceptionable.

After holding that the 'triple tests' laid down by the court in earlier decisions to be unexceptionable, Iyer J. then proceeded to formulate positively and negatively decisive principles for identifying 'industry' under the ID Act which are summarised hereunder:

- (a) Where (i) systematic activity, (ii) organised by co-operation between employer and employees, (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes *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.
- (e) 'Undertaking' must suffer a contextual and associational shrinkage; so also, service, calling and the like. Thus all organised activity possessing the triple elements, although not trade or business, may still be 'industry' *provided the nature of the activity, viz.* the employer-employee basis, bears resemblance to trade or business.



- (f) However, 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 *Delhi University* 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 *Corporation of Nagpur* will be the true test. The whole undertaking will be ‘industry’ although those who are not ‘workmen’ may not benefit by the statute.
- (g) Applying the aforesaid tests to the specific cases, activities such as (i) professions, (ii) clubs, (iii) educational institutions, (iv) co-operatives, (v) research institutes, (vi) charitable projects and (vii) other kindred adventures, if they fulfil the triple tests (*supra*), cannot be exempted from the scope of section 2(j).
- (h) A restricted category of professions, clubs, co-operatives and even gurukulas and little research labs may qualify for exemption if in simple ventures, substantially, and going by the dominant nature criterion, substantively, no employees are employed but in minimal matters marginal employees are hired without destroying the non-employee character of the unit.
- (i) 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 or ashramites 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.
- (j) Notwithstanding the previous clauses, sovereign functions, strictly understood (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies.
- (k) 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).

In view of the aforesaid tests laid down by it, the court had no hesitation in specifically overruling *Safdarjung, Solicitor’s, Gymkhana Club, Delhi University* and other rulings whose ratio ran counter to the principles



enunciated above and in rehabilitating *Hospital Mazdoor Sabha*. All the judges in *Bangalore Water Supply*, however, pleaded for legislative reform and made it clear that the judgment only sought “to serve the future hour till changes in the law or in industrial culture occur”.

Iyer J, however, did not agree with everything that was said in *Banerji*. He applied the rule of *noscitur a sociis* in interpreting the term ‘undertaking’ which had been rejected in *Banerji*. Again, the view expressed in *Banerji* that charitable undertakings are not ‘industry’ was held to be untenable. Except for these two aspects, it must be said that the court used *Banerji* as its mariner’s compass in its judicial navigation in pursuit of culling out clear and simple tests for determining whether an activity was ‘industry’ or not.

Beg CJ who delivered a separate opinion, seems to have dissented from the opinion of his other three brethren excluding only certain state run industries from the purview of the Act. According to him, that is a matter purely of legislation and not of interpretation.²⁷

Chandrachud J who took over as chief justice delivered a separate opinion on 7.4.1978 which was neither seen by Beg CJ nor dealt with by the other three judges: K. Iyer, Bhagwati and Desai, JJ. Chandrachud J did not fully agree with the opinion of K. Iyer J that the definition of ‘industry’, although of wide amplitude can be restricted to take out of its purview certain sovereign functions of the ‘state’ limited to its ‘inalienable functions’ and other activities which are essentially for self and spiritual attainments. He seems to have projected a view that all kinds of organized activities giving rise to employer - employee relationship are covered by the wide definition of ‘industry’ and its ‘scope’ cannot be restricted by identifying and including certain type of industries and leaving some other types impliedly outside its purview.

A separate opinion was delivered later by Jaswant Singh J. for himself and Tulzapurkar J. According to them the definition covers only following activities:²⁸

Systematically and habitually carried on commercial lines by private entrepreneurs with the co-operation of employees for production or distribution of goods or for rendering material services to the community at large or part of such community..

The definition of ‘industry’ in section 2(j) has since been amended by the Industrial Disputes (Amendment) Act, 1982. The amended definition has, however, not been enforced yet, although an unsuccessful attempt was made recently in *Union of India v. Shree Gajanan Maharaj Sansthan*²⁹

27. See *id.* at 292.

28. *Id.* at 300, para 185.

29. (2002) 5 SCC 44; also see *Aeltemesh Rein v. Union of India*, (1988) 4 SCC 54.



for a writ of *mandamus* against the central government to bring into force the amended definition of 'industry'. The court held that no *mandamus* could be issued to the Central Government directing it to commence or fix the date for operation of the enactment in view of the stand taken by the Central Government that no alternative machinery for redressal of the service disputes had materialized for employees of the categories of industries excluded by the amended definition, namely, employees in hospitals and educational institutions. Thus, for all intents and purposes, the principles laid down by Krishna Iyer J. in *Bangalore Water Supply* have to be applied for the purposes of resolving disputes relating to the concept of 'industry'.

Applying the tests as laid down above, a division bench of the court held in *Dandakaranya Project Koreput v. Workmen*³⁰ that a project undertaken by the Government of India to rehabilitate the refugees from Pakistan was 'industry' within the meaning of section 2(j) of the Act, bearing in mind the 'dominant nature' of the project and the nature of duties discharged by the workers. In *All India Radio v. Santosh Kumar*,³¹ it was held that functions carried on by All India Radio and Doordarshan cannot be said to be confined to sovereign functions as they carry on commercial activities for profit by broadcasting or telecasting commercial advertisements through their various stations and kendras by charging fee. For arriving at this conclusion, the court drew support from the judgment in *General Manager, Telecom*³² wherein the court had held that the Telecommunication Department of Government of India was an 'industry,' as it answered the 'dominant nature test'.

In *Coir Board, Ernakulam, Cochin v. Indira Devi P.S.*,³³ however, a division bench of two judges of the court felt that the case-law on the question of 'industry' had left uncertainty and it was necessary that the decision in *Bangalore Water Supply* be re-examined by a larger bench, as it had the effect of bringing in various organisations in the fold of 'industry' which, in their opinion, were quite possibly not intended to be covered by the machinery set up under the Act. The division bench felt that *Bangalore Water Supply* might have done more damage than good not merely to the organisations but also to the employees by curtailing of employment opportunities. It is submitted that the sweeping observations of the division bench of the court that the decision in *Bangalore Water Supply* might have done more damage than good are not based on any study or research.³⁴ Subsequently, a three judge bench headed by the Chief Justice of India in

30. (1997) 2 SCC 296.

31. (1998) 3 SCC 237.

32. *General Manager, Telecom v. A. Srinivasa Rao* (1997) 8 SCC 767.

33. (1998) 3 SCC 259.

34. See Bushan Tilak Kaul, "Labour Law-I" (Industrial Relations Law), XXXIII-XXXIV *ASIL* 433, 433-37 (1997-98).



*Coir Board, Ernakulam v. Indira Devi*³⁵ observed that the judgment delivered by the seven judge bench of the court in *Bangalore Water Supply* did not require any reconsideration on the reference being made by the two judge bench which was bound by the judgment of the larger bench. The court, therefore, directed that the appeal of the Coir Board, Ernakulam be listed before the appropriate bench for further proceedings.

'Sovereign function': Judicial interpretation

Sovereign functions are primary inalienable functions, which only the state can exercise. The defence of the country, raising armed forces, making peace or war, foreign affairs, power to acquire and retain territory, taxation, maintenance of law and order, internal and external security, grant of pardon are mentioned in judicial decisions as illustrations of sovereign function. Other functions of the state, including welfare activities, cannot be construed as sovereign exercise of power. Various functions of the state may be ramifications of sovereignty, but all cannot be construed as primary inalienable functions. Every governmental function need not necessarily be sovereign. State activities are multifarious. The dichotomy between sovereign functions and non-sovereign functions can be determined by finding out which of the functions of state could be undertaken by any private person or body; the one which could be undertaken by any private person or body cannot be a sovereign function. Even subjects on which the state has a monopoly may also be non-sovereign in nature. Absence of profit motive would not take an enterprise out of the ambit of 'industry'. In fact, the ID Act in terms contemplates cases of 'industrial disputes' where the government or the local authority or the public utility service may be the employer.

In view of the of expanding activities of the modern state, the industrial adjudication machinery had to spell out the concept of 'regal' and 'sovereign' functions in the new perspective while interpreting the ambit of the term 'industry' under the Industrial Disputes Act, 1947. The classic definition of 'regal' and 'sovereign' functions is given by Isaacs J., of the High Court of Australia in his dissenting judgment in *Federated State School Teachers' Association, Australia v. State of Victoria*³⁶ thus:³⁷

Regal functions are inescapable and inalienable. Such are the legislative powers, the administration of laws, the exercise of the judicial power.

35. *Coir Board, Ernakulam, Kerala State v. Indira Devi P.S.*, (2000) 1 SCC 224. 11. *Coir Board, Ernakulam, Kerala State v. Indira Devi P.S.*, (2000) 1 SCC 224 (hereinafter referred to as *Coir Board*) [Coram: A.S. Anand, C.J., S.P. Bharucha & M. K. Mukherjee, JJ.]

36. (1928-29) 41 CLR 569.

37. *Id.* at 585.



As will be seen later this definition has greatly influenced approach of the Indian courts including industrial adjudication machinery.

In *Corporation of Nagpur*,³⁸ the Supreme Court, relying upon the aforesaid legal position stated by Isaacs J, made it clear that it could not have been in the contemplation of the legislature to bring in regal functions of the state within the definition of 'industry' and thus confer jurisdiction on industrial tribunals to decide disputes in respect of them.

The court, however, has not followed a consistent approach with respect to defining the legal contours of sovereign and regal functions. There are visible zigzags discernible in the judgments of the court while deciding whether a particular function of the state is a sovereign or a non-sovereign function. The court had an occasion to deal with the question of sovereign functions in *Hospital Mazdoor Sabha*.³⁹ The test applied was: Can such activity be carried on by a private individual or group of individuals? This test was reiterated by Subba Rao J in *Corporation of Nagpur*. But this test was later on rejected by Hidayatulla J in *Gymkhana Club* with the following observation:⁴⁰

This test...is not enlightening because there is hardly any activity which private enterprise cannot carry on.... Even war can be financed and waged by commercial houses. They manufacture ammunition and war equipment and can carry on war with mercenaries.... Even the infra-structures of Adam Smith can be provided by private enterprise. The East India Company did both.

The same judge subsequently held in *Safdarjung* that the hospital was not an 'industry' as it was a department of the Ministry of Health & Welfare, Government of India. The obvious consequence of this holding was that any activity carried on by the government, whether regal or non-regal, would be outside the scope of the definition of 'industry'.

Notwithstanding the aforesaid observations of Hidayatulla J, the court in *Workman of Indian Standards Institution v. Indian Standards Institution*⁴¹ held that the Indian Standard Institution run by the Government of India was an 'industry'. In *Banglore Water Supply*, the court was not directly concerned with the categories of employees who came under the department charged with the responsibility for essential constitutional functions of the government. But since the court was constituted to review all its earlier judgments, there was sharp difference of opinion among the judges on the true scope and meaning of sovereign functions. K. Iyer J observed that sovereign functions, strictly understood, alone qualified for

38. *Supra* note 14.

