**AFR**
**RESERVED**

**Court No. - 3**

**Case :-** WRIT - C No. - 51047 of 2017

**Petitioner :-** Arun Vihar Residents Welfare Association G.B. Nagar
**Respondent :-** State Of U.P. And 2 Others
**Counsel for Petitioner :-** Diptiman Singh
**Counsel for Respondent :-** C.S.C.,Radhey Shyam Dwivedi,Shekhar Srivastava

**Hon'ble Dr. Yogendra Kumar Srivastava,J.**

1. Heard Sri Diptiman Singh, learned counsel for the petitioner and Sri Shekhar Srivastava, learned counsel appearing on behalf of the third respondent.

2. The core issue which arises in the present petition is as to whether an association or society of apartment owners employing persons for rendering personal services to its members can be held to be an "industry" and its employees can be held to be "workmen" under the provisions of the Industrial Disputes Act, 1947[1] or under the U.P. Industrial Disputes Act, 1947[2].

3. The petition arises out of an award dated 22.07.2017 passed by the Labour Court in Adjudication Case No.1493 of 2008 whereby the reference with regard to the legality/validity of the termination of services of the third respondent w.e.f. 04.12.2002 has been answered by the Labour Court by holding that the termination having been made without following the provisions of Section 6N of the U.P.I.D. Act, 1947, the same would amount to an illegal retrenchment, and in view thereof a direction has been issued for reinstatement of the the third respondent in service with full back wages and all consequential benefits.

4. The records of the case indicate that upon an industrial

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1 the I.D. Act, 1947
2 the U.P.I.D. Act, 1947

dispute having been raised by the third respondent, a reference was made under Section 4K of the U.P.I.D. Act, 1947, and the question referred for adjudication was as follows:-

> "क्या सेवायोजकों द्वारा अपने श्रमिक श्री राम नारायन मिश्रा पुत्र श्री मदन मोहन पद चपरासी की सेवायें दिनांक 04.12.2002 से समाप्त किया जाना उचित तथा/अथवा वैधानिक है? यदि हाँ अथवा नहीं तो श्रमिक अपने सेवायोजकों से क्या अनुतोष प्राप्त करने का अधिकारी है और किस सीमा तक एवं अन्य किस विवरण सहित?"

5. Apart from the written statements being filed by the parties, preliminary objections with regard to jurisdiction were also raised by the petitioner asserting that the petitioner being a society of apartment owners which had been formed for looking after maintenance of the apartments, and the same having not been formed for any profit motive, the provisions of the U.P.I.D. Act, 1947 would not be applicable and the proceedings which had been initiated were without jurisdiction.

6. Rejoinders were filed by the parties, and documentary and oral evidence were also adduced and thereafter the Labour Court passed the award which is sought to be challenged in the present petition.

7. It has been submitted by the counsel for the petitioner that the petitioner-society was registered under the U.P. Co-operative Societies Act, 1965, and subsequently in the year 2000 the society was registered under the Societies Registration Act, 1860. The society was formed by resident members of Sectors 28, 29 and 37, Noida, and its main object is to provide the necessary maintenance facilities to the apartment owners who are its members. It was submitted that the residential area has been developed by Army Welfare Housing Organization, and the apartments were allotted to the serving and retired defence personnel. The object of the society is only to provide services to its members who are apartment owners and the society is not a profit earning body and as such the same cannot be held to be an industry and would not be covered by the provisions of the

U.P.I.D. Act, 1947. It was further contended that the petitioner-society being not an industry and the provisions of the U.P.I.D. Act, 1947 being not applicable there would be no question of violation of provisions of Section 6N of the U.P.I.D. Act, 1947 or any other provisions of the said Act. Reliance in this regard has been placed on the judgment in the case of **Som Vihar Apartment Owners Housing Maintenance Ltd. Vs. Workmen**[3].

8. *Per contra*, the counsel appeared on behalf of the third respondent submits that the services of the workman having been terminated without any domestic enquiry and without complying with the provisions of Section 6N of the U.P.I.D. Act, 1947, the Labour Court has rightly answered the reference by holding the termination to be illegal and invalid and granting the relief of reinstatement with full back wages. Reliance has been sought to be placed upon the judgment in the case of **Bangalore Water Supply and Sewerage Board Vs. A. Rajappa**[4] and **Karnani Properties Ltd. Vs. State of West Bengal & Ors.**[5].

