IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 897 OF 2002

IN THE MATTER OF:

STATE OF UTTAR PRADESH …APPELLANT

VERSUS

JAI BIR SINGH …RESPONDENT

WRITTEN SUBMISSIONS BY ATTORNEY-GENERAL FOR INDIA ON BEHALF OF THE UNION OF INDIA

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A. INTRODUCTION

1. The present reference concerns the scope of the expression 'industry' under Section 2(j) of the Industrial Disputes Act, 1947 **(ID Act).** As is evident from the issues framed by this Hon'ble Court, the issue is not limited to the correctness of the test in ***Bangalore Water Supply & Sewerage Board v. A. Rajappa & Ors,*** (1978) 2 SCC 213 ***(Bangalore Water Supply).*** The trigger for the present reference was a conflict of decisions on whether social forestry activities and other similar state departments' activities amount to an 'industry'. A **3-Judge Bench** noticed this conflict and, by order dated 31.01.2002, referred the matter for consideration by a larger bench.

2. Thereafter, a **5-Judge Bench** was constituted because of the conflicting decisions in *Chief Conservator of Forests v. Jagannath Maruti Kondhare* and *State of Gujarat v. Pratamsingh Narsinh Parmar*. This Bench *vide* order dated 05.05.2005, found that the problem went beyond forestry and raised wider doubts about the correctness and workability of the test suggested in ***Bangalore Water Supply***, especially for hospitals, educational institutions, and similar bodies. The Bench also noted that although Parliament enacted the Industrial Disputes (Amendment) Act, 1982 (**1982 Amendment**), it was never brought into force, leaving the controversy unresolved. A further concern was that exclusions under the amended definition could not be smoothly implemented without alternative dispute-resolution mechanisms for the excluded categories. The Bench further noted the issues put forth in *Coir Board, Ernakulam, Cochin v Indira Devi P.S. & Ors,* (1998) 3 SCC 259 in relation to the correctness of *Bangalore Water Supply.* However, there are certain reservations as to the characterisation of *Bangalore Water Supply* and the different opinions therein. Therefore, this Court need not be influenced by the said reference order.

3. Subsequently, a **7-Judge Bench**, by an order dated 02.01.2017, noted the serious doubts raised in the reference order dated 05.05.2005, directed the matter to be placed before a 9-Judge Bench for an authoritative and final settlement of the law and to answer the questions raised in the 5-Judge Bench reference.

4. This Hon'ble Court by the order dated 16.02.2026, was pleased to frame the following four issues:

> *"(i) Whether the test laid down in paragraphs 140 to 144 in the opinion rendered by Hon'ble Mr. Justice V.R. Krishna Iyer in **Bangalore Water Supply and Sewerage Board's case (supra)** to determine if an undertaking or enterprise falls within the definition of "industry" lays down correct law? And whether the Industrial Disputes (Amendment) Act, 1982 (which seemingly did not come into force) and the Industrial Relations Code, 2020 (with effect from 21.11.2025) have any legal impact on the interpretation of the expression "industry" as contained in the principal Act?*
> *(ii) Whether social welfare activities and schemes or other enterprises undertaken by the Government Departments or their instrumentalities can be construed to be "industrial activities" for the purpose of Section 2(j) of the ID Act?*
> *(iii) What State activities will be covered by the expression "sovereign function", and whether such activities will fall outside the purview of Section 2(j) of the ID Act?*
> *(iv) Any other issue(s) that may arise during the course of hearing before the Nine-Judge Bench."*

5. The answer to these questions is important because it determines the reach of the statutory machinery for conciliation, adjudication, and maintenance of industrial peace. The matter cannot be decided by reading *Bangalore Water Supply* in isolation. The provision must be understood in its full legal background, including:

1(ii) the legislative history,

2(ii) the pre-*Bangalore Water Supply* decisions,

3(ii) the reasons for the expansive test adopted in *Bangalore Water Supply*, and

4(ii) subsequent developments in law.

