Bombay High Court
Fancy Rehabilitation Trust, A ... vs Union Of India (Uoi), Through The ... on 19 September, 2006
Equivalent citations: (2007) ILLJ 1073 Bom
Author: F Rebello
Bench: F Rebello, A V Mohta

JUDGMENT F.I. Rebello, J.

1. Rule. Heard forthwith.

2. Petitioner No. 1 is a Trust, registered under the provisions of the Bombay Public Trusts Act. Petitioners activities commenced in 1974 and after 1990 the petitioners activities are in the field of rehabilitation of the physically handicapped persons and other less fortunate people. Petitioner No. 2 is the Managing Trustee of petitioner No. 1. Respondent No. 3-a Private Limited Company had given a contract to petitioner No. 1 for house keeping. In February 2003, the respondent No. 3 discontinued part of the services rendered by petitioner No. 1. but again gave them a contract in April, 2004. There is some dispute between the petitioners and respondent No. 3 about the outstanding amount payable in a sum of Rs. 1,43,000/- since April 2004 till May, 2006. Respondent No. 3 has now discontinued the contract with petitioner no. 1. Petitioner No. 1 for the purposes of house-keeping activities had engaged 8 persons and of them two are deaf and dumb, one orphan and three widows.

It is submitted on behalf of the petitioners that on account of the act of termination of the contract, persons with disabilities and widows are likely to be affected and this act of the respondents is violative of Articles 14 and 42 of the Constitution of India.

Petitioners for that purpose rely on the provisions of the Persons With Disabilities (Equal Opportunities and Equal Participation) Act, 1995 (hereinafter referred to as "the Act"). As the handicapped persons are entitled to approach this Court, petitioner No. 1 are espousing their case. The petitioners have made a complaint to the Commissioner for Handicapped Persons under the Act, on 22nd July, 2006. In the complaint, it has been set out that respondent No. 3 is an establishment covered under the provisions of the Act and as such respondent No. 4 is having necessary jurisdiction to try and entertain the complaint. Eventhough petitioner No. 1 is termed and named as contractor by respondent No. 3, strictly speaking, they are an NGO and petitioner No. 1 is a no loss no profit trust. After considering the provisions of the Act, a Division Bench of this Court in Satish Prabhakar Padhye v. Union of India and Ors. 2006-II LLJ 671 has held that the private limited companies are also an establishment under the Act. Reference is made to Writ Petition No. 5359 of 2005 where certain orders have been passed. It is in these circumstances in the present petition, the petitioners have sought a direction to call upon the respondents to explain as to what steps they have taken for rehabilitation of the persons with disabilities who are deputed by the present petitioners with respondent No. 3. It is also prayed that the order dated 18th July, issued by respondent No. 3 discontinuing the maintenance and cleaning services be quashed and set aside. There are various other reliefs which have been prayed for. It is not necessary to reproduce all the reliefs as prayed.

3. On behalf of the respondent No. 3, a reply has been filed. It is pointed out that the respondent No. 3 is not a State within the meaning of Constitution of India and, therefore, not amenable to the writ jurisdiction of this Court. Respondent No. 3 is not performing or discharging any public function nor has been entrusted with any public utility services so as to make it amenable to the writ jurisdiction of this Court. The petition proceeds on the basis that the provisions of the Act apply to the petitioners. Respondent No. 3 is a private limited company, incorporated under the provisions of the Companies Act and is not a corporation established by or under a Central, Provincial or the State Act. There is no privity of contract between respondent No. 3 and the persons on whose behalf the petition has been filed. Respondent No. 3 had given a contract to petitioner No. 1. Respondent No. 3 was compelled to terminate the contract with respondent No. 1 mainly on account of shifting of all operations apart from other grounds and as the petitioner No. 1 is not equipped to provide, the level and standard of service required, considering that the equipment installed by the respondents is sophisticated and the requirement of their house keeping is entirely different from routine house keeping. It is not necessary to advert to the various other averments which are in answer to the averments made by the petitioners in the petition.

4. The main issue which arise for consideration is, whether the provisions of the Act apply to the establishment of respondent No. 3 and further considering the contract between respondent No. 3 and petitioner No. 1, even if the Act be applicable, whether on the facts and circumstances, the provisions of the Act are applicable to respondent No. 3?

5. At the outset, we may point out that our attention has been invited by the learned Counsel for the petitioners to a judgment of Division Bench of this Court in Satish Prabhakar Padhye (supra). By that judgment a learned Bench of this Court considering provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, has held that the provisions of the Act would also be applicable to companies registered under the Indian Companies Act. Our attention is also invited to Writ Petition No. 5339/2005 which has been admitted and wherein directions have been issued to a Bank which is not a Government company, not to terminate the services of the employees engaged from the petitioner No. 1 there, who is the same as the petitioner No. 1 in this case.