9. Based on the rival contentions, the legal issue which arises in the present petition is as to whether an association or society of apartment owners, employing persons for rendering personal services to its members can be held to be an "industry" and its employees can be held to be "workmen" under the provisions of the I.D. Act, 1947 or under the U.P.I.D. Act, 1947.

10. For the purposes of adjudicating upon the aforementioned controversy it would be necessary to advert to the relevant statutory provisions under the I.D. Act, 1947:-

> "**2. Definitions**.—
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> (j) “industry” means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen;

3 (2002) 9 SCC 652
4 (1978) 2 SCC 213
5 (1990) 4 SCC 472

> (k) “industrial dispute” means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the term of employment or with the conditions of labour, of any person;
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> (s) “workman” means any person (including 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, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes 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, but does not include any such person—
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> > (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
> >
> > (ii) who is employed in the police service or as an officer or other employee of a prison; or
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> > (iii) who is employed mainly in a managerial or administrative capacity; or
> >
> > (iv) who being employed in a supervisory capacity, draws wages exceeding ten 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."

11. It may be noted that the definitions of the aforementioned expressions "industry", "industrial dispute" and "workman" are in similar terms under the U.P.I.D. Act, 1947 also.

12. The I.D. Act, 1947 was enacted to make provisions for the investigation and settlement of industrial disputes and for certain other purposes. The preamble of the I.D. Act, 1947 also states the same object, and in its terms the Act seeks to achieve industrial peace and harmony and settlement of industrial disputes.

13. The meaning and scope of the term “industry” as defined under Section 2(j) of the I.D. Act, 1947 was exhaustively discussed and analysed in the judgment in the case of **Bangalore Water Supply and Sewerage Board** (supra). The conclusions

recorded in the judgment are being extracted below:-

> “140. 'Industry', as defined in Section 2(j) and explained in Banerji (supra), has a wide import.
>
> (a) Where (i) systematic activity, (ii) organized by co-operation between employer and employee (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g. making, on a large scale prasad or food), prima facie, there is an ‘industry’ in that enterprise.
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> (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.
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> (d) If the organization is a trade or business it does not cease to be one because of philanthropy animating the undertaking.
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> 141. Although Section 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself.
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> (a) ‘Undertaking’ must suffer a contextual and associational shrinkage as explained in Banerji (supra) and in this judgment ; so also, service, calling and the like. This yields the inference that all organized activity possessing the triple elements in I (supra), although not trade or business, may still be ‘industry’ provided the nature of the activity, viz. the employer-employee basis, bears resemblance to what we find in trade or business. This takes into the fold of ‘industry’ undertakings, callings and services, adventures ‘analogous to the carrying on the trade or business’. All features, other than the methodology of carrying on the activity viz. in organizing the co-operation between employer and employee, may be dissimilar. It does not matter, if on the employment terms there is analogy.
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> x x x x x
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> 143. The dominant nature test :
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> (a) Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not ‘workmen’ as in the University of Delhi case (supra) or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur (supra) will be the true test. The whole undertaking will be ‘industry’ although those who are not ‘workmen’ by definition may not benefit by the status.
>
> (b) 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.

> (c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2(j).
>
> (d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby."

14. The "triple test" laid down in the aforementioned judgment for determination as to whether an activity would fall within a purview of the definition of industry, is as follows:-

> "...(i) systematic activity, (ii) organized by co-operation between employer and employee (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes..."

15. The question as to whether an association or society of apartment owners employing persons for rendering personal services to its members would be covered within the meaning of the term "industry" for the purposes of Section 2(j) of the I.D. Act, 1947 was considered in the case of **Som Vihar Apartment Owners Housing Maintenance Ltd.** (supra) and referring to the judgment in the case of **Bangalore Water Supply and Sewerage Board**, it was held that when personal services are rendered to members of a society which is constituted only for the purposes of those members, the activity would not be treated as an industry nor the employees would be treated as workmen. The relevant observations in the judgment are as follows:-

> "7. Indeed this Court in Rajappa case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207] noticed the distinction between such classes of workmen as domestic servants who render personal service to their masters from those covered by the definition in Section 2(j) of the Industrial Disputes Act. It is made clear that if literally interpreted these words are of very wide amplitude and it cannot be suggested that in their sweep it is intended to include service however rendered in whatsoever capacity and for whatsoever reason. In that context it was said that it should not be understood that all services and callings would come within the purview of the definition; services rendered by a domestic servant purely in a personal or domestic matter or even in a casual way would fall outside the definition. That is how this Court dealt with this aspect of the