6. On the above issues, the submissions on behalf of the Union of India proceed on the following basis:

a. Law declared in ***Bangalore Water Supply*** as regards the triple-test principles for determining what constitutes an "*industry*" does not call for any serious disagreement.

b. However, as regards the application of the said principles, the understanding in ***Bangalore Water Supply*** that certain categories of activities could qualify as 'industries' remains open to debate, particularly in respect of categories

such as charitable activities, sovereign functions, and similar welfare activities and schemes of the State.

c. With respect to the question of sovereign functions and their relevance to the definition of 'industry' under Section 2(j) of the ID Act, it is important to go beyond the concept and framework suggested in *Bangalore Water Supply*. This aspect will be dealt with in greater detail in the latter part of these submissions.

d. However, briefly stated, it may be advisable to examine the question of sovereign functions not necessarily from the perspective of international law, or other approaches that may have their roots in pre-constitutional settings. Rather, the concept of sovereign functions may have to be examined within the constitutional framework, which defines, sets forth and enumerates the various functions of the State, including the fields of activity that the State is authorised to undertake.

B. HISTORY AND EVOLUTION

7. The word "*industry*" existed in ordinary language long before labour statutes, generally denoting organised productive activity. In labour law, however, it became a condition precedent, as it determines which employments or undertakings fall within the statutory dispute-resolution mechanism. The Black's Law Dictionary (Ninth Edition) defined "*industry*" as:

> *Systematic labour for some useful purpose; esp., work in manufacturing or production.*
> *A particular form or branch of productive labour; an aggregate of enterprises employing similar production and marketing facilities to produce items having markedly similar characteristics.*

8. For convenience, the pre-*Bangalore Water Supply* evolution may be traced in four phases. The table below captures each phase, the key judgments, and the issue that drove the next shift.

Phase	**Period**	**What happened (in sentences)**
Phase 1 Statutory foundation	1947 (ID Act enacted)	The ID Act was enacted, which introduced a statutory definition of 'industry' in Section 2(j).
Phase 2 Expansion of the term 'industry'	Banerji → Baroda Borough	The Court confined itself to 'sovereign and regal functions' and kept that exclusion narrow. It also introduced the dominant nature approach for departments with mixed functions.
Phase 3 Systematic activity / material services (wide approach)	Hospital Mazdoor Sabha → Nagpur Corporation	The Court treated an institution as an 'industry' if it carried on a systematic or habitual activity through employer–employee cooperation. It held that rendering 'material services' to the community can also amount to industry, even if the institution is not producing goods.
Phase 4 Narrow interpretation	Madras Gymkhana Club and Safdarjung Hospital	The Court adopted a narrower lens and insisted that 'industry' must have a definite economic content, i.e., activities analogous to trade or business producing goods/wealth or

		material/utility-type services. Distinction between two-part definition v. unified concept was in vogue.

B.1. PHASE 1 — STATUTORY FOUNDATION

9. As far as Indian legislative history is concerned, the journey begins from resolution of trade and industrial disputes. The Employers' and Workmen's Disputes Act, 1860, provided for speedy and summary disposal by magistrates of disputes concerning wages of workmen employed in railways, canals and other public works. Like some of the earlier regulations of the East India Company, it was concerned with specific industries and with only those disputes that gave rise to a cause of action in civil courts. Later, the Trade Disputes Act, 1929 was the main central enactment, but it primarily regulated strikes and lockouts in specified services and did not create a binding, conclusive dispute resolution system. It also did not attempt to define industry.

10. During World War II, Rule 81 A of the Defence of India Rules, 1942 (**Rule 81A**), empowered the government to (1) require employers to observe such terms and conditions of employment in their establishments as may be specified (2) refer any dispute for conciliation or adjudication (3) enforce the decisions of the adjudicators and (4) make general or special order to prohibit strikes or lockouts in connection with any trade dispute unless reasonable notice had been given.

11. In 1947, the ID Act was enacted because the Trade Disputes Act, 1929, model restricted strikes and lockouts, but did not ensure a binding and conclusive dispute resolution mechanism. The Statement of Objects and Reasons records that a permanent enactment was necessary to replace the temporary wartime/emergency arrangement and provide lasting machinery for settlement of industrial disputes. The relevant portion of the Statement of Objects and Reasons is reproduced hereinbelow for reference:

> ***"Statement of Objects and Reasons.***
> *Experience of the working of the Trade Disputes Act, 1929, has revealed that its main defect is that while restraints have been imposed on the rights of*

strike and lock-out in public utility services no provision has been made to render the proceedings institutable under the Act for the settlement of an industrial dispute, either by reference to a Board of Conciliation or to a Court of Inquiry, conclusive and binding on the parties to the dispute. This defect was overcome during the war by empowering under Rule 81 -A of the Defence of India Rules, the Central Government to refer industrial disputes to adjudicators and to enforce their awards. Rule 81- A, which was to lapse on the 1st October, 1946, is being kept in force by the Emergency Powers (Continuance) Ordinance, 1946, for a further period of six months; and as industrial unrest, in checking which this rule has proved useful, is gaining momentum due to the stress of postwar industrial readjustment, the need of permanent legislation in replacement of this rule, is self-evident. This Bill embodies the essential principles of Rule 81-A, which have proved generally acceptable to both employers and workmen, retaining intact, for the most part, the provisions of the Trade Disputes Act, 1929."