39. *Supra* note 15.

40. *Supra* note 7 at 559.

41. (1975) 2 SCC 847.



exemption, not the welfare activities or economic adventures undertaken by the government or statutory bodies. Even in departments discharging sovereign functions, if there were units which were industry and substantially severable, then they could be considered to come within the definition of industry. In the result, in *Bangalore Water Supply*, the court held that *Safdarjung* was wrongly decided, overruled it and rehabilitated *Hospital Mazdoor Sabha*.

In *Chief Conservator of Forests v. Jaganath Maruti Kondhare*,⁴² the court observed that the dichotomy of the levels such as sovereign and non-sovereign, or regal or non-regal, or state functions or non-government functions, really did not exist. Therefore, to extend the concept of sovereign functions to include all welfare activities would erode the ratio of *Bangalore Water Supply*. Hence, except the strictly understood sovereign functions, other activities of the state such as welfare activities would fall within the purview of the definition 'industry.' Not only this, even within the wider circle of the sovereign functions there may be an inner circle encompassing some units which could be considered as 'industry', if substantially severable. These two decisions not only brought the non-regal functions of the state back into the ambit of industry, but applied the doctrine of severability even to the departments of the state discharging regal functions.⁴³

However, soon after this decision there has been a deviation in the approach of the court from the well-set course that it followed earlier to *Safdarjung* and thereafter. In *Sub-Divisional Inspector of Posts, Vaicam v. Theyyam Joseph*,⁴⁴ a two judge bench of the court held that functions of the postal department of the government are part of the sovereign functions of the state and it is, therefore, not 'industry' without even referring to its earlier decision in *Bangalore Water Supply*. However, in *Bombay Telephone Canteen Employees Association v. Union of India*,⁴⁵ while dealing with the question as to whether the Telecommunication Department of the Government of India was an 'industry' within the meaning of section 2(j), another two judge bench though noticed *Bangalore Water Supply* but deviated from the 'dominant nature test' and held that the telecommunication department was not an 'industry'.

These two decisions were, however, subsequently overruled by a three-judge bench in *General Manager, Telecom*.⁴⁶ The court observed that since

42. (1996) 2 SCC 293.

43. E.M. Rao, I *O.P. Malhotra's the Law of Industrial Disputes* 152 (6th ed., 2004); also see observations of Chandrachud C.J. in *Bangalore Water Supply*, *supra* note 11.

44. (1996) 8 SCC 489.

45. (1997) 6 SCC 723.

46. *Supra* note 32.



the definition of 'industry' substituted by the amendment Act, 1982 for the original definition had not been brought into force by issuing a notification required for the purpose, the law stated by it in *Bangalore Water Supply* which was decided by a larger bench held the field. Therefore, while holding that telecommunication department answered the 'dominant nature test', the court also observed that as a matter of judicial discipline it was not permissible for a smaller bench to take a view contrary to the law settled by the seven judge bench.

In an earlier case, a two-judge bench in *Desh Raj v. State of Punjab*,⁴⁷ had by applying the 'dominant nature test', held that the irrigation department clearly came within the ambit of 'industry'. But in a subsequent case, another two-judge bench held that the irrigation department was performing 'regal function' and, therefore, not an 'industry'.⁴⁸ One hoped that the court would adopt an approach consistent with *Bangalore Water Supply*, but judicial vacillation was clearly discernible in this case. It seems the attention of the court was not drawn to its earlier decisions.

Again, the correctness of the decision in *Himanshu Kumar Vidyarthi v. State of Bihar*⁴⁹ that when the appointments in government departments are regulated by statutory rules, the concept of 'industry' to that extent stood excluded, was not free from doubt being inconsistent with the principles laid down by the Constitution bench in *Bangalore Water Supply* that a government department which fulfilled the triple test and was not performing sovereign functions strictly was 'industry' within the meaning of the Act.

In *Physical Research Laboratory v. K.G. Sharma*,⁵⁰ the question arose whether Physical Research Laboratory ('PRL'), a public trust registered under the Bombay Public Trust Act, 1950, dedicated to research in space and allied sciences, was 'industry' within the meaning of the ID Act. PRL was financed mainly by the Department of Space, Government of India with nominal contribution from Government of Gujarat and two educational institutions. Assailing the award of the labour court before the Supreme Court, PRL argued *inter alia* that It was virtually an institute falling under the Department of Space, Government of India, engaged in carrying on fundamental research regarding the origin and evolution of the universe and atmosphere of earth which was more in the nature of governmental or sovereign function. The court held that, although PRL was carrying on the activity of research in a systematic manner with the help of its employees, yet its object was not to render services to others, nor in fact it did so except in an indirect manner. Holding that PRL was not an 'industry', the

47. (1988) 2 SCC 537.

48. *Executive Engineer, State of Karnataka v. K. Somasetty*, (1997) 5 SCC 434.

49. (1997) 4 SCC 391.

50. (1997) 4 SCC 257.



court ruled that it was more an institution discharging government function and a domestic enterprise than a commercial enterprise.

In *Agricultural Produce Market Committee v. Ashok Harikuni*,⁵¹ the core question before a two judge bench judge of the court was whether the appellant, a market committee, established under the Karnataka Agricultural Produce Marketing Regulations Act, 1966 was exercising sovereign functions, the answer to which question depended upon the nature of the power conferred on the committee and the manner of its exercise. To arrive at the correct decision, it became necessary for the court to examine the whole of the statute. The court observed that even if a statute conferred on a statutory body any function which could be construed to be sovereign in nature, it did not mean that every other function under the same statute was also to be sovereign. In interpreting any statute to find if the body created under it was 'industry' or not, the courts must find the *pith and substance* of the statute. Since the ID Act was enacted to maintain harmony and industrial peace between the parties, the endeavour of the court should not in all circumstances be to exclude any enterprise from the ambit of the Act.

The court observed that merely because an enterprise was a statutory corporation, a creature of a statute, it did not fall outside the ambit of 'industry' under the ID Act. It was, therefore, held that the present case did not fall under any of the exceptions laid down under the *Bangalore Water Supply*.

However, soon after this decision another two judges bench of the Supreme Court in *State of Gujarat v. Pratamsingh Narsingh Parmar*⁵² took the view that ordinarily departments of a government cannot be held to be an 'industry' and rather it is a part of the sovereign function. The court observed that in the absence of any assertion by the petitioner in the writ petition indicating the nature of the duties discharged by him, as well as the job at the establishment where he has been recruited, it would not be correct to hold that the Forest Department of the State of Gujarat is an 'industry'. The court distinguished this case from *Jagannath Maruti Kondhare*⁵³ where it had held that there was sufficient material on record and specific averments made in the petition and affidavits to show that social forestry department of a state could not be regarded as part and parcel of the sovereign function of the state. It is important to note that in both the judgments reference was made to *Bangalore Water Supply* to cull out differently the ratio of the said judgment.

In view of the cleavage of opinion between two benches of the court relating to the position of the social forestry department of a state and

51. (2000) 8 SCC 61.

52. (2001) 9 SCC 713.

53. *Supra* note 42.



different interpretation given by them to the ratio laid down in *Bangalore Water Supply*, a constitution bench of five judges was constituted by the Chief Justice of India to examine the issue on a reference made by a bench of three judges of the court who found an apparent conflict between the decision of the three judges bench in *Chief Conservator of Forest*⁵⁴ and the two judge bench in *State of Gujarat v. Pratamsingh Narsingh Parmar*.⁵⁵ The Constitution Bench of five judges in *State of U.P. v. Jai Bir Singh*⁵⁶ after considering the rival contentions and closer examination of the decision in *Bangalore Water Supply*, held that a reference to a larger bench for reconsideration of the decision was required for the following, amongst other, reasons:

- a) The judges delivered different opinions in the case of *Bangalore Water Supply* at different times and in some cases without going through, or having had an opportunity of going through, the opinion of some of the judges on the Bench. They have themselves recognized that the definition clause in the Act is so wide and vague that it is not susceptible to a very definite and precise meaning.
- b) In the opinion of all of them it would be better that the legislature intervenes and clarifies the legal position by simply amending the definition of 'industry'. The legislature did respond by amending the definition of 'industry', but unfortunately 23 years were not enough for the legislature to provide Alternative Dispute Resolution Forums to the employees of specified categories of industries excluded from the amended definition.
- c) The legal position thus continues to be unclear and to a large extent uncovered by the decision of the *Bangalore Water Supply* case.

In its opinion the larger bench will have to necessarily go into legal questions in all dimensions and depth, keeping in view all these aspects. Further, the court in *Rajbir Singh* expected the larger bench which would review *Bangalore Water Supply* to look at the statute under consideration not only from the angle of protecting workers' interests but also of other stake holders in the industry – the employer and the society at large.

The court also stressed the need to reconsider where the line should be drawn and what limitation can and should be reasonably implied in interpreting the wide words used in section 2(j). It stated that no doubt it is

54. *Ibid.*

55. *Supra* note 52.

56. *Supra* note 6.



rather a difficult problem to resolve more so when both the legislative and the executive branches are silent and have kept an important amended provision of law dormant on the statute book. It observed that pressing demands of the competing sectors of employers and employees and the helplessness of the legislative and the executive branches in bringing into force the Amendment Act compelled it to make the present reference for constituting of a suitable bench for reconsidering *Bangalore Water Supply*. Ever since this reference, managements have been making prayers before the respective bench of the court to adjourn their appeals till the larger bench disposes of the reference.⁵⁷

It is submitted that even if it is agreed that on various important aspects there exists divergence of opinion amongst the judges in *Bangalore Water Supply*, including what constitutes 'sovereign functions', which need to be reconsidered and clarified, the true remedy does not lie in judicial reinterpretation of the definition of 'industry' but in a legislative action. What is needed at this stage is not judicial activism but legislative action. The responsibility for this squarely lies on the government of the day to bring about a consensus amongst different groups on basic reforms in industrial relations law. The court cannot assign to itself a role that necessarily has to be performed by the legislature, given the fact that basic reforms in industrial relations law on all aspects is the crying need of the day. It is submitted that the three-judge bench in *Coir Board* had rightly rejected the plea for reconsideration of the judgment in *Bangalore Water Supply*.