On the other hand, on behalf of respondent No. 3, it is submitted that the judgment of this Court in Satish Prabhakar Padhye (supra) is per incuriam having not considered the judgment of the Supreme Court in Sukhdev Singh and Ors. v. Bhagatram Sardar Singh Raghuvanshi and Anr. and the judgment in S.S. Dhanoa v. Municipal Corporation, Delhi and Ors. . It is also submitted that the learned bench did not take into consideration various provisions of the Act which would indicate that the Act is not applicable to a private company.

6. To answer the issue, we will first have to decide whether the judgment in Satish Prabhakar Padhye (supra) is per incuriam. Reference may be made to some of the provisions of the Act to the extent they are relevant for the purpose of deciding the issue in controversy. We may firstly refer to the definition of "establishment" under Section 2(k) which reads as under:

2(k). "Establishment" means a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in Section 617 of the Companies Act, 1956 and includes Departments of a Government.

We may also refer to the definition of "employer" under Section 2(j) and the definition of "Appropriate Government" under Section 2(a):

2(j). "Employer" means (i) in relation to a Government, the authority notified by the Head of the department in this behalf or where no such authority is notified, the Head of the Department; and

(ii) in relation to an establishment, the Chief Executive Officer of that establishment.

2(a). "appropriate Government" means, (i) in relation to the Central Government or any establishment wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonment Act, 1924 the Central Government;

(ii) in relation to a State Government or any establishment wholly or substantially financed by that Government, or any local authority, other than a Cantonment Board, the State Government;

(iii) in respect of the Central Co-ordination Committee and the Central Executive Committee, the Central Government;

(iv) in respect of the State Co-ordination Committee and the State Executive Committee the State Government.

We may now consider the provisions of Chapter IV of the Act. Section 25 sets out that the Appropriate Governments and local authorities with a view to preventing the occurrence of disabilities have to undertake what is set out therein. Section 26 enjoins upon the Appropriate Government and local authorities to ensure that every child with a disability has access to free education in an appropriate environment till the child attains the age of eighteen years as also other duties as set out therein. Section 32 casts a duty on the Appropriate Government to identify posts in the establishments which can be reserved for persons with disability and thereafter review the lists.

Section 33 is relevant and reads as under:

33. Reservation of posts. -Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent. for persons or class of persons with disability of which one per cent, each shall be reserved for persons suffering from (i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

Another relevant section is Section 41, which reads as under:

41. Incentives to employers to ensure five per cent of the work force is composed of persons with disabilities. -The appropriate Governments and the local authorities shall, within the limits of their economic capacity and development, provide incentives to employers both in public and private sectors to ensure that at least five per cent of their work force is composed of persons with disabilities.

7. Let us now consider the judgment of the learned Division Bench of this Court in Satish Prabhakar Padhyue (supra). In coming to the conclusion that the provisions of the Act in the matter of reservation also apply to private companies, the learned Division Bench relied on the expression 'Corporation' in definition of "establishment" under Section 2(k) of the Act which we have reproduced above and held that a Company registered under the provisions of the Companies Act is a Corporation, after noting that a Government Company has been specifically included in the definition. The learned Division Bench further in paragraph 19 observed as under:

Whether or not a private limited company such as respondent No. 5 can be included in the term "establishment", can be seen further upon reading the act as a whole.

Then in paragraph 21, the learned Bench observed as under:

It is therefore seen that there is a distinction between a Government Undertaking and other Establishments. These other Establishments could be interalia companies established under the Central Act namely Companies Act.

For the purpose of construction, the learned Division Bench has relied upon various judgments including in the case of Hakam Singh v. Gammon (India) Ltd. . Is the ratio decedendi in Hakam Singh (supra), applicable for considering the provisions of the Act The issue there was, as to whether the Civil Court considering the cause of action had jurisdiction to decide the Suit. In that context the term 'Corporation' in Section 20 of the C.P.C. was considered. The Supreme Court held that the term 'Corporation' would include not only a Statutory Corporation but also a Company. What was under consideration was not the expression 'Statutory Corporation', but the expression 'Corporation'. The issue in Hakam Singh (supra) was, where a company could sue or be sued. Even if the discussion in that judgment is considered, it will be of no assistance in answering the issue, as to whether a statutory corporation includes a company registered under the Companies Act. 'A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent.'. See Uttaranchal Road Transport Corporation and Ors. v. Mansaram Nainwal (2006) 6 SCC 366.