[Emphasis added]

12. For the first time, a statutory definition of the term *'industry'* appears in Section 2(j) of the ID Act. The original definition is reproduced below:

> *(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;*

13. The ID Act was designed to deal with industrial tensions, provide a dispute-resolution mechanism, and maintain industrial peace. Since the ID Act applied only if there was an industry; the definition became a condition precedent to invoking the Act.

B.2. PHASE 2 — EXPANSION OF THE TERM 'INDUSTRY'

14. ***D. N. Banerji v. P. R. Mukherjee & Ors,*** (1952) 2 SCC 619 ***(Budge Budge Municipality or Banerji),*** was the first major case wherein this Hon'ble Court observed that the earlier narrow meaning of "*industry*" must give way to a much wider meaning to cover the many modern forms of organised work. This would enable approaching the disputes between labour and capital as questions of status and social balance than mere contracts. Further, such disputes could be resolved swiftly through specialised conciliation and tribunal mechanisms without causing

dislocation to the needs of society or being confined to strict legal procedures. The relevant extract of *Banerji* is reproduced below:

> *"13...It is obvious that the limited concept of what an industry meant in early times must now yield place to an enormously wider concept so as to take in various and varied forms of industry, so that disputes arising in connection with them might be settled quickly without much dislocation and disorganisation of the needs of society and in a manner more adapted to conciliation and settlement than a determination of the respective rights and liabilities according to strict legal procedure and principles. The conflicts between capital and labour have now to be determined more from the standpoint of status than of contract. Without such an approach, the numerous problems that now arise for solution in the shape of industrial disputes cannot be tackled satisfactorily, and this is why every civilised government has thought of the machinery of conciliation officers, Boards and Tribunals for the effective settlement of disputes."*

15. The Hon'ble Court in the course of its judgement referred to the following observations made by *Justice Isaacs* and *Justice Rich*, in ***Federated Municipal and Shire Council Employees' Union of Australia v. Lord Mayor, Alderman, Councillors and Citizens of the Melbourne Corporation***, [1919] 26 CLR 508 ***(Melbourne Corporation),*** to hold that industrial disputes arise where capital and labour cooperate to satisfy human wants and then dispute terms of cooperation:

> *"…Industrial disputes occur when, in relation to operations in which capital and labour are contributed in cooperation for the satisfaction of human wants and desires, those engaged in cooperation dispute as to the basis to be observed, by the parties engaged, respecting either in share of the product or any other terms and conditions of their cooperation."*

16. The line of reasoning given in *Banerji* was followed in ***Baroda Borough Municipality v. Workmen & Ors,*** (1956) 2 SCC 535 (***Baroda Borough Municipality***). In ***Baroda Borough Municipality***, the Supreme Court treated the municipal electricity undertaking as an industry. The Court held that:

> *"6. It is now finally settled by the decision of this Court in D. N. Banerji v. P. R. Mukherjee (supra) that a municipal undertaking of the nature we have under consideration here is an 'industry' within the meaning of the definition of that word in s. 2(j) of the Industrial Disputes Act, 1947…"*

17. This phrase is relevant because it shows two things: first, the Court treated a municipal undertaking of that kind (municipal electricity supply undertaking) as an 'industry' under Section 2(j). Second, it repeats the earlier ***Banerji*** formulation that

such municipal work is covered where it is 'analogous to the carrying on of a trade or business'.