II Industrial Dispute

Prefatory

The definition of the term 'industrial dispute'⁵⁸ is obviously one of the key concepts of importance in the scheme of the ID Act. The definition has remained unamended since its incorporation in the Act. This definition is a modified form of the definition of 'trade disputes' in section 2(j) of the repealed Trade Disputes Act, 1929, which in its turn was a reproduction of section 8 of the U.K. Industrial Courts Act, 1919. The definition of "trade dispute" (UK) underwent major changes from time to time. The definition, as it stands today in U.K., is given in section 218 of the Trade Union and Labour Relations (Consolidation) Act, 1992. The Indian Parliament has, however, made no effort to make changes in the definition, though more than five decades have gone. It has been said that the trend in the U.K., in sharp contrast to the *status quoist* position in India, is definitely in favour

⁵⁷ See in *R.M. Yellatti v. Asstt. Executive Engineer*, (2006) 1 SCC 106.

⁵⁸ S. 2(k) of the ID Act, 1947.



of simplification and consolidation of labour laws⁵⁹.

‘Industrial Dispute’: Judicial analysis

Demand need not to be made in writing

The Supreme Court had to deal with different facets of the definition from time to time. The hallmark of its decisions has been that the court has not allowed formalism and technicalities to stand in the way of workers or trade unions from seeking redressal under the Act. The Act nowhere contemplates that the dispute would come into existence in any particular, specific or prescribed form. In *Shambu Nath Goyal v. Bank of Baroda*,⁶⁰ the court held that written demand is not a *sine qua non* for coming into existence of an industrial dispute, except in the case of public utility service because section 22 of the ID Act forbids strike without giving notice. To read otherwise would tantamount to re-writing the section. In *Village Paper Mazdoor Sangh v. State of H.P.*⁶¹ the court held that even an apprehension of an ‘industrial dispute’ is a sufficient ground for making of a valid reference by the ‘appropriate government’, thereby implicitly recognizing that a reference cannot become bad merely because there was no formal demand made by the workers or their union to the employer.

In *J.K. Synthetics v. Rajasthan Trade Union Kendra*,⁶² the court held that an industrial dispute can arise only in an industry where the business is being carried on and not where it has been closed. However, it will be within the jurisdiction of the industrial adjudicator on a reference to go into the question as to whether the closure was *bona fide* or a sham.

‘Individual Dispute’ and ‘Industrial Dispute’: distinguished

Notwithstanding the fact that the language of section 2(k) is wide enough to cover a dispute between an employer and a single workman, the Supreme Court has held that the scheme of the Act appears to contemplate that the machinery provided under the Act should be set in motion to settle only such disputes as involve the right of the workmen as a class and not a dispute touching the individual rights of a workman.⁶³ The term ‘industrial dispute’ has been held to convey the meaning that the dispute must be such as would affect large groups of workmen and employer, ranged on opposite

59. E.M. Rao, “Globalization and Dispute Settlement Process” 44 *IJLE* 459 (2001).

60. (1978) 2 SCC 353.

61. 1995 SCC Supp (1) 291.

62. (2001) 2 SCC 87.

63. *Central Provinces Transport Services Ltd. v. Raghunath Gopal Patwardhan*, AIR 1957 SC 104, 109.



sides.⁶⁴ The dispute or difference must be real and not imaginary or ideological. The dispute between the workmen and the employer must relate to employment, non-employment, or terms of employment, or conditions of labour. The applicability of the Act to an 'individual dispute', as distinguished from a dispute involving a group of workmen, is excluded unless the workmen, as a body, or a considerable section of them, make common cause with the individual workman.⁶⁵

'Individual Dispute' when becomes 'Industrial Dispute'

Before the decision of the Supreme Court in *Central Province Transport Services Ltd.*,⁶⁶ there was a conflict of judicial decisions in the high courts and industrial tribunals on the issue whether a dispute between an employer and a single workman can attain the character of an industrial dispute. Three different views had been expressed, viz:

- (a) a dispute between an employer and a single workman cannot be an industrial dispute;⁶⁷
- (b) it can be an industrial dispute;⁶⁸ and
- (c) it cannot *per se* be an industrial dispute, but may become one if it is taken up by a trade union or a number of workmen.⁶⁹

The Supreme Court in *Central Provinces Transport Services*, however, preferred the last of the above three views. This view was affirmed in *Newspapers Ltd. v. Industrial Tribunal*.⁷⁰ In *Workmen v. Dharampal Premchand*,⁷¹ the court held that notwithstanding the width of the words used in section 2(k), a dispute raised by a single workman cannot become an industrial dispute unless it is supported either by his union or in the absence of a union, by a substantial number of workmen. This decision of

64. *D.N. Banerji*, *supra* note 1 at 58,61. The *obiter* in this case was cited with approval in *Newspapers Ltd. v. State Industrial Tribunal, U.P.*, AIR 1957 SC 532.

65. *Supra* note 63 also *Bombay Union of Journalists v. The 'Hindu', Bombay*, AIR 1963 SC 318 : (1961) II LLJ 436; *Newspapers Ltd. v. State Industrial Tribunal, U.P.*, AIR 1957 SC 532 : (1957) II LLJ 1.

66. *Supra* note 63.

67. *Kandan Textiles v. Industrial Tribunal*, (1949) LLJ 875(Mad).

68. *Swadeshi Cotton Mills Co. Ltd. v. Sri Ramzani*, (1953) I LLJ 277 (LAT, Kanpur) (FB); also *infra* note 80.

69. *Bilash Chandra Mitra v. Balmer Lawrie Co. Ltd.*, (1953) I LLJ 337 (Cal).

70. AIR 1957 SC 532.

71. AIR 1966 SC 182. This principle was reiterated in *Workmen of Indian Express Newspapers Pvt. Ltd. v. Management of Indian Express Newspapers Pvt. Ltd.* (1969) 1 SCC 228.



the court has acquired the status of *locus classicus*.⁷²

Another important question that arose in subsequent cases⁷³ was quantification of substantial number of workers required to make an espousal a valid espousal in the eyes of law for the purposes of the Act. The court held that no hard and fast rule can possibly be laid down to decide this issue. It is enough if there is a potential cause of disharmony which is likely to endanger industrial peace and a substantial number of workmen raise a dispute about it to take the view that it is an industrial dispute.⁷⁴ The following are the broad guidelines discernable from the decisions of the court handed down from time to time:

- (a) In order that an individual dispute may become an industrial dispute, it has to be established that it has been taken up by the union of workers or by an appropriate number of workers of the establishment.⁷⁵
- (b) A collective dispute, however, does not mean that all the workmen, or a majority of them, from the concerned establishment should sponsor and support the dispute. All that is necessary is that a dispute in order to become an industrial dispute should have the support of a substantial section of the workers concerned in the establishment.⁷⁶
- (c) Even a minority group of the workmen of an establishment, or a minority union, can make a demand and thereby raise an industrial dispute which in a proper case may be referred for adjudication.⁷⁷ The number of workmen must, however, be such as to lead to an inference that the dispute is one which affects the workmen as a class.
- (d) In disputes relating to non-employment, before the incorporation of section 2A in the Act, support by five workmen out of twenty-

72. *J. H. Jadhav v. Forbes Gokak Ltd.*, (2005) 3 SCC 202. In *Workmen v. Dharampal Premchand*, AIR 1966 SC 182, the management terminated services of 18 out of 45 workmen. The Supreme Court held that in the absence of a union of workers in the establishment, dispute raised with the management about their non-employment by the said 18 workers constituted substantial number of workers to give the dispute character of an 'industrial dispute.'

73. *Working Journalists of the Hindu v. Hindu* (1961) 1 LLJ 288, 294 (Mad.) (DB); *Bombay Union of Journalists v. The 'Hindu', Bombay*, AIR 1963 SC 318.

74. *Indian Oxygen Ltd. v. Its Workmen* (1979) 3 SCC 291, 295.

75. *Bombay Union of Journalists*, *supra* note 73.

76. *Supra* note 70.

77. *Ibid.*; also see *Associated Cement Companies Ltd. v. Workmen*, AIR 1960 777; *Tata Chemicals Ltd. v. Workmen*, (1978) 3 SCC 42; *New India Motors(P.) Ltd. v. K. T. Morris*, AIR 1960 SC 875; *Workmen v. Dharampal Premchand*, AIR 1966 SC 182 and *J.H. Jadhav v. Forbes Gokak Ltd.*, (2005) 3 SCC 202.



two workmen of a dispute relating to the dismissal of two workmen had the effect of converting an individual dispute into an industrial dispute.⁷⁸ Thus it can be said that espousal by 25% of the workmen of the establishment, would constitute valid espousal of the dispute.⁷⁹ But in a case of espousal by a union, it is not sufficient that the union had in its membership a substantial number of workmen from the establishment in which the concerned workman was employed. It must further be shown that a substantial number of such workmen participated in or acted together and arrived at an understanding by a resolution, or by other means, and collectively supported the dispute.⁸⁰ The industrial adjudicator has, therefore, to consider the question as to how many of the fellow workers actually espoused the cause of the concerned workmen, by participating in the particular resolution of the union. In the absence of such determination by the tribunal, it cannot be said that the individual dispute has acquired the character of an industrial dispute. The tribunal will not acquire jurisdiction to adjudicate upon such dispute.

Another important connected issue is: What is the material date which is relevant for the purposes of converting an 'individual dispute' into an 'industrial dispute'? The Supreme Court has observed⁸¹ that in each case, while ascertaining whether an 'individual dispute' has acquired the character of an 'industrial dispute', the test is whether, at the date of the reference, the dispute was taken up or supported by the union of workers of the employer against whom the dispute is raised by an individual workman, or by an appreciable number of workmen. Subsequent withdrawal of support or espousal will not affect the validity of the reference.

Interpretation of the term 'any person' in section 2(k)

In *Workmen of Dimakuchi Tea Estate v. Dimakuchi Tea Estate*,⁸² the court was called upon to construe the term 'any person' used in the wide definition of 'industrial dispute' and to decide whether the dispute relating

78. *Workmen of Rohtak General Transport Co. v. Rohtak General Transport Co.*, (1962) 1 LLJ 634 (SC).

79. *Workmen of Indian Express Newspapers Pvt. Ltd.*, (1969) 1 SCC 228.

80. *Nellai Cotton Mills v. Labour Court*, (1965) 1 LLJ 95 (Mad).

81. *Bombay Union of Journalists*, *supra* note 73.