> matter. The whole purpose of the Industrial Disputes Act is to focus on resolution of industrial disputes and the regulation will not meddle with every little carpenter or a blacksmith, a cobbler or a cycle repairer who comes outside the idea of industry and industrial dispute. This rationale, which applies all along the line to small professions like that of domestic servants would apply to those who are engaged by a group of flat-owners for rendering personal services even if that group is not amorphous but crystallised into an association or a society. The decision in Rajappa case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207] if correctly understood is not an authority for the proposition that domestic servants are also to be treated to be workmen even when they carry on work in respect of one or many masters. It is clear when personal services are rendered to the members of a society and that society is constituted only for the purposes of those members to engage the services of such employees, we do not think its activity should be treated as an industry nor are they workmen. In this view of the matter so far as the appellant is concerned it must be held not to be an "industry". Therefore, the award made by the Tribunal cannot be sustained. The same shall stand set aside."

16. The judgment in the case of **Som Vihar Apartment Owners Housing Maintenance Ltd.** was subsequently followed in the case of **M.D. Manjur & Ors. Vs. Shyam Kunj Occupants' Society & Ors.**[6] and it was reiterated that the housing co-operative society is not an industry and its employees cannot be treated to be "workmen" as defined under Section 2(s) of the I.D. Act, 1947.

17. Reference may also be had to the case of **Regional Director, Employees' State Insurance Corporation Vs. Tulsiani Chambers Premises Co-operative Society**[7] wherein while considering the applicability of the Employees State Insurance Act, 1948[8] to a co-operative housing society it was held that the society could not be said to be covered within the meaning of the word "shop" so as to bring it within the ambit of the E.S.I. Act, 1948. The status of a housing co-operative society under various statutory enactments was considered and it was

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6 AIR 2005 SC 1501
7 2008 (116) FLR 656
8 the E.S.I. Act, 1948

held that the society could not be said to be carrying out commercial or trading activities. The relevant observations made in the judgment are as follows:-

> "49. In this background it is material to consider such activities and status of such society under other laws.
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> (A) Industrial Disputes Act, 1947 : The status of a Co-operative society under Industrial Disputes Act, 1947 was subject-matter of decision of the Apex Court in the case of Management of SOM Vihar Apartment Owners Housing Maintenance Society Ltd. v. Workmen C/o. Indian Engineering and General Mazdoor, 2001 LLR 599 = 2001 (3) LLN 815 (SC). The Honourable Apex Court has held the society cannot be held to be Industry or shop and at the highest it can be stated that employees of the society are rendering personal services to the members of the society.
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> (B) Minimum Wages Act, 1948 : A Single Bench of this High Court was required to consider whether a Co-operative Society owning industrial units or galas wherein members or shareholders are carrying on commercial or trading activities in the said units would make the society amenable to Minimum Wages Act, 1948 insofar as employees of the Society are concerned. This was considered in the case of Kiran Industrial Premises Co-operative Society Ltd. v. Janata Kamgar Union [2001 (89) FLR 707 (Bom.)], it has been held that a society, in which its members carry on commercial and trading activities, cannot be treated or said to be engaged in any commercial venture or business, trade or profession and does not even amount to "commercial establishment" much less a "shop".
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> (C) Security Guards Act : In the case of - Maharashtra Rajya Suraksha Rakshak and Gen. Kamgar Union v. Security Guards Board for Greater Bombay and Thane District [2007 (2) AIR Bom. R. 146 (DB)], it has been held that a Co-operative Housing Society having residential and commercial tenements is not an establishment if it is not carrying on business, trade or profession even though some of its members are carrying on business, trade or profession in their premises. Relevant test is whether the society is carrying on business, trade or profession. Mere rendering of service by Society to its members, cannot be said to be either business or trade or commercial activity.
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> (D) Provident Fund and Misc. Provisions Act, 1952 : In the case of Backbay Premises Co-operative Society Ltd. v. Union of India [1997 (2) CLR 1075], it was held that the petitioner society consisting of various premises, which are used for business purpose by the members, are required to collect maintenance charges and statutory charges from its members under the provisions of Co-operative Societies Act and the Bye-laws. Such activity of the society would not amount to commercial or business activity. The petitioner society was hence not covered by the Act even under Section 1(3)(b) of the PF Act.
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> (E) Bombay Shops and Establishments Act, 1948 : A demi

> official letter of Under Secretary to Government of Maharashtra addressed to the Mumbai District Co-operative Housing Federation Ltd. (page 50 of respondent's compilation) clearly states that a Co-operative society is neither an establishment which carries on any business, trade or profession nor a society registered under Societies Registration Act. It is, therefore, not a commercial establishment as defined under the Bombay Shops and Establishments Act and hence it will not come within the purview of the Bombay Shops and Establishment Act.
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> 50. The respondents-societies render services to the members are domestic in nature like operating lifts, water supply, electricity, cleaning, sweeping and security. These services are essential for the very existence and security of its members and society building. These services therefore are in the nature of personal services and cannot be said to be economic activity. Therefore such services as contended by itself would not make the respondents-societies a "shop".”