B.3. PHASE 3 —SYSTEMATIC ACTIVITY / MATERIAL SERVICES (WIDE APPROACH)

18. In ***State of Bombay v. Hospital Mazdoor Sabha****,* (1960) 2 SCR 866 (***Hospital Mazdoor Sabha*****),** the Supreme Court did not agree with 'analogous to carrying out of a trade or business' test, instead, it evolved a distinct test, namely, 'whether the activity is 'systematically organised' in a trade or business like manner'. It accordingly formulated the working principle that an activity systematically or habitually undertaken for the production or distribution of goods, or for the rendering of material services with the assistance of employees, would amount to an 'undertaking', so long as it is neither casual, nor self-serving, nor undertaken merely for pleasure. Applying this principle, the Court treated State-run hospitals as falling within the expression "*industry*". The relevant portion of the judgment (at pages 879 and 880) is reproduced below:

> *"We have yet to decide which are the attributes the presence of which makes an activity an undertaking within Section 2(j), on the ground that it is analogous to trade or business. It is difficult to state these possible attributes definitely or exhaustively; 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 cooperation 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 must it be for oneself nor for pleasure. Thus the manner in which the activity in question is organised or arranged, the condition of the cooperation 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. Judged by this test there would be no difficulty in holding that the State is carrying on an undertaking when it runs the group of Hospitals in question.*
>
> *Is quid pro quo necessary for bringing an activity under Section 2(j)? It has been urged before us that though profit motive may not be essential, it is nevertheless necessary that the person who carries on the activity should receive some consideration in return; and it is only if the test of quid pro quo is satisfied that an activity should be treated as an undertaking. Though this*

argument is put in a slightly different form, in substance it is really based on the idea that profit motive is necessary to make any activity an undertaking analogous to trade or business. If the absence of profit motive is immaterial why should an activity be excluded from Section 2(j) merely because the person responsible for the conduct of the activity expects no consideration, does not want any quid pro quo and is actuated by philanthropic or charitable motive? In our opinion, in deciding the question as to whether any activity in question is an undertaking under Section 2(j) the doctrine of quid pro quo can have no application. Therefore, we are satisfied that the High Court was right in coming to the conclusion that the conduct and running of the group of Hospitals by the appellant amounted to an undertaking under Section 2(j) and the relevant provisions of the Act were applicable."

[Emphasis added]

19. Yet again in the ***Corporation of the City of Nagpur v. Employees & Anr,*** (1960) 2 SCR 942 ***(Nagpur Corporation),*** this Hon'ble Court emphasised on the inclusive character of the definition of 'industry'. It may be said that the definition gave the pre-*Bangalore Water Supply* framework. Drawing a distinction between (a) regal and (b) municipal function of the corporation, and holding the latter as 'analogous to business or trade', the Court observed at pages 953 – 955 and 961 – 963:

"11. Before considering the positive aspects of the definition, what is not an industry may be considered. However wide the definition of 'industry' may be, it cannot include the regal or sovereign functions of State. This is the agreed basis of the arguments at the Bar, though the learned counsel differed on the ambit of such functions. While the learned counsel for the Corporation would like to enlarge the scope of these functions so as to comprehend all the welfare activities of a modern State, the learned counsel for the respondents would seek to confine them to what are aptly termed 'the primary and inalienable functions of a constitutional Government'. It is said that in a modern State the sovereign power extends to all the statutory functions of the State except to the business of trading and industrial transactions undertaken by it in its quasi-private personality. Sustenance for this contention is sought to be drawn from Holland's Jurisprudence, wherein the learned author divides the general heading 'Public Law' into four sub-heads and under the sub-head 'Administrative Law' he deals with a variety of topics including welfare and social activities of a State. The treatment of the subject 'Public Law' by Holland and other authors, in our view, has no relevancy in appreciating the scope of the concept of regal powers which have acquired a definite connotation. Lord Watson, in Richard Coomber v. Justices of the County of Berks describes the functions such as administration of justice, maintenance of order and repression of crime, as among the primary and inalienable functions of a constitutional Government. Isaacs, J., in his dissenting judgment in Federated State School Teachers' Association of Australia v. State of Victoria concisely states thus at p. 585:

'Regal functions are inescapable and inalienable. Such are the legislative power, the administration of laws, the exercise of the judicial power. Non-regal functions may be assumed by means of the legislative power. But when they are assumed the State acts simply as a huge corporation, with its legislation as the charter. Its action under the legislation, so far as it is not regal execution of the law is merely analogous to that of a private company similarly authorised.'

These words clearly mark out the ambit of the regal functions as distinguished from the other powers of a State. It could not have been, therefore, in the contemplation of the legislature to bring in the regal functions of the State within the definition of industry and thus confer jurisdiction on Industrial Courts to decide disputes in respect thereof. We, therefore, exclude the regal functions of a State from the definition of industry.