82. AIR 1958 SC 353 per SK Das J, for the majority. This view has been consistently followed ever since on the interpretation given to the word 'any person'. In this case a dispute arose out of the dismissal of the medical officer of the tea estate who was not a 'workman' as defined in section 2(s) of the Act, as it originally stood. The workmen of the said tea estate espoused his dispute.



to non-employment of the medical officer fell within the definition of 'industrial dispute'. The court by a majority held that a liberal construction of the expression 'any person', used in the definition of industrial dispute, was impermissible despite the wide amplitude of those words. The court observed that 'any person' could not be everybody in this wide-world and if the words were given their ordinary meaning, then the definition would become inconsistent with the objects and other provisions of the Act, as well as the definition itself. Earlier, the Bombay High Court in *N. K. Sen v. L.A.T*⁸³ had illustrated the absurdity of construing the words without any limitation or qualifications whatsoever and expounded the crucial test of 'direct and substantial interest.' This test of 'direct and substantial interest' was approved by a majority decision of the court in *Workmen of Dimakuchi Tea Estate*.⁸⁴ From the context of the definition of 'industrial dispute' and its setting in the Act, the court applied limitations on the construction of the expression 'any person' and held that a dispute relating to person in respect of whom the employer-employee relationship never existed, or can never possibly exist, could not be the subject-matter of a dispute between the employer and the workmen. The court, therefore, held that 'any person' in the definition clause meant a person in whose employment or non-employment, terms of employment, or conditions of labour, the employer was in a position to give relief and the workmen as a class, have a direct and substantial interest—with whom they have, under the scheme of the Act, a community of interest. It is the community of interest of the class as a whole – the class of employers or the class of workmen—which furnishes the clear nexus between the dispute and the parties to the dispute. In cases where a party to the dispute is composed of aggrieved workmen themselves and the subject-matter of the dispute relates to them or any of them, they clearly have a direct interest in the dispute. In the same manner, where a dispute of a person whose employment, or non-employment, or terms of employment, or conditions of labour may have the effect of prejudicing the interest of other workmen espousing his cause, the workers have a substantial interest in the subject matter of the dispute. In both such cases the dispute is an 'industrial dispute'. The majority judgment of the court stressed that the crucial test is one of 'community of interest' with the concerned person and subjected the interpretation of the expression 'any person' to the following two limitations:

- (a) The dispute must be a real dispute between the parties to the dispute (as given in the definition of 'industrial dispute') so as to be capable of settlement between them, or through adjudication giving the necessary relief; and

83. (1953) 1 LLJ 6 (Bom).

84. *Supra* note 82.



- (b) the person regarding whom the dispute is raised, must be one in whose employment, non-employment, terms of employment, or conditions of labour, (as the case may be) the parties to the dispute have a direct or substantial interest though he may not be strictly speaking a 'workman' within the meaning of section 2(s) of the Act.

In *Dimakuchi Tea Estate*, the majority of the court, applying the aforesaid tests, held that the workers espousing the case of the medical officer had failed to build up a case of 'direct and substantial interest' with the dispute of non-employment of the medical officer and therefore the dispute was not an 'industrial dispute.'⁸⁵ The application of this principle was further illustrated in *Standard Vacuum Refining Co. of India Ltd. v. Their Workmen*,⁸⁶ where, dealing with the question relating to the demand of workmen to abolish the contract system of employing labour for the cleaning and the maintenance work of the refinery of the company, the court held, following the test of community of interest laid down in the *Dimakuchi Tea Estate*, that the workmen had a community of interest with the employees of the contractor and they had also a substantial interest in the subject-matter of the dispute in the sense that the class to which they belonged, namely workmen, was substantially affected thereby. However, after the enactment of the Contract Labour (Regulation and Abolition) Act, 1970, the issue of abolition of contract labour in a genuine situation lies now in the exclusive domain of the 'appropriate government' under section 10 of the said Act and outside the purview of the industrial adjudication.

In *Municipal Corporation of Delhi v. Female Workers*⁸⁷ the Delhi Municipal Workers Union raised an 'industrial dispute' demanding grant of maternity leave to the muster roll female workers. On reference, the industrial tribunal passed an award in favour of muster roll female workers holding the espousal by the union as valid and directed the corporation to extend the benefits to them on par with regular female workers under Maternity Benefit Act, 1961 if they had rendered continuous service with the corporation for three years or more. The Supreme Court adopted an activist role in upholding the award by relying heavily on various provisions of part III and part IV of the Constitution and also article 11 of the Convention on the Elimination of all Forms of Discrimination against Women adopted by the United Nations on 18.12.1979 enjoining the state to take steps to provide or cause to provide such benefits and other humane conditions to female workers.

85. See also *Workmen of Dahingepar Tea Estate v. Dahingepar Tea Estate*, AIR 1958 SC 1026; *Bombay Union of Journalists*, *supra* note 73.

86. AIR 1960 SC 948.

87 (2000) 3 SCC 224,



The position of law that emerges from the above analysis is that in order to fall within the scope of the expression 'any person', a person need not to be a 'workman'. He must, however, be a person in whose conditions of employment, etc. the workmen have direct or substantial interest, or with whom they have a community of interest, and in whose case the employer is in a position to give relief. The question whether the concerned person satisfies this test is a question of fact in each case. Thus the court was able to construe the term 'any person' consistent with the object of the legislation by reading down words of wide import. The court preferred not to give literal meaning to the wide definition of 'industrial dispute' and instead opted for a construction which was intended to make a distinction between 'individual dispute' and 'collective dispute' keeping in view the object of the Act which is to promote collective bargaining with or without third party intervention, wherever possible, failing which the adjudication of disputes which are collective in nature.

'Individual Dispute' relating to termination in any form deemed as 'Industrial Dispute'

The Supreme Court perhaps did not realize the effect of laying down the principle that valid espousal is a *sine qua non* for converting an 'individual dispute' into an 'industrial dispute', namely, that it would leave individual worker at the mercy of the trade unions, or his colleagues for espousal even in disputes of non-employment, whether by way of discharge, dismissal, or retrenchment, etc. and that often the unions would show little interest in his case. Resultantly, hardships came to be faced by the workers whose services were terminated by the management, but the trade unions did not, or failed to, espouse their cases of non-employment.⁸⁸ Parliament had to intervene by enacting section 2A in the Act which introduced a legal fiction to the effect that an 'individual dispute' connected with a 'discharge, dismissal, retrenchment or termination' is deemed to be an 'industrial dispute' notwithstanding that no other workman, or any union of workmen, espouses such a dispute. It is important to note that Parliament maintained the distinction drawn by the court between 'individual dispute' and 'industrial dispute' and section 2A endorses such distinction with the exception envisaged therein. Thus, a 'workman' who has been discharged, dismissed or retrenched, or whose services have been otherwise terminated, could raise a dispute with respect to such dismissal, etc. even without same being espoused by his fellow workers. But that does not mean that such a dispute can be raised by such workman alone and not by the workmen of the

88. See *Balmer Lawrie Workers' Union v. Balmer Lawrie & Co. Ltd.*, 1984 Supp SCC 663, 672.



establishment collectively. However, except the disputes relating to 'discharge, dismissal, retrenchment or otherwise termination of service', all other disputes relating to the terms of employment, or condition of labour of an individual workman, such as demotion or reduction in rank by way of punishment, transfer, wages, bonus, increments, promotion, etc. will require espousal, by a substantial number of fellow workmen in order to partake the character of an industrial dispute.⁸⁹

Recommendations of the Second National Commission on Labour

Keeping in view that many individual disputes are thus out of the purview of the ID Act, the Second National Commission on Labour (2002), constituted by the Government of India, recommended that all matters pertaining to individual workers, be it termination of employment or transfer or any other matter, be determined by recourse to the Grievance Redressal Committee recommended by it, or through conciliation and arbitration/adjudication by the labour court. These disputes need not to be elevated to the rank of industrial disputes which would then take the form of collective disputes. In this view of the matter, the commission has recommended that section 2A of the ID Act may be amended to enable such disputes to be treated as individual disputes and defined accordingly in law. Individual disputes, the commission has recommended, may be taken up by the affected workers themselves or by trade unions to the aforesaid forums and the collective disputes by the negotiating agent or an authorized representative of the negotiating college for resolution. The commission has recommended that both individual and collective disputes not settled bilaterally may be taken up in conciliation, arbitration and adjudication.⁹⁰ Individual disputes can be taken up by the union of which the workman is a member provided it has at least 10% members amongst the employees in a unit and a provision to this effect may be made in section 36 of the ID Act.

'Industrial Dispute' survives even after the death of workman

In *Shri Rameshwar Manjhi (deceased) v. Management of Sangramgarh Colliery*,⁹¹ the Supreme Court was called upon to decide whether an industrial dispute survives when the workman concerned dies during its pendency and whether such proceedings before the labour court/tribunal can be continued by the legal heirs/representatives of the deceased worker. There was a sharp difference of opinion between the

89. See *RSRTC v. Krishna Kant*, (1995) 5 SCC 75, 87.

90 See Government of India, *Report of the Second National Commission on Labour* 357-58 (2002).

91. (1994) 1 SCC 292.



Assam,⁹² Patna,⁹³ Delhi⁹⁴ and Orissa⁹⁵ High Courts, on the one hand, and the Kerala⁹⁶ and Gujarat⁹⁷ High Courts, on the other. The first set of high courts had held that on the death of a workman the industrial dispute cannot survive, and the proceedings must come to an end, whereas the Kerala and Gujarat High Courts had held that the industrial dispute survives the deceased workman and the reference can be continued by the legal heirs/representatives of the deceased workman.

The Supreme Court in the instant case rejected the view taken by the Assam, Patna, Delhi and Orissa High Courts and approved the view taken by the Kerala and Gujarat High Courts. The court observed that the former view seemed to be founded on the maxim '*actio personalis moritur cum persona*' which, though part of the English Common Law, has been subjected to criticism in England. It had been dubbed as 'unjust maxim, obscure in its origin, inaccurate in its expression and uncertain in its application', resulting invariably in grave injustice. The court observed that in a different context it had been held⁹⁸ that this maxim had a limited application and its application or otherwise depended upon relief claimed and the facts of the case. It ruled that this maxim could have no application to the adjudication proceedings of industrial disputes under the Act, the primary object of which is to bring industrial peace with the help of the industrial adjudication machinery.

The court held that even when the reference of an 'individual dispute' is under section 2A of the Act, the tribunal did not become '*functus officio*' and the reference did not abate merely because, pending adjudication, the workman concerned died. It is open to the heirs and legal representatives of the deceased workman to have the matter adjudicated and decided.

The court disagreed with the view that the claim for computation under sub-section (2) of section 33C of the Act died with the death of a workman. Approving the view of the Bombay High Court,⁹⁹ the court held:¹⁰⁰

It is difficult to understand why a claim of money which became payable to the deceased workman should not be claimable, upon satisfaction of other relevant conditions, by the heirs of the deceased workman by making a claim under sub-section (2) of

92. *Management of Tocklai Experimental Station v. State of Assam*, AIR 1960 Assam 132.

93. *Bihar Working Journalists' Union v. H.K. Chaudhuri*, 1968 Lab IC 515.

94. *Yad Ram v. Bir Singh*, (1974) Lab IC 970.

95. *Hararnani Naik v. Management, Sarna*, (1978) Lab IC 1630.

96. *Gwalior Rayons v. Labour Court*, (1978) II LLJ 188.

97. *Bank of Baroda v. Workmen*, (1979) II LLJ 57.