18. In **Smt. Jagvatibai S. Taak Vs. S.D. Paithane Presiding Officer, VIII Labour Court Mumbai & Anr.**[9] referring to the judgment of **Bangalore Water Supply and Sewerage Board**, it was reiterated that a co-operative housing society is not an “industry” as defined under Section 2(j) of the I.D. Act, 1947, and the employees who were engaged to provide services to the members of the society cannot be treated as “workmen”. The observations made in the judgment are as follows:-

> “3. It is now well settled by a catena of judgment that a co-operative housing society is not an industry. In the case of Management of SOM Vihar Apartment Owners Housing Maintenance Society Ltd. v. Workmen C/o. Indian Engineering and General Mazdoor [(2002) 9 SCC 652], the Supreme Court, after considering its judgment in the cas of Bangalore Water Supply and Sewerage Board Vs. S.A. Rajappa [1978 (36) FLR 266 (SC) = 1978 LIC 467], has observed that workmen engaged to provide service for members of a Society cannot be treated as “workmen” of the housing society, as a housing society is not an “industry” as defined under section 2(j) of the I.D. Act.”

19. The question of applicability of the provisions of the Contract Labour (Regulation and Abolition) Act, 1970[10] to an apartment owners association came up for consideration in the case of **Smt. Rachana Gopinath & Anr. Vs. State of**

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9 2008 (119) FLR 234

10 the C.L.R.A. Act, 1970

**Karnataka**[11], and upon examining its activities it was held that the same could not be said to be concerning any industry, trade, business, manufacture or occupation and accordingly the association could not be construed to be an "establishment" under Section 2(e) of the C.L.R.A. Act, 1970. The judgment in the case of **Bangalore Water Supply and Sewerage Board** and also **Som Vihar Apartment Owners Housing Maintenance Ltd.** were considered and it was stated as follows:-

> "10. At this juncture, it would be apt to refer to the judgment of the Apex Court in the case of 'Management of Som Vihar Apartment Owners Housing Maintenance Society Ltd. v. Workmen C/o. Indian Engineering and General Mazdoor,' [2001 (1) LLJ 1413] wherein the Apex Court while considering the applicability of the Industrial Disputes Act, 1947 to the Apartment Owners Housing Society formed by the Apartment Owners, has held that when personal services are rendered to the Members of a Society and that Society is constituted only for the purposes of those Members to engage the services of such employees, its activity should not be treated as an industry nor are they workmen. In that context, it is held that the Apartment Owners Housing Maintenance Society is not an Industry. The Constitution Bench Judgment of the Apex Court in the case of Bangalore Water Supply and Sewerage Board v. R. Rajappa & Others, [1978 (36) FLR 266 (SC)] was considered while arriving at the said conclusion. It is held that the rationale which applies all along the line to small professions like that of domestic servants would apply to those who are engaged by a group of flat owners for rendering personal services even if that group is not amorphous but crystallized into an Association or a society. The proposition that domestic servants are also to be treated as workmen even when they carry on work in respect of one or many masters is negated by the Apex Court in Management of SOM Vihar Apartment Owners Housing Maintenance Society Ltd. case. This judgment is squarely applicable to the facts of the present case. The Apartment Owners Association is an Association created for the benefit of the Members of the Association and the so called workmen employed by the Association are rendering only personal services to the Members of the Association. As aforesaid, to attract the provisions of the Act, the essential ingredients of an 'establishment' as set out in Section 2(e) of the Act which contemplates that the activities must be commercial in nature, carried on by the office or Department of the Government or the Local Authority must be satisfied. In the absence of such satisfaction, respondent insisting for compliance of the procedures prescribed under the Act is

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11 2016 (150) FLR 1052

wholly unsustainable."