It is settled law that in the first instance what the courts must look at is the language of the statute and read it in its plain or literal sense. If on so reading of the provisions there is no scope for interpretation, Courts have to follow the plain and grammatical meaning. However, if there be ambiguity and/or the meaning is not clear and to give effect to what Parliament intended, then only will the Courts apply the other rules of interpretation, so as to find out the object of the Act and the intent of Parliament. See South Eastern Coalfields Ltd. v. Commissioner, Customs & Central Excise, M.P. (2006) 6 SCC 340.

In our opinion, to understand the provisions of the Act, the key will lie in the definition clauses which we have reproduced earlier.

The definition of "establishment" can be read as under:

(i) A corporation established by or under the Central, Provincial or State Act; or

(ii) an authority or a body owned, controlled or aided by the Government; or

(iii) a local authority; or

(iv) a Government company established under Section of the Companies Act, 1956 and includes department of Government.

8. Is a company incorporated under the provisions of the Indian Companies Act, a corporation established by or under the Central, Provincial or State Act? Similar terminology is found in various Acts which have been the subject matter of interpretation by the Supreme Court. We may firstly refer to the judgment in Sukhdev Singh (supra). There were two issues to be answered which depended on answering the question whether statutory corporations are authorities within the meaning of Article 12. For that purpose, the Court noted the distinction between a company, incorporated under the Companies Act and a statutory body. We may gainfully reproduce paragraph 25 of the judgment which reads as under:

25. The Additional Solicitor General submitted that regulations could not have the force of law because these regulations are similar to regulations framed by a company incorporated under the Companies Act. The fallacy lies in equating rules and regulations of a company with rules and regulations framed by a statutory body. A company makes rules and regulations in accordance with the provisions of the Companies Act. A statutory body on the other hand makes rules and regulations by and under the powers conferred by the statutes creating such bodies Regulations in Table-A of the Companies Act are to be adopted by a company. Such adoption is a statutory requirement. A company cannot come into existence unless it is incorporated in accordance with the provisions of the Companies Act. A company cannot exercise powers unless the company follows the statutory provisions. The provision in the Registration Act requires registration of instruments. The provisions in the Stamp Act contain provisions for stamping of documents. The non-compliance with statutory provisions will render a document to be of no effect. The source of the power for making rules and regulations in the case of corporation created by a statute is the statute itself. A

company incorporated under the Companies Act is not created by the Companies Act but comes into existence in accordance with the provisions of the Act. It is not a statutory body because it is not created by the statute. It is a body created in accordance with the provisions of the statute.

The position of law was made clearer in S.S. Dhanoa (supra). The issue before the Supreme Court was whether the appellant before it, a member of the Indian Administrative Service and whose services were placed at the disposal of Cooperative stores limited-a society registered under the Bombay Cooperative Societies Act, 1925, was a public servant within the meaning of Clause (12) of Section 21 of the Indian Penal Code, 1860, for the purposes of Section 197 of the Code of Criminal Procedure, 1973. Whilst considering the issue, the Supreme Court had to consider the expression 'a Corporation established by or under a Central, Provincial or State Act'. Some of the relevant definitions were quoted:

21. The words 'public servant' denote a person falling under any of the descriptions hereinafter following, namely:

Twelfth.- Every person (a) in the service or pay of the government or remunerated by fees or commission for the performance of any public duty by the government;

(b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in Section 617 of the Companies Act, 1956.

The language as used in the definition of "establishment" under that Act in question and the act in issue was similar. We may gainfully reproduce paragraphs 8 and 9 of the judgment:

8. A corporation is an artificial being created by law having a legal entity entirely separate and distinct from the individuals who compose it with the capacity of continuous existence and succession, notwithstanding changes in its membership. In addition, it possesses the capacity as such legal entity of taking, holding and conveying property entering into contracts, suing and being sued, and exercising such other powers and privileges as may be conferred on it by the law of its creation just as a natural person may. The following definition of corporation was given by Chief Justice Marshall in the celebrated Dartmouth College case:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By

these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.

The term 'corporation' is, therefore, wide enough to include private corporations. But, in the context of clause Twelfth of Section of the Indian Penal Code, the expression 'corporation' must be given a narrow legal connotation.

9. Corporation, in its widest sense, may mean any association of individuals entitled to act as an individual. But that certainly is not the sense in which it is used here. Corporation established by or under an Act of Legislature can only mean a body corporate which owes its existence, and not merely its corporate status, to the Act. For example, a Municipality, a Zilla Parishad or a Gram Panchayat owes its existence and status to an Act of Legislature. On the other hand, an association of persons constituting themselves into a company under the Companies Act or a society under the Societies Registration Act owes its existence not to the Act of Legislature but to acts of parties though, it may owe its status as a body corporate to an Act of Legislature.