98. *Girja Nandini Devi v. Bijendra Narain Choudhury*, AIR 1967 SC 1124.

99. *Sita Bai v. Auto Engineers*, (1972) Lab IC 733.

100. *Supra* note 91 at 297.



Section 33-C of the Act. Having regard to the well established principle that all causes of action—except those which are known as dying along with the death of a person—must survive to his heirs, the cause of action created in favour of workman under sub-section (2) of Section 33-C of the Act should in normal circumstances survive to the heirs.

It is submitted that the court has rightly held that the legal heirs of the workman whether in a proceeding under a reference or under section 33C(2) are entitled to get themselves substituted in the event of the death of the workman and become entitled to the benefits if the reference or application under section 33C(2) is decided in favour of the workman. Any other interpretation would have been contrary to the interest of the working class and their families who are dependent on their earnings and benefits that accrue to the workmen during their employment.

III Workman

Prologue

The definition of 'workman', as originally enacted in section 2(s) of the ID Act, 1947, was as follows:

'Workman' means any person employed (including an apprentice) in any industry, to do any skilled or unskilled manual or clerical work, for hire or reward and includes, for the purpose of any proceedings under this Act, in relation to any industrial dispute, a workman discharged during that dispute, but does not include any person employed in the naval, military or air service of the Crown.

This clause was replaced by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956, which materially altered it. The changes brought about by the Amending Act, 1956, were:

- (i) 'supervisory' work and 'technical' work were added;
- (ii) the words "whether terms of employment be express or implied" were added after the words 'hire or reward';
- (iii) the original definition included, for the purposes of an industrial dispute, only 'a workman discharged during that dispute', whereas the amended definition enlarged the scope of the definition by using the words "any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute"; and
- (iv) in the original definition, only "any person employed in the naval, military or air service of the crown" was excluded, but the amended definition in 1956 excludes any person -



- (a) who is subject to the Army Act 1950 (46 of 1950), or the Air Force Act 1950 (45 of 1950), or the Navy (Discipline) Act 1934 (34 of 1934); or
- (b) who is employed in the police service or as an officer or other employee of a prison; or
- (c) who is employed mainly in a managerial or administrative capacity; or
- (d) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per *mensem*, or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

The definition of 'workman' again underwent an amendment by the Amending Act 46 of 1982 which came into effect on 21.08.1984 introducing the following changes:

(i) *Nature of work*

In the previous definition,¹⁰¹ the words 'skilled or unskilled', before the word 'manual', followed by a comma, appeared to be qualifying only 'manual work'. But the present definition,¹⁰² by using the word 'manual' before the word 'unskilled' and 'skilled', has clarified its intention, that 'manual', 'skilled' or 'unskilled' are to be treated as separate categories of work. Another category of work that has been inserted is 'operational' work.

(ii) *Persons excluded*

Sub-clause (i) has been recast, excluding a person 'who is subject to the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957' from the definition. In clause (iv), previously, persons employed 'in supervisory capacity, drawing wages exceeding Rs.500/- per month were excluded. But now the figure of Rs. 500/- has been raised to Rs. 1600/-. In other words, the persons employed in a supervisory capacity, drawing wages up to Rs. 1600/- per month, will not be excluded from the definition of 'workman'.

101. The definition of 'workman' in section 2(s) as amended by the Industrial Disputes (Amendment & Miscellaneous Provisions) Act, 1956..

102. The definition of 'workman' underwent further amendment by Amending Act 46 of 1982.



Analysis of the definition

The definition of 'workman' in section 2(s) falls in three parts. The first part gives a statutory meaning of 'workman'. This part determines a 'workman' by reference to a person (including an apprentice) employed in an 'industry' to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work, for hire or reward. It determines what a 'workman' means. The second part is designed to include something more in what the term primarily denotes. This part gives an extended connotation to the expression 'workman'. The third part specifically excludes the categories of persons specified in clauses (i) to (iv) of this sub-section. Even if a person satisfies the requirements of any of the first two parts, he shall be excluded from the definition of 'workman' if he falls in any of the four categories in the third part.

In first part, the legal basis of the definition of 'workman' contained in section 2(s) the ID Act, as in other statutes, remains the contract of employment between the employer and the employee. Unless there is a contract of employment between the two or, in other words, there is a relationship of employer and employee between them, the definition of 'workman' will not come into play.

- a) Employment: Tests for determining contract of service and contract for service

General

The concept of employment involves three ingredients: (1) 'employer' (2) 'employee' and (3) the contract of employment. 'Employer', in relation to an employee, means the person by whom the employee is, or, where the employment has ceased, was, employed; 'employee' means an individual who has entered into, or works under, a contract of employment.¹⁰³ The contract of employment brings in the contract *of* service between the 'employer' and the 'employee.' Under the 'contract of service', the 'employee' agrees to serve the 'employer' subject to his control and supervision.

The employer and employee relationship implies that the contract between the two is of 'contract *of* service' and not 'contract *for* service.' The distinction between 'contract *of* service' and 'contract *for* service' is that in the case of former, the employer can order or require not only what is to be done, but also how it shall be done, but in the case of latter, the person can be asked what is to be done but not how it shall be

103. 16 *Halsbury's Laws of England*, 'Employment' 10-11 (4th ed., 2000).



done.¹⁰⁴ The control and supervision test that used to be considered sufficient is no longer considered sufficient, especially in the case of employment of highly skilled individuals, and is now only one of the particular factors which may assist a court or tribunal in deciding the point.¹⁰⁵ There is no single test for determining whether a person is an employee. The question whether the person was integrated into the business or remained apart from, and independent of, it has been suggested as an appropriate test, but is likewise only one of the relevant factors for the modern approach is to balance all those factors in deciding on the overall classification of the individual. This may sometimes produce a fine balance with strong factors for and against employed status.¹⁰⁶

The factors relevant in a particular case may include, in addition to control and integration, the following,¹⁰⁷ namely, “method of payment; an obligation to work only for that employer; stipulation as to hours; overtime, holidays, etc., how the contract may be terminated; whether the individual may delegate the work; who provides tools and equipments; and who ultimately bears the risk of loss and the chance of profit. In some cases, the nature of the work itself may be an important consideration.” But once the relationship of employment is established, its duration would not be material. Even a temporary or casual hand would fall within the ambit of this part of the definition of ‘employee.’

Due control test

In India, the earliest case in which the Supreme Court had to consider whether the person is an employee or an independent contractor was *Shivnandan Sharma v. Punjab National Bank Ltd.*¹⁰⁸ The court after referring to English decisions¹⁰⁹ on the subject held that the correct test for determining the relationship was the control and supervision test. Applying the said test to the facts of the case, it held that the treasurers who were in charge of the cash department of the bank and their nominees were the servants of the bank and, therefore, entitled to protection of the

104. *Collins v. Hertfordshire County Council*, [1947] 1 KB 598, 615(A) cited with approval in *Dharangadhra Chemical Works Ltd. v. State of Saurashtra*, AIR 1957 SC 264, 267.

105. *Supra* note 103.

106. *Ibid.*

107. *Ibid.* These factors have been culled out from the decisions rendered in various English cases and adopted by the Indian courts.

108. AIR 1955 SC 404.

109. See *Donovan v. Laing, Wharton and Down Construction Syndicate, Ltd.*, [1893] 1 QB 629; *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd.*, 1947 AC 1. The court referred to the speech of Lord Porter and Lord Macmillan on the issue.



ID Act. In *Dharangadhra Chemical Works Ltd. v. State of Saurashtra*,¹¹⁰ the court held that the professional labourers known as *agarias*, engaged in a salt manufacturing company and working under the supervision and control of the officers of the company, though free to engage others to assist them in manufacturing salt from rain water that got mixed up with saline matter in the soil, who were paid by the company on the basis of per mound of salt if the same was of a desired standard, were workmen under section 2(s) of the Industrial Disputes Act and not independent contractors. The court held that the *prima facie* test to determine whether there was relationship of employer and employee was the existence of the right in the master to supervise and control the work done by the servant, not only in the matter of directing what work the employee was to do but the manner in which he had to do the work.¹¹¹ The nature and extent of control might vary from business to business and was by its nature incapable of precise definition.¹¹² The court suggested that the correct method of approach would be to consider whether having regard to the nature of work there was due control and supervision by the employer and “the greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the ground for holding it to be a contract of service, and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service”.¹¹³ Although it is often easy to recognize a contract of service when one sees it, yet it is difficult to say wherein the difference lies.¹¹⁴ The court also emphasized the difficulties in applying this test in different concrete factual situations. It referred to another test applied by the English courts, namely, whereas under contract *of* service a man is employed as part of the business and his work is done as are integral part of the business, under contract *for* service, his work, although done for the business, is not integrated with it but is only an accessory to it.¹¹⁵ The court also cited with approval the relevance of four indices of contract of service recapitulated by Lord Thankerton in *Short v. J & W. Henderson Ltd.*¹¹⁶ which are (a) master’s power of selection of his servant; (b) the payment of wages and

110. AIR 1957 SC 264.

111. *Id.* at 268.

112. *Ibid.*

113. The court cited with approval the above observations of Fletcher Moulton L.J. in *Simmons v. Heath Laundry Co.* (1910) 1 KB 543, 549-50.

114. The court cited with approval the observations of Lord Denning L.J. in *Stevenson Jordan and Harrison Ltd. v. Macdonald and Evans*, [1952] IT 101, 111.

115. *Ibid.*

116. (1946) 62 TLR 427, 429.



other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension and dismissal.

The real difficulty arose in cases relating to the beedi industry that came up for consideration before the court.¹¹⁷ The beedi industry employs large number of men and women. The difficulty faced by the court in determining the relationship in such cases was because of the various devices adopted by the industry to escape social and economic responsibility under the Factories Act making it difficult for the court to apply the due control and supervision test. Three systems are adopted in the manufacture of beedis.¹¹⁸ First, is the factory system which poses no problem. There the manufacturer is the owner of the factory. Workers gather and work under his supervision as his employees. Second is the contract system of employment. This has been the most prevalent form. Under this system, the proprietor gives to middlemen quantities of beedi leaves and tobacco. The contractor receiving the materials manufactures beedis either by employing labourers directly for this purpose, or by distributing the materials amongst home-workers, as they are called, mostly women who manufacture beedis in their homes with the assistance of other members of their family including children. The third system is that of outworkers. They roll beedis out of the tobacco and beedi leaves supplied by the proprietor himself without the agency of middlemen. The beedis thus supplied whether by the outworkers or contractor are roasted, labelled and packed by the proprietor and sold to the public.