20. In a similar set of facts, as in the present case, in **M/s Arihant Siddhi Co-operative Housing Society Ltd. Vs. Pushpa Vishnu More & Ors.**[12] where the termination of services of a watchman engaged by a co-operative housing society was subject matter of an industrial dispute and the Labour Court had answered the reference by making an award and directing reinstatement with full back wages and continuity of services, upon a challenge being raised to the award, it was held that where the predominant nature of the activity of the co-operative housing society was to render services to its own members, even if it carries on any commercial activity as an adjunct to its main activity it could not be termed as an industry within the meaning of Section 2(j) of the I.D. Act, 1947. The relevant extracts from the judgment are as follows:-

> "2. The petition challenges an award passed by the Labour Court at Mumbai in a reference made to it under the Industrial Disputes Act. The controversy concerns the claim of reinstatement with full back wages and continuity of service of original respondent No.1. By the impugned award, the reference was allowed and reinstatement with full back wages and continuity in service was ordered. That order was challenged in the present petition chiefly on the ground that the Petitioner, against whom the award was passed, is not an 'industry' within the meaning of Section 2(j) of the Industrial Disputes Act.
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> 3. The Petitioner is a Co-operative Housing Society. It had engaged respondent No.1 as a watchman. Upon his completion of 60 years of age, his services were terminated with effect from 1 November 2000. It is the petitioner's case that the termination was with mutual consent. That is a matter of dispute. Respondent No.1 was paid ex- gratia/retirement benefit, which was accepted by him. He, thereafter, raised a demand for reinstatement. It was his case that he was a permanent employee of the Petitioner and was terminated without any enquiry or offering proper retrenchment compensation. The reference was resisted by the petitioner herein on the ground that the Petitioner was a housing society; that the services rendered by respondent No.1 were personal services; and that the society not being an industry or respondent No.1 its workman within the meaning of the term under the Industrial

12 2018 (159) FLR 271

Disputes Act, the reference was not maintainable. By its impugned award, the Labour Court held that though the society was a co-operative housing society, it earned profits by way of additional income from its members and accordingly, fell within the definition of industry. The Court held that the profit motive was proved and that the society could not be termed merely as a housing society. It, accordingly, held the reference to be maintainable and then proceeded to decide the other issues concerning legality of the termination and the reliefs to be granted to respondent No.1.

4. This Court, in its judgment in the case of M/s. Shantivan-II Co. Op. Hsg. Society v. Smt. Manjula Govind Mahida, W.P. No.360 of 2007 dated 21 June, 2018 has considered whether a co-operative housing society can be termed as an industry within the meaning of Section 2(j) of the Industrial Disputes Act merely because it carries on some commercial activity, not as its predominant activity, but as an adjunct to its main activity. This Court has held that such society is not an industry. In a case like this, that is to say, where there is a complex of activities, some of which may qualify the undertaking as an industry and some would not, what one has to consider is the predominant nature of services or activities. If the predominant nature is to render services to its own members and the other activities are merely an adjunct, by the true test laid down in the case of Bangalore Water Supply and Sewerage Board v. A. Rajappa [(1978) 2 SCC 213] the undertaking is not an industry.

5. The Labour Court appears to have been swayed by the fact that a few members of the society were carrying on business such as coaching classes and dispensary and the society was charging advertisement charges for the neon signs put up by the members. The Court was of the view that the society was thereby earning income and, in the premises, could not be termed as a mere housing society. The Court also observed that in the premises the services rendered by respondent No.1 to the society and its members could not be termed as personal services. The Court observed that the judgment of Som Vihar Apartment Owners' Housing Maintenance Society's case accordingly had no application to the facts of the present case. There is a fundamental fallacy in this reasoning. As held by the Supreme Court in Bangalore Water Supply case when there are multiple activities carried on by an establishment, what is to be considered is the dominant function. In the present case, merely because the society charged some extra charges from a few of its members for display of neon signs, the society cannot be treated as an industry carrying on business of hiring out of neon signs or allowing display of advertisements. In the premises, the impugned award of the Labour Court suffers from a serious error of jurisdiction.

6. Rule is, accordingly, made absolute and the petition allowed. The reference before the Labour Court is held to be not

> maintainable and the order of reinstatement with continuity of service and full back wages passed by the Labour Court is quashed and set aside."