From these judgments, it would be clear that the expression "corporation" established by or under a Central, Provincial or State Act, can only mean a body corporate which owes its existence and corporate status to the Act. On the other hand, an association of persons constituting themselves into a company under the Companies Act, owe their existence not to the Act of Legislature but to acts of parties though it may owe its status as a body corporate to an Act of Legislature. Secondly, it may be noted that the definition of "establishment" itself indicates that the Government company as defined in Section 617 of the Companies Act is included within the definition of an "establishment". In other words, considering the rule of exclusion other companies not being Government companies would be excluded. We have noted earlier that the definition of "establishment" necessarily excludes a private company unless apart from the Government company, it is a body owned, controlled or aided by the Government. All other companies by necessary implication would be excluded. To that extent the definition of "Appropriate Government" becomes relevant in so far as the exercise of powers are concerned. In so far as the Central Government is concerned, an establishment wholly or substantially financed by Government etc, similarly would be the position in so far as the State Government. This has a bearing on Section 33 of the Act which enjoins or mandates the Appropriate Government to provide for appointment of persons with disabilities. It would thus be clear that the entire premise based on which the learned Division Bench proceeded to hold that the private company falls under the expression "establishment", was without noting the judgments of the Apex Court in Sukhdev Singh (supra) as also in S.S. Dhanoa (supra). The law laid down by the Supreme Court considering Article 141 of the Constitution of India would be binding on all courts. A judgment ignoring the law laid down by the Supreme Court has to be treated as a judgment per incuriam. A decision should be treated as per incuriam when it is given in ignorance of the terms of a statute or a rule having the force of statute or a judgment of the Supreme Court. We may also gainfully refer to the observations of a Constitutional Bench judgment of the Supreme Court in Punjab Land Development and Reclamation Corporation Ltd. Chandigarh v. Presiding Officer, Labour Court, Chandigarh and Ors. , as to when a judgment can be said to be per incuriam.

40. We now deal with the question of per incuriam by reason of allegedly not following the Constitution Bench decisions. The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this Court. It cannot be doubted that Article 141 embodies, as a rule of law, the doctrine of precedents on which our judicial system is based. In Bengal Immunity Company Ltd. v. State of Bihar, it was held that the words of Article 141, "binding on all courts within the territory of India", though wide enough to include the Supreme Court, do not include the Supreme Court itself, and it is not bound by its own judgments but is free to reconsider them in appropriate cases. This is necessary for proper development of law and justice. May be for the same reasons before judgments were given in the House of Lords and Re Dawson's Settlement Lloyds Bank Ltd. v. Dawson, on July 26, 1966 Lord Gardiner, L.C. made the following statement on behalf of himself and the Lords of Appeal in Ordinary:

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

We are clearly therefore of the opinion that this is not a case which we should refer to the learned Chief Justice to constitute a Larger Bench, considering the judgments in Sukhdev Singh (supra) and S. S. Dhanoa (supra).

9. The learned Counsel for the petitioners has drawn our attention to the resolution adopted by the General Assembly of the United Nations and the Standard Rules on Equalisation of Opportunity for Persons with Disabilities as also Agenda for Action for the Asian and Pacific Decade of the Disabled Persons 1993-2002. It cannot be gainsaid, that there has to be affirmative action in our approach to assisting the disabled to make them partners in the development process and participate in making the world a better place. We share with the petitioners the object behind the petition and the cause which they are espousing. Courts, however, have been conferred the power of judicial review so as to keep within the constitutional limits, the other organs namely; the Legislature and the Executive. The extra-ordinary jurisdiction can be invoked when the impugned action or direction is sought against the 'State or other Authority' within the meaning of Article 12 of the Constitution of India or against a body conferred with statutory duties. When Courts consider legislation which is an aid of directive principles and in furtherance of fundamental rights, it tries to give an extended meaning to the Act so as to give effect to the object of the Legislation, if it is possible to do. Courts, however,

have a constitutional limitation beyond which the power of judicial review ought not to be exercised. The balance provided by our constitutional philosophy, must be maintained and Courts cannot act as a super-legislature. If there be deficiencies, all that the Courts can point out are the limitations of the Act and it is for the legislature, if it falls within its competence to take steps to remove the disparities and/or omissions, if any.

10. The various reliefs as sought for by the petitioners are based on the hypothesis that Act applies to respondent No. 3 and consequently respondent No. 4 has jurisdiction. Once we have held that respondent No. 3 is not subject to the provisions of the Act, the jurisdiction of respondent No. 4 to issue any directions to respondent No. 3 itself would be without jurisdiction. The mere fact that in another petition, rule has been issued and interim direction is given, is no answer as we have decided the present petition on merits of the matter.

Considering the above, in our opinion, the petition will have to be dismissed and consequently rule is discharged. There shall however be no order as to costs.