The earliest case that came to the court for determining the relationship of master and servant in beedi industry was *Chintamani Rao v. State of MP*.¹¹⁹ In this case, certain contractors known as *sattedars* supplied beedis to the manager of a beedi factory. The *sattedars* manufactured the beedis in their own factories or they entrusted the work to third parties. The inspector of factories found in the beedi factory certain *sattedars* who came there to deliver beedis manufactured by them. The owner of the factory was prosecuted for failure to maintain the register of adult workers. The court was called upon to consider whether *sattedars* and the coolies engaged by them to roll beedis were workers or independent contractors. It held that the *sattedars* were not under the control of the factory management and could manufacture the beedis wherever they pleased. The coolies were neither employed by the management directly, nor were they employed by

117. See *Chintamani Rao v. State of MP*, AIR 1958 SC 388; *Birdhichand Sharma v. First Civil Judge, Nagpur*, AIR 1961 SC 644; *Shankar Balaji Waje v. State of Maharashtra*, AIR 1962 SC 517; *R.C. Dewan Mohideen Sahib & Sons v. Industrial Tribunal, Madras*, AIR 1966 SC 370 and *Mangalore Ganesh Beedi Workers v. Union of India*, (1974) 4 SCC 43.

118. *Mangalore Ganesh Beedi Workers*, *ibid*.

119. AIR 1958 SC 388.



the management through the *sattedars*. Therefore, on the facts of this case, the court held that *sattedars* were independent contractors and that they and the coolies engaged by them were not workmen within the meaning of section 2(1) of the Factories Act. This judgement resulted in the principal employers disowning responsibility in respect of contract labour and depriving them of the benefits of the legislation.¹²⁰

In *Birdhichand Sharma v. First Civil Judge, Nagpur*,¹²¹ the question again was whether the beedi-rollers in question were workmen within the meaning of the term in the Factories Act. Here the workers who rolled beedis had to work at the factory and were not at liberty to work at their houses; their attendance was noted in the factory and they had to work within the factory hours, though they were not bound to work for the entire period and could come and go when they liked; but if they came after midday they were not supplied with tobacco and thus not allowed to work even though the factory closed at 7.00 PM. Further, they could be removed from service if they absented for eight days. Payments were made on piece rates according to the amount of work done, and beedis which did not come up to the proper standard could be rejected. On these facts, the court held that the workers were workmen under the Factories Act and were not independent contractors. The court pointed out that there was sufficient control and supervision.

But, in *Shankar Balaji Waje v. State of Maharashtra*¹²² the court found that the facts were distinguishable from those *Birdhichand Sharma* in many respects. In *Shankar Balaji*, the person in question was not bound to attend the factory for rolling beedis for any fixed hours or period; he was free to go to the factory at any time during the working hours and leave the factory at any time he liked. He could be absent from the work any day he liked and for ten days without even informing the appellant. He had to take permission of the appellant, if he was to be absent for more than ten days. He was not bound to roll the beedis at the factory. He could do so at home with the permission of the appellant, taking home the tobacco supplied to him. In these circumstances, the majority judgment held that there was no actual supervision of the work done by him in the factory. The fact that the beedis which were not upto the standard could be rejected and that he was paid at fixed rates on the quantity of beedis turned out, the majority held that he was not a workman and distinguished the decision in *Birdhichand Sharma* on the ground that the appellant had no control or supervision over him. However, Suba Rao J. dissented mainly on the ground that rejection of the beedis found not in accordance with the sample was

120. Government of India, *Report of the National Commission of Labour* 420 (1969).

121. AIR 1961 SC 644.

122. AIR 1962 SC 517.



clear indication of the right of the employer to dictate the manner in which the labourer should manufacture the beedis. Subsequently, in *R.C. Dewan Mohideen Sahib & Sons v. Industrial Tribunal, Madras*,¹²³ the court held that the contractors in question who employed workmen for manufacturing beedis were merely branch managers appointed by the management and that the relationship of employers and employees subsisted between them and the beedi-rollers. The court followed the test laid down in *Birdhichand Sharma* that since the work was of such a simple nature, supervision all the time was not required, and that supervision was made through a system of rejecting defective beedis at the end of the day.

As regards the tests applied by the court for determining the relationship of employer and employee, the court in *V. P. Gopala Rao v. Public Prosecutor*,¹²⁴ observed that it was always a question of fact in each case and there was no abstract *a priori* test of the control required for establishing the contract of service. With the emergence of skilled and professional workforce, the court realized that the control test in its traditional form suited to a past age has broken down.

In all beedi cases, the court, in principle, consistently subscribed to the supervision and control test, even as it was at the same time mindful of the limitations of this principle in its application to concrete fact-situations. But differences in perception amongst the judges of the court in the application of the control and supervision test became quite visible in the beedi cases. The court arrived at different conclusions by emphasizing the difference in factual situations while applying the control test.

With a view to obviate the vices of such deceptive devices, Parliament enacted the Beedi and Cigar Workers (Conditions of Employment) Act, 1966 so as to protect employees in beedi industry and ensure that basic economic and social rights were available to them. The constitutional validity of this legislation was challenged by the owners of the establishments in *Mangalore Ganesh Beedi Workers*¹²⁵ as violative of article 14, 19(1)(g) and 19(1)(f). The Supreme Court upheld the constitutional validity of this legislation of great importance enacted to enforce better conditions of labour amongst those who were engaged in the manufacture of beedis and cigars after clearly bringing out the mischief sought to be curbed by this welfare legislation. Here we see Parliament and the judiciary collaborating in ensuring social justice to bidi workers.

In *Punjab National Bank v. Gulam Dastagir*,¹²⁶ the court held that a car driver of an area manager of the bank for which allowance was given to him was not 'workman' of the bank, even though the car was maintained at

123. AIR 1966 SC 370.

124. (1969) 1 SCC 704.

125. *Supra* note 117.

126. (1978) 2 SCC 358.



the bank's expense. K. Iyer J. held that in absence of material to make out that the driver was under the bank's direction and control, that he was paid his salary by the bank and was included in the army of the employees in the establishment of the bank, it could not be assumed that the crucial test of due control and supervision had been proved. The court also came to the conclusion that there was no case of camouflage or circumvention of any statute and that there was nothing on record to make out a nexus between the bank and the driver. At the same time, however, the court expected the public sector undertakings like the bank here to be model employers and resort to appointment of driving staff in a fair and straightforward method. On consideration of social justice the Court in this case suggested to the bank to provide some monetary ex-gratia compensation to the employee and consider him for further appointment as a personal driver of one or other of the higher officers of the bank and the employer positively responded to the said suggestions of the court.

Organizational test

In *Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments*,¹²⁷ the court observed that other factors like organizational test, working in the premises of the employer, working on the machines in the employers premises, and power to remove if the work is not in conformity with the standards prescribed, are relevant factors for determining the relationship. In this case there was flexibility in coming to the shop for the tailors who were paid on piece-rate basis. They were free to bring cloth from outside and stitch it in the shop. They were given cloth in the shop for stitching after it was cut and were told how to stitch it. They could be asked to re-stitch it, if tailoring was not of the prescribed standard. No further work was given, if the fault persisted. The court held that there was enough control and, therefore, employer-employee relationship subsisted. The court also implicitly recognized the applicability of the organization test, as cutting and stitching were integral parts of the business of a tailoring shop. The court held that if a worker accepted some work from other establishments, or did not work whole time in a particular establishment, that would not derogate from his being employed in the shop where he was principally employed.

Later, in *Hussainbhai v. The Alath Factory Thezhilali Union*,¹²⁸ the court applied both the 'control test' and 'integral business test' by stating so in express terms. The court observed:¹²⁹

127. (1974) 3 SC 498.

128. (1978) 4 SCC 257. .

129. *Id.* at 259-260.



If the livelihood of the workmen substantially depends on labour rendered to produce goods and services for the benefit and satisfaction of an enterprise, the absence of direct relationship or the presence of dubious intermediaries or the make-believe trappings of detachment from the Management cannot snap the real life-bond. The story may vary but the inference defies ingenuity. The liability cannot be shaken off.

In *M/s. Shining Tailors v. Industrial Tribunal*,¹³⁰ the Supreme Court held that the tribunal had erred in holding that because payments were being made to the tailors by piece-rate there was no relationship of master and servant between the tailoring establishment and the tailors. Here, the tailors had been demanding an increase in the tailoring charges. The court held that the test to determine the relationship of employer and the workmen was the test of control and not the method of payment. The court stated that Mathew J in *Silver Jubilee Tailoring House*¹³¹ referred with approval to the opinion of Kahn Freund¹³² that the control test was more suited to the agricultural society prior to industrial revolution and in recent years emphasis in the field is shifting from this test and it is no longer exclusively or strongly relied upon. The court held that search for a formula in the nature of a single test would not serve any useful purpose and all the relevant factors should be considered.

Recently, the court in *Ram Singh v. Union Territory, Chandigarh*¹³³ has held that though ‘control’ is one of the important tests in determining employer-employee relationship, it is not to be taken as the sole test. All other relevant factors and circumstances were required to be considered including the terms and conditions of contract. Emphasizing the importance of an integrated approach in such matters, the court observed:¹³⁴

It is necessary to take a multiple pragmatic approach weighing up all the factors for and against an employment instead of going by the sole “test of control”. An integrated approach is needed. “Integration” test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer’s concern or remained apart from and independent of it. The other factors which may be relevant are – who has the power to select and dismiss, to pay remuneration, deduct insurance contributions, organize the work, supply tools and materials and what are the “mutual obligations” between them.

130. (1983) 4 SCC 464.

131. *Supra* note 127.

132. Otto Kahn-Freund, “Servants and Independent Contractors” 14 *Modern Law Review* 504-09 (1951).

133. (2004) 1 SCC 126.

134. *Id.* at 131.



The court held that whether a particular arrangement was genuine or a mere camouflage, through the mode of a contractor, to hide an employer-employee relationship is essentially a question of fact to be determined on the basis of the features of the relationship, the written terms of the employment, if any, and the actual nature of employment. These questions could be raised and proved only before an industrial adjudicator. In *Ram Singh*, the court held that without ascertaining, through the industrial forum, the factual aspects of the *inter se* relationship between the employer, the contractor and the contract employees, no relief could be granted.

Lifting of veil principle

In *Hussainbhai*¹³⁵ the court extended the corporate law principle of lifting the veil to the area of employment law jurisprudence and subsequent decisions of the court have reinforced this principle.¹³⁶ In *G.B. Pant University of Agriculture & Technology v. State of U.P.*,¹³⁷ the court reiterated the legal position settled by it that the principle of corporate jurisprudence was now being imbibed on to industrial jurisprudence. Repelling the contention of the University constituted under a State Act against treating the canteen employees as the employees of the University, the court observed that pragmatism did not necessarily mean deprivation of the legitimate claims of the weaker sections of the society. A number of regulations framed under the State Act showed that the control of the University in the matter of running of the cafeteria was all pervasive. The court held that continuing of the cafeteria employees as half fed and half clad would not be consistent with the socialistic pattern conceived by the founding fathers of the Constitution.