21. Again, in a similar case, in **M/s Shantivan-II Co-operative Housing Society Vs. Smt. Manjula Govind Mahida & Anr.**[13] the services of several persons engaged as sweepers were terminated by the housing co-operative society and upon an industrial dispute being raised references were made under Section 10 of the I.D. Act, 1947 and awards were passed by the Labour Court holding that since the housing society had indulged in a commercial activity of letting out its premises to outsiders for services to be rendered for parking of vehicles etc., this activity made the housing society an industry within the meaning of Section 2(j). The awards of the Labour Court upon being challenged by filing writ petitions, the High Court placing reliance upon the judgment in the case of **Bangalore Water Supply and Sewerage Board** and **Som Vihar Apartment Owners Housing Maintenance Society Ltd.** reiterated that the housing society which had been formed by individual flat owners for providing services, maintenance and upkeep of the apartments could never be termed as an "industry" and the predominant nature of such society being to render services to its members the other commercial activities were merely an adjunct and on the basis of the same its activities could not be brought under the ambit of the term "industry". The observations made in the judgment are as follows:-

> "6. These broad principles laid down by the Supreme Court in Banglore Water Supply case were applied by it to the particular case of a housing society in Som Vihar Apartment Owners' Housing Maintenance Society Ltd. Vs. Workmen C/o Indian Engg. & Genl. Mazdoor [(2002) 9 SCC 652]. That was a case where the appellant before the court was an entity which was said to be an association of apartment owners, rendering services to the latter. It was contended before the Court that the employees were not rendering personal services to the apartment owners directly but through the society; that they

13 2019 LLR 601

received salary and emoluments from the society; that they worked under the direct control and supervision of the society; and therefore, the society's activities must be characterized as activities of an industry. It would, accordingly, constitute an industry as understood by the Supreme Court in Banglore Water Supply case. The Supreme Court noticed the distinction between such classes of workmen as domestic servants who render personal service to their masters and those covered under the definition under Section 2(j) of the Industrial Disputes Act, 1947 as considered in Banglore Water Supply case. The court noticed that services rendered by domestic servants purely in a personal or domestic matter or in a casual way would fall outside the definition. The whole purpose of the Industrial Disputes Act is to focus on resolution of industrial disputes and such resolution is not meant to meddle with every carpenter or blacksmith or cobbler or cycle repairer who comes outside the idea of industry and industrial dispute. The court noticed that this rationale, which applied all along the line to small professions like that of domestic servants, would also apply to those who were engaged by a group of flat owners for rendering services, even if that group was not amorphous but crystallized into an association or a society. The court held that when personal services are rendered to members of a society and the society is constituted only for the purposes of those members so as to engage employees for such services, its activities should not be treated as industry nor are the employees to be termed as workmen. The court, in the premises, held that the apartment owners' housing society, who was the appellant before it, was not an industry.

7. This law should have ordinarily put an end to any speculation whether or not a co-operative housing society like the one we are concerned with in the present petition is an industry. A housing society, after all, is a society formed by and for individual flat owners, who in real terms own the property and who form themselves into a society so that services for maintenance and upkeep of the property, etc. could be availed of by them in a more systematic manner. Such society, in an ordinary case, can never be termed as an industry. Even in the present case, learned counsel for the Respondent does not dispute this position. It is, however, submitted, and that is what has found favour with the Labour Court, is that this society does not merely exist for rendering services to its members, but in fact carries on a commercial activity by hiring out a part of its terrace to an outside agency and earns income by way of licence fees or charges from this outside agency and to the extent that it does so, it must be treated as an industry. The submission has no force. What one has to consider in a case like this, that is to say, where there is a complex of activities, some of which may qualify the undertaking as an industry and some would not, what one has to consider is the predominant nature of services or activities. If the predominant nature is to render services to its own members and the other activities are merely

> an adjunct, by the true test laid down in Banglore Water Supply, the undertaking is not an industry. It cannot even possibly be suggested in the present case that the predominant nature of services rendered by the petitioner-society here is hiring out of its terrace for the purposes of erection of a telephone tower. It is but a minor part of its entire activity, a mere adjunct to its predominant activity, which is to enable the members to organize themselves better for availing personal services. The organized activity in its case does not possess the triple elements mentioned in the Bangalore Water Supply case. Considering the overall purpose of existence of the society and the nature of services rendered by it, by applying the dominant nature test succinctly laid down by the Supreme Court in Banglore Water Supply, it is but a foregone conclusion that the society is not an industry in any true sense of the word as applied under Section 2(j) of the Act."

22. The judgment in the case of **Karnani Properties Ltd.** (supra) which is sought to be relied upon by the counsel for the the third respondent is clearly distinguishable on facts inasmuch as the aforementioned case was not one of a housing society of apartment owners but it was a case of a real estate company owning mansion houses and employing workers for maintenance services and it was in this context that the activities carried on by the company were held to be within the ambit of the definition of the term "industry", and its employees were held to be "workmen". It may be noted that the judgment in the case of **Karnani Properties Ltd.** has been considered in the case of **Som Vihar Apartment Owners Housing Maintenance Ltd. Vs. Workmen**[3], and held to be distinguishable on facts.