The court, therefore directed the University to regularise the services of the employees in terms of the award passed by the labour court so as to entitle the employees of the cafeteria to obtain monthly wages on par with the other employees of the University. This is a classic case of judicial activism in labour law.

Who is a 'workman'?

Test that the employee must be employed to do one of the works specified in the definition and must not fall in any excluding category.

What should be the true test for determining whether an employee employed under a contract of service is a workman under section 2(s) of the ID Act has been subject matter of debate in a number of cases that have

135. *Supra* note 128.

136. *Secretary HSEB v. Suresh*, (1999) 3 SCC 601.

137. (2000) 7 SCC 109.



reached the Supreme Court. Three-judge bench decisions of the court in *May & Baker (India) Ltd. v. Workmen*,¹³⁸ *Western India Match Co. Ltd. v. Workmen*¹³⁹ and *Burmah Shell Oil Storage & Distribution Co. of India v. Burmah Shell Management Staff Association*¹⁴⁰ took the view that a person to be qualified as a 'workman' must be doing the work which falls in any of the four categories viz., manual, clerical, supervisory or technical.¹⁴¹ In *Burmah Shell* the dispute among others was whether the sales engineering representatives and the district sales representatives employed in the company were 'workman' within the meaning of that term in the Industrial Disputes Act. It was argued by the Staff Association of Burmah Shell that the amendment to the definition of 'workman' introduced the words 'supervisory' and 'technical' with the object of making the definition all-comprehensive and contemplates that all persons employed in an industry must necessarily fall in one or other category namely, skilled or unskilled manual, or clerical, or technical or supervisory and, consequently, the court should proceed on the assumption that every person is a 'workman', unless he is taken out of the definition of 'workman' under any of the four exceptions contained in the definition. Rejecting this contention of the staff association, the court held:¹⁴²

If every employee of an industry was to be a workman except those mentioned in the four exceptions, these four classifications need not have been mentioned in the definition and a workman could have been defined as a person employed in an industry except in cases where he was covered by one of the exceptions. The specification of the four types of work obviously is intended to lay down that an employee is to become a workman only if he is employed to do work of one of those types, while there may be employees who, not doing any such work, would be out of the scope of the word "workman" without having to resort to the exceptions. An example, which appears to be very clear, will be that of a person employed in canvassing sales for an industry. He may not be required to do any paper work, nor may he be required to have any technical knowledge. He may not be supervising the work of any other employees, nor would he be doing any skilled or unskilled manual work. He would still be an employee of the

138. AIR 1967 SC 678.

139. (1964) 3 SCR 560.

140. (1970) 3 SCC 378.

141. Later on, two two-judge bench decisions in *A. Sundarambal v. Government of Goa, Daman & Diu*, (1988) 4 SCC 42 and *T.P. Srivastava v. National Tobacco Co. of India Ltd.*, (1992) 1 SCC 281 after referring to one or the other of the said three decisions reiterated the same view.

142. *Supra* note 140 at 383.



industry and, obviously, such an employee would not be a workman, because the work, for which he is employed, is not covered by the four types mentioned in the definition and not because he would be taken out of the definition under one of the exceptions.

The court then referred to the nature of the duties of sales engineering representatives and the district sales representatives with whom, among others, the court was concerned. It found that the amount of technical work that the sales engineering representative did was of ancillary nature to his chief duty of promoting sales and giving advice. The mere fact that he was required to have technical knowledge for such a purpose did not make his work technical. According to the court, the work of advising and removing complaints so as to promote sales remains outside the scope of technical work. The court held that the chief duty of promoting sales or giving advice was not work of technical nature. Hence the sales engineering representative was not a 'workman.' Referring to the district sales representatives, the court held that they were not doing clerical work and that they were principally employed for the purposes of promoting sales of the company. Their main work was canvassing and obtaining orders with incidental work of doing clerical work. On these facts the work that they were mainly doing was neither manual, nor clerical, nor technical, nor supervisory and, therefore, could not be included in any of the said four classifications.

Test that the employee should not be excluded by the exclusionary clause of the definition

As against this, in a set of cases, viz. *S.K. Verma v. Mahesh Chandra*,¹⁴³ *Ved Prakash Gupta v. Delton Cable India (P) Ltd.*¹⁴⁴ and *Arkal Govind Raj Rao v. Ciba Geigy India Ltd. Bombay*,¹⁴⁵ all three-judge bench decisions which without referring to the decisions in *May & Baker*, *WIMCO* and *Burmah Shell*, took the other view which was expressively negated, viz. if a person does not fall within the four exceptions to the said definition, he is a workman within the meaning of the Act. In *S.K. Verma*, the court examined whether a development officer employed by the Life Insurance Corporation is a workman within the meaning of the expression in the Act. After referring to the multifarious duties assigned to a development officer the court concluded that the principal duty of the appellant appeared to be to organise and develop the business of the corporation in the area allotted to him and for that purpose to recruit active and reliable agents and to train them to canvas new business and to render best service to policyholders. Even though the development officer had the power to recruit agents and to supervise their work, yet his duties were held to be primarily clerical. The

143. (1983) 4 SCC 214.

144. (1984) 2 SCC 569.

145. (1985) 3 SCC 371.



contention that his duties were mainly supervisory or administrative or managerial was rejected by the court. The court held that he was a workman within the meaning of section 2(s). Chinnappa Reddy J, speaking for the court, propounded the test that if a person does not fall within the four exceptions to the said definition, he is a 'workman' within the meaning of the Act.¹⁴⁶

In *H.R. Adyanthaya v. Sandoz (India) Ltd.*,¹⁴⁷ a three-judge bench of the Supreme Court referred to a five-judge bench of the court the question of laying down true test for determining whether an employee employed under a contract of service is a 'workman' under section 2(s) and the question of the status of medical/sales representatives under the said definition in view of the conflict between the three-judge bench decisions of the court in *May & Baker (India) Ltd. v. Workmen*,¹⁴⁸ *Western India Match Co. Ltd. v. Workmen*¹⁴⁹ and *Burmah Shell Oil Storage & Distribution Co. of India v. Burmah Shell Management Staff Association*¹⁵⁰ on the one hand and the later three-judge bench decisions in *S.K. Verma v. Mahesh Chandra*,¹⁵¹ *Ved Prakash Gupta v. Delton Cable India (P) Ltd.*¹⁵² and *Arkal Govind Raj Rao v. Ciba Geigy India Ltd. Bombay*,¹⁵³ on the other.

Test that worker must be employed to do one of the works specified in the definition and should not be excluded by the exclusionary clause reiterated

Although, the constitution bench of the court in *H.R. Adyanthaya v. Sandoz (India) Ltd.*¹⁵⁴ observed that the later set of decisions were based on the facts found in those cases, and, therefore, they had to be confined to those facts, it agreed that on surveying the whole body of case law on the definition of 'workman' there was conflict between two sets of the three judge bench decisions on the interpretation of section 2(s) of the Act. It reaffirmed the tests laid down by the court in *May & Baker*, *Western India Match Co.* and *Burmah Shell*, to the effect that a person to be a workman he must be employed to do any of the categories of work envisaged in section 2(s) and that he should not be excluded by the excluding part of the definition.

On the second issue whether medical representatives are 'workman', the court held that they did not perform duties of a 'skilled' and 'technical'

146. *Supra* note 143 at 217.

147. (1994) 4 SCC 164.

148. *Supra* note 138.

149. *Supra* note 139.

150. *Supra* note 140.

151. *Supra* note 143.

152. *Supra* note 144.

153. *Supra* note 145.

154. (1994) 5 SCC 737.



nature. The context in which the word 'skilled' is used, would not include the work of a sales promotion employee such as a medical representative. The court expressed the opinion that the word 'skilled' has to be construed *ejusdem generis* and thus construed, would mean skilled work whether 'manual' or 'non-manual', which is of a genre of other types of work mentioned in the definition.¹⁵⁵ The court held that the work of promotion of sales of the product or services of the establishment was distinct from and independent of the types of work covered by the said definition and hence the contention that the medical representatives were employed to do 'skilled' work within the meaning of the said definition had to be rejected. As regards the 'technical' nature of their work, the court noted that it had been expressly rejected by it in the *Burmah Shell*.

It is submitted that the constitution bench of the court by construing the term 'skilled' narrowly has made the amendment to the definition in 1982 almost redundant. The amendment specifically had split skilled or unskilled manual into three independent categories, i.e. skilled, manual, unskilled, so that more categories of employees were brought within the sweep of the definition.¹⁵⁶ But by narrowly interpreting the word 'skilled' the court has put the clock back to the pre-amendment position.

The determinative factor is the main work performed by the employee

The question whether an employee is a 'workman' under section 2(s) of the Act is required to be answered with reference to principal nature of the duties and functions performed by him. This view has been consistently taken by the Court right from the decision in *May & Baker (India) Ltd.*, followed in *Burmah Shell* and even in *Akral Govind Raj Rao* and thereafter.

In *S.K. Maini v. Carona Sahu Co. Ltd.*,¹⁵⁷ a division bench, ruled that the determinative factor is the main duties of the employee concerned and not some work incidentally done. If the employee is mainly doing supervisory work but incidentally also does some manual or clerical work, he shall be held to be doing supervisory work. Conversely, if the main work is manual, clerical or technical, the mere fact that he does some supervisory work is

155. *Id.* at 755.

156. For detailed analysis, see Bushan Tilak Kaul, "Industrial Relations Law" XXV *ASIL* 422-27 (1989).

157. (1994) 3 SCC 510; see also *M/s Inter Globe Air Transport v. Leela Deshpande*, (1994) Lab IC 1095 (Bom); *Narsinha Anant Joshi v. M/s Century Shipping and another*, (1994) Lab IC 2417 Bom); *C. Narayana Reddy v. Management of Ajantha Theatre*, (1994) Lab IC 2634 (Kant). Also see *Anand Regional Coop. Oil Seedgrowers' Union Ltd. v. Shaileshkumar Harshadbhai Shah*, (2006) 6 SCC 548 where the court reiterated that it is now a well settled legal position that for determining whether a person employed in an 'industry' is a 'workman' or not, the two relevant considerations are the nature of the work performed by him and the terms of his appointment.



immaterial and the employee will come within the purview of the definition of 'workman'.

Strong judicial perception against teachers being treated as 'workman' under various labour legislations

The Supreme Court in *Miss A. Sundarambal v. State of Goa*¹⁵⁸ held that a teacher was not a workman under section 2(s) of the ID Act for the following reasons:¹⁵⁹

Imparting of education which is the main function of teachers cannot be considered as skilled or unskilled manual work or supervisory work or technical work or clerical work. Imparting of education is in the nature of a mission or a noble vocation. A teacher educates children, he moulds their character, builds up their personality and makes them fit to become responsible citizens. Children grow under the care of teachers. The clerical work, if any they may do, is only incidental to their principal work of teaching.