23. In view of the foregoing discussions the underlying position which emerges is that in order for an activity to be held to be covered within the ambit of the term "industry", the activity should be an organized one and not that which pertains to private or personal employment. The distinction between such classes of workers who are employed as domestic servants to render personal services to their masters with those covered by the definition of the term "workmen" in terms of the definition

3 (2002) 9 SCC 652

under Section 2(j) of the I.D. Act, 1947 was noticed in the case of **Bangalore Water Supply and Sewerage Board**, and the services rendered by such domestic servants engaged for providing personal services were held to be outside the purview of the activity which may be referred as being an "industry". It was held that the whole purpose of the I.D. Act, 1947 was to focus on resolution of industrial disputes and regulation of industrial relations and not to meddle with "every little carpenter in a village or blacksmith in a town who sits with his son or assistant to work for the customers who trek in".

24. This rationale and line of reasoning which was applied to exclude the small professions providing personal services would also by the same analogy apply to those who are engaged by a group of apartment owners for rendering personal services. It would not be material even if the group was not amorphous but had formed itself into an association or a society. When personal services are rendered to members of a society and the society is constituted only for the purposes of those members and the engagement of the employees is for providing such services, these activities could not be treated to be covered within the purview of the term "industry", nor the employees could be held to be "workmen".

25. In the present case, the petitioner is a society of apartment owners formed for the purposes of providing necessary maintenance facilities to its members who are the apartment owners. Such an activity in view of the settled legal position cannot be held to be an activity covered by the definition of the term "industry". Any ancillary activities which may be carried on by such a housing society would be treated to be merely an adjunct and applying the "dominant nature test" the same would not change the nature of the activity so as to bring it within the purview of the term "industry". Moreover, the organized activity

in the present case which is to enable the members of the society to organize themselves better for availing certain personal services, does not possess the elements of the "triple test" referred to in the **Bangalore Water Supply and Sewerage Board** case.

26. Taking an overall view of the nature of the activities of the petitioner-society and the nature of the services rendered by it to its members who are the apartment owners and applying the "dominant nature test" laid down in the case of **Bangalore Water Supply and Sewerage Board** the conclusion is inescapable that the petitioner-society cannot be held to be carrying out activities which may bring it within the purview of the expression "industry", and its employees within the ambit of the term "workmen".

27. The reference of a dispute for adjudication to a Labour Court/Tribunal pre-supposes the existence of an industrial dispute or its apprehension as its necessary concomitant. It is, therefore, clear that before the powers under Section 10 can be invoked for making a reference of a dispute to the Labour Court/Tribunal the existence of an "industrial dispute" would be a foundational, fundamental or jurisdictional fact.

28. **Black's Law Dictionary**[14] defines a jurisdictional fact as a fact that must exist for a Court to properly exercise its jurisdiction over a case, party or thing.

29. **P. Ramanatha Aiyar's Advanced Law Lexicon**[15] defines a jurisdictional fact as follows:-

> "Facts, the existence of which is necessary to the validity of the proceeding, and without which the act of the Court is a mere nullity."

30. In **Arun Kumar & Ors. Vs. Union of India & Ors.**[16], it was

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14 Black's Law Dictionary, 9th Edition
15 P. Ramanatha Aiyar's Advanced Law Lexicon, 6th Edition, Volume 3
16 (2007) 1 SCC 732

held that "concession" under Section 17(2)(ii) of the Income Tax Act, 1961 was a jurisdictional fact, determination of which was necessary before the authority could proceed further. The observations made in the judgment are as follows:-

> "74. A "jurisdictional fact" is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not posses."

31. The requirement to decide questions as to maintainability/jurisdictional facts prior to determination on merits came up for consideration in the case of **Ramesh Chandra Sankla & Ors. Vs. Vikram Cement & Ors.**[17], and it was held that jurisdictional facts have to be established before a Court or Tribunal takes up a lis on merits. The relevant observations made in the judgment are as under:-

> "68. A "jurisdictional fact" is one on existence of which depends jurisdiction of a court, tribunal or an Authority. If the jurisdictional fact does not exist, the court or tribunal cannot act. If an inferior court or tribunal wrongly assumes the existence of such fact, a writ of certiorari lies. The underlying principle is that by erroneously assuming existence of jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not possess."