The term 'workman' was amended by the Industrial Disputes Amendment Act, 1982 and came into force from August 24, 1984. This definition as it stands now reads: "Workman means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied...."

As can be seen, the most significant thing in the amended definition is that now manual work stands alone without adjective of 'skilled' or 'unskilled' as was the case before. 'Skilled' work and the 'unskilled' work are two separate types of works, which need not be 'manual'. Thus, a 'skilled' work could be even mental or intellectual work performed by a teacher while teaching students. Besides this change the amendment has included 'operational' work as additional category in the definition. In view of the sweeping changes in the definition, it is submitted that the term 'skilled' can cover teachers. But the decision in *Ahmedabad Pvt. Primary Teachers Association v. Administrative Officer*¹⁶⁰ once again demonstrates the strong judicial perception against teachers being brought within the fold of labour laws.

In this case essentially the issue was as to whether teachers qualified as 'employee' within section 2(e) of the Payment of Gratuity Act, 1972, to be entitled to gratuity benefit payable under the Act. The connotation of the term 'employee' in the said Act is in many material particulars similar to the definition of 'workman' under section 2(s) of the ID Act as amended by the Industrial Disputes (Amendment) Act of 1982. Relying on *Sundarambal*,

158. (1988) 4 SCC 42.

159. *Id.* at 48.

160. (2004) 1 SCC 755.



the court held that teachers were not covered by the definition of 'employee' under the Payment of Gratuity Act, 1972 as well and, therefore, benefits under the Act were not available to them.

It is submitted that the court in *Ahmedabad Pvt. Primary Teachers Association* has not appreciated that the decision in *Sundarambal* was rendered prior to the 1982 amendment of the definition of 'workman' and, therefore, the decision in *Sundarambal* could not be the basis for denying teachers the benefits under various labour legislations. It was unfortunate that after the 1982 amendment of the definition of 'workman' a constitution bench of the Supreme Court in *H.R. Adyanthaya v. Sandoz (India) Ltd.*¹⁶¹ resorted to the rule of *ejusdem generis*, even when there was no common genus present amongst the words used in the definition, to give a narrow meaning to the wide words in the amended definition of 'workman' under the ID Act. The court excluded 'sales representatives' from the definition of 'workman' by holding that the words 'skilled', 'unskilled' and 'manual' had to be read *ejusdem generis*. It is submitted that the court erred in applying the rule of *ejusdem generis* as the words 'skilled', 'unskilled' and 'manual' cannot be said to be species of the same or common *genus*.

In *Ahmedabad Pvt. Primary Teachers Association*, the court has resorted to the rule of *noscitur a sociis* which is wider in scope than the rule of *ejusdem generis* for construing the definition of 'employee' under the Payment of Gratuity Act, 1972, implicitly recognizing that the words 'skilled', 'unskilled' and 'manual' do not belong to the same *genus* and, therefore, the principle of *ejusdem generis* could not be applied. However, the court has even by applying the rule of *noscitur a sociis* held that 'teachers' are not 'employee' restricting the meaning of otherwise wide term 'skilled' in a beneficial legislation like the Payment of Gratuity Act.

It is submitted that both *H.R. Adanthaya*, as well as *Ahmedabad Pvt. Primary Teachers Association*, which have interpreted the term 'skilled' narrowly under the two legislations referred to above need to be reexamined by a larger bench of the court so that social welfare legislations like the Payment of Gratuity Act which deal with payment of terminal benefit and the ID Act which is intended to provide, *inter alia*, job security to the workers and bring resolution to the industrial conflicts do not result in the denial of the benefit of the provisions of these statutes to those otherwise falling within the definition of 'employee' or 'workman', because of preconceived notions of the courts.

Need for uniform definitions including that of 'workman'

The decision of the Supreme Court in *Ahmedabad Pvt. Primary Teachers Association*¹⁶² also brings to the fore the need for having a uniform

161. (1994) 5 SCC 737; for detailed analysis of the judgement see Bushan Tilak Kaul, "Labour Law-I". (Industrial Relations Law) XXX *ASIL* 347-50 (1994).

162. *Supra* note 160.



definition for various terms, including ‘workman,’ under different statutes concerning labour. The need to have a uniform definition had engaged the attention of both the National Commissions on Labour constituted by the Government of India. The first National Commission on Labour (1969) had observed that in order to bring about a feasible degree of simplification and uniformity in definitions it should be possible to integrate those enactments which cover subjects having common objective.¹⁶³

The report of the Second National Commission on Labour (2002) had also considered this issue and recommended thus:¹⁶⁴

The Commission is of the view that the coverage as well as the definition of the term ‘worker’ should be the same in all groups of laws, subject to the stipulation that social security benefits must be available to all employees including administrative, managerial, supervisory and others excluded from the category of workmen and others not treated as workmen or excluded from the category of workmen.... We propose that instead of having separate laws, it may be advantageous to incorporate all the provisions relating to employment relations, wages, social security, safety and working conditions etc., into a single law, with separate parts in respect of establishments employing less than 20 persons.

It is high time to implement the recommendations of both the Commissions by integrating and amending labour legislations to bring uniformity in the definitions of various terms so that there is no conflict or inconsistency in their interpretation by the courts.

IV Conclusion

Judicial interpretation of definition of the term ‘industry’ subsequent to *Hospital Mazdoor Sabha* and *Corporation of Nagpur* had the effect of frustrating the dual goals of industrial harmony and social justice underlying the ID Act. Hence, the court in *Bangalore Water Supply* felt it desirable to lay down clear and broad principles to interpret this term in the absence of legislative changes. This was done with a view to stimulating industrial harmony and cooperation between employer and workmen for the overall good of the society. The court neither rejected everything ruled earlier nor fabricated new tests, but only rejected erratic excursions. The decision of the court in *Bangalore Water Supply* and consistent application of the tests laid down in it over the period made one to believe that these tests had stood the test of time and internalized by all concerned. But there have

163. Government of India, *Report of the National Commission on Labour* 318 (1969).

164. Government of India, *Report of the National Commission on Labour* 322 (2002).



been disturbing trends discernible in some of the later decisions of the court. The smaller benches of the court have either not referred to, or have misconstrued, the tests laid down in *Bangalore Water Supply*. But the decision in *General Manager, Telecom*¹⁶⁵ has for the time being restored the position of pride to *Bangalore Water Supply*¹⁶⁶ by emphasizing the importance of judicial discipline and overruling two of its earlier decisions which *ex-facie* were inconsistent with the principles laid down in *Bangalore Water Supply*. The recent decision of the constitution bench of the court in *State of U.P. v. Jai Bir Singh*¹⁶⁷ directing that the cases that were placed before it for consideration be now placed before Hon'ble Chief Justice of India for constituting a suitable larger bench for reconsideration of the judgement in *Bangalore Water Supply* has left the entire scope and ambit of the definition of 'industry' wide open. It is submitted that the true ambit of the definition of 'industry' needs to be authoritatively and clearly laid down by Parliament which is bound to perform its constitutional function and which it has, generally speaking, abdicated after 1984. Let the court not be made to perform the function which essentially is of Parliament and which it had failed to perform due to its lack of will. The Second National Commission on Labour has submitted its report and made recommendations which, if considered by the government at appropriate level with the seriousness that it deserves, may clean up the web of forensic hairsplitting of various legalistic definitions. It may still be necessary to legislatively define the contours of sovereign functions for the purposes of industrial relations law. Therefore, a debate for a rational legislative action, rather than a judicial reconsideration of *Bangalore Water Supply*, is urgent and necessary. It all depends on whether the government of the day has the will to do so in all its earnestness.

As regards 'industrial dispute' the court while dealing with different facets of the definition has not allowed formalism and technicalities to stand in the way of workers or trade unions from seeking redressal under the Act. The court has departed from the literal construction of the definition and has rather preferred purposive construction while dealing with different facets of the definition and added dynamism into it that has otherwise remained unamended since its incorporation in the statute book. The distinction between 'individual disputes' and 'industrial disputes' has been made with a view to emphasize the fact that essentially the ID Act deals with collective disputes and the machinery under the Act was conceived to intervene essentially in collective disputes as these disputes may lead to dislocation of supply of goods and provision of services to the society at large causing serious inconvenience. The Act essentially was envisaged for the purposes of furthering the object of social control by arresting strikes

165. *Supra* note 33.

166. *Supra* note 11.

167. *Supra* note 6.



and lockouts, creating industrial harmony and providing expeditious and specialized conciliation and adjudication machinery for the resolution of industrial conflicts which were rampant at the time when the legislation was made. However, in view of the difficulty faced by workers in respect of individual disputes and the jurisdictional issues involved in such cases, the recommendations of the Second National Commission on Labour need serious consideration.

The definition of 'workman' in the ID Act has undergone amendments from time to time leading to expansion of the legislative scope of the definition. The edifice of this definition continues to rest on the concept of contract of employment. Before a person can seek to bring his case within the definition of 'workman' he has to establish that he was employed under a contract *of* service and not under a contract *for* service. The Supreme Court has played an activist role in ensuring that the employers are not allowed to resort to camouflages or smoke screens to escape their liability under the Act. It has brought in the corporate law principle of lifting the veil to find out the true relationship. It has invoked relevant tests- due control and supervision test, integral part of the business test, lifting of veil test and other relevant principles from English cases – to treat more and more cases including those of bidi workers in the fold of contract *of* service. However, in spite of the expanding definition of 'workman' in the matter of classes of work which a person may be employed to do in an organisation, the court has adopted rather an approach of restraint, more particularly in case of teachers, sales representatives and artistes, denying them the protection of the Act, notwithstanding the wide words used in the definition of 'workman' which are almost all-encompassing. In view of this approach of restraint adopted by the court, it is submitted that the definition of 'workman' needs to be recast to make the legislative policy clear as to the categories of employees who should be entitled to the benefit of the Act. Simplifying the definition of 'workman' on the lines suggested in *S.K. Verma*¹⁶⁸ needs consideration. This is not to undermine the important role that the court has played in building up a strong base for determining the contours of the contract of employment in the context of Indian industry.

It is submitted that uniform definitions in various labour statutes and their simplification is the prime need of the day so that the time of the industrial adjudication machinery, as also of the superior courts, is not wasted on adjudicating preliminary issues such as whether a person is a 'workman', whether the dispute in question is an 'industrial dispute,' and whether the activity in question is an 'industry'. These definitions have become the main litigating areas consuming time, energy and space of industrial adjudication. The legislative process has promises to keep if industrial harmony, in tune with distributive economic justice and continuity of active production, is to be accomplished.

168 *Supra* note 143.