32. In **Shrisht Dhawan (Smt.) Vs. M/s Shaw Brothers**[18] while considering the question of permission for limited period of tenancy under Section 21 of the Delhi Rent Control Act, 1958 it was held that error of jurisdictional fact vitiates the order. The observations made in the judgment are as follows:-

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17 (2008) 14 SCC 58
18 (1992) 1 SCC 534

> "19. ...What, then, is an error in respect of jurisdictional fact? A jurisdictional fact is one on existence or non-existence of which depends assumption or refusal to assume jurisdiction by a court, tribunal or an authority. In Black's Legal Dictionary it is explained as a fact which must exist before a court can properly assume jurisdiction of a particular case. Mistake of fact in relation to jurisdiction is an error of jurisdictional fact. No statutory authority or tribunal can assume jurisdiction in respect of subject matter which the statute does not confer on it and if by deciding erroneously the fact on which jurisdiction depends the court or tribunal exercises the jurisdiction then the order is vitiated. Error of jurisdictional fact renders the order ultra vires and bad[19]. In Raza Textiles[20] it was held that a court or tribunal cannot confer jurisdiction on itself by deciding a jurisdictional fact wrongly..."

33. The existence of jurisdictional fact as a *sine qua non* for assumption of jurisdiction by a Court or Tribunal was reiterated in the case of **Carona Ltd. Vs. Parvathy Swaminathan & Sons.**[21], and it was stated as follows:-

> "26. The learned counsel for the appellant company submitted that the fact as to "paid-up share capital" of rupees one crore or more of a company is a "jurisdictional fact" and in absence of such fact, the court has no jurisdiction to proceed on the basis that the Rent Act is not applicable. The learned counsel is right. The fact as to "paid-up share capital" of a Company can be said to be a "preliminary" or "jurisdictional fact" and said fact would confer jurisdiction on the court to consider the question whether the provisions of the Rent Act were applicable. The question, however, is whether in the present case, the learned counsel for the appellant tenant is right in submitting that the "jurisdictional fact" did not exist and the Rent Act was, therefore, applicable.
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> 27. Stated simply, the fact or facts upon which the jurisdiction of a court, a tribunal or an authority depends can be said to be a "jurisdictional fact". If the jurisdictional fact exists, a court, tribunal or authority has jurisdiction to decide other issues. If such fact does not exist, a court, tribunal or authority cannot act. It is also well settled that a court or a tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate court or an inferior tribunal cannot confer upon itself jurisdiction which it otherwise does not posses."

34. The existence of jurisdictional fact has thus been held to be

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19 Wade, Administrative Law
20 Raza Textiles Ltd. v. ITO, (1973) 1 SCC 633 : 1973 SCC (Tax) 327 : AIR 1973 SC 1362
21 (2007) 8 SCC 559

the *sine qua non* or the condition precedent before the Court assumes jurisdiction to decide the lis on merits.

35. In **Halsbury's Laws of England**[22], it has been stated as follows:-

> "...Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue, or as jurisdictional. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the jurisdictional issue; but that ruling may be reviewed by the court."

36. In the present case jurisdictional essence is the presence of an industrial dispute. The petitioner being not an "industry" and its employees being not "workmen" within the meaning of the terms as defined under the I.D. Act, 1947 there could not be said to have arisen any "industrial dispute" and the award of the Labour Court suffers from a fundamental error of jurisdiction, and is thus legally unsustainable.

37. Counsel for the petitioner has pointed out that even if the third respondent were held to be illegally retrenched the retrenchment compensation payable under Section 6N of the U.P.I.D. Act, 1947 would be an amount which would be much less than the amount which has been released in favour of the said respondent in terms of an earlier order dated 02.11.2017 passed in the present case. However, on the basis of instructions received, counsel for the petitioner has fairly submitted that the petitioner would not raise a claim to the amount which has already been released and paid to the third respondent.

38. The writ petition is accordingly allowed and the award of the Labour Court dated 22.07.2017 passed in Adjudication Case No.1493 of 2008 is set aside.

39. It is however observed that in view of the statement made

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22 Halsbury's Laws of England, 4th Edition, Reissue, Volume 1(1), Para 68, pp. 114-115

by the counsel for the petitioner no claim in respect of the amount which has already been released and paid to the third respondent in terms of the order dated 02.11.2017 passed earlier would be made by the petitioner.

**Order Date :-** 13.09.2019
Shahroz

(Dr. Y.K. Srivastava,J.)