This leads us to the question whether the Corporation can be said to exercise regal functions by legislative delegation. The Corporation functions under a statute and its powers, duties and liabilities are regulated by it. It is a juristic person and it can sue and be sued in its name. The statute constituting it may confer upon it some strictly regal functions and other municipal functions. In County Council of Middlesex v. Assessment Committee of St. George's Union certain premises were used for the administration of justice and also for municipal purposes. The question raised was whether the said premises were rateable and the Court held that they were rateable insofar as they were occupied for municipal purposes and not rateable insofar as they were occupied for the administration of justice, which was held to be a function of the Crown. So too, the Supreme Court of America in Verisimo Vasquez Vilas v. City of Manila expounded the dual character of a municipal corporation thus:

'They exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a governmental sub-division, and for that purpose exercises by delegation a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred.'

Isaacs and Rich, JJ., in Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation in the context of the dual functions of State say much to the same effect at p. 530:

'Here we have the discrimen of Crown exemption. If a municipality either (1) is legally empowered to perform and does perform any function whatever for the Crown, or (2) is lawfully empowered to perform and does perform any function which constitutionally is inalienably a Crown function — as, for instance, the administration of justice — the municipality is in law presumed

to represent the Crown, and the exemption applies. Otherwise, it is outside that exemption, and, if impliedly exempted at all, some other principle must be resorted to. The making and maintenance of streets in the municipality is not within either proposition.'

A corporation may, therefore, discharge a dual function: it may be statutorily entrusted with regal functions strictly so-called, such as making of laws, disposal of certain cases judicially etc. and also with other welfare activities. The former, being delegated regal functions, must be excluded from the ambit of the definition of 'industry'.

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The result of the discussion may be summarized thus: (1) The definition of 'industry' in the Act is very comprehensive. It is in two parts : one part defines it from the standpoint of the employer and the other from the standpoint of the employee. If an activity falls under either part of the definition, it will be an industry within the meaning of the Act. (2) The history of industrial disputes and the legislation recognizes the basic concept that the activity shall be an organized one and not that which pertains to private or personal employment. (3) The regal functions described as primary and inalienable functions of State though statutorily delegated to a corporation are necessarily excluded from the purview of the definition. Such regal functions shall be confined to legislative power, administration of law and judicial power. (4) If a service rendered by an individual or a private person would be an industry, it would equally be an industry in the hands of a corporation. (5) If a service rendered by a corporation is an industry, the employees in the departments connected with that service, whether financial, administrative or executive, would be entitled to the benefits of the Act. (6) If a department of a municipality discharges many functions, some pertaining to industry as defined in the Act and other non-industrial activities, the predominant functions of the department shall be the criterion for the purposes of the Act.

The following are the various departments of the Nagpur City Corporation : (1) General Administration Department; (2) Octroi Department; (3) Tax Department; (4) Public Conveyance Department; (5) Fire Brigade Department; (6) Lighting Department; (7) Water Works Department; (8) City Engineer Department; (9) Enforcement (encroachment) Department; (10) Sewage Pumping Station Department; (11) Sewage Farm Department; (12) Health Department; (13) Market Department; (14) Cattle Pound Department; (15) Public Gardens Department; (16) Public Works Department; (17) Assessment Department; (18) Estate Department; (19) Education Department; (20) Printing Press Department; (21) Workshop Department; and (22) Building Department. Out of these departments, the State Industrial Court has held that all the departments except those pertaining to (i) assessment and levy of house tax, (ii) assessment and levy of octroi, (iii) removal of encroachment and pulling down of dilapidated houses, (iv) maintenance of cattle pounds, and (v) prevention and control of food adulteration, are industries. Even in regard to the departments which

the State Industrial Tribunal held to be industries it denied relief to persons who are not covered by the definition of 'employees' in the Act. As the employees have not preferred any appeal against the award insofar as it went against them, nothing further need be said in regard to the aforesaid five departments."

[Emphasis added]

20. To repeat, what the Court said was: (i) the definition works from both sides, on the one hand it covers the 'undertaking' or activity carried on by the employer, and on the other it separately includes the 'calling/service/employment/occupation' of workmen, showing the Legislature intended a wide coverage and not a narrow trade-only meaning; (ii) activity must be organized, not personal or private employment; (iii) regal or sovereign functions are excluded, such as, legislative power, administration of law and judicial power; and (iv) dominant function test for mixed departments.

21. Importantly, many municipal departments were treated as not sovereign and hence within "*industry*", including the education department, etc. The difficulty was that the more the 'undertaking or service' was expanded, the harder it became to draw a workable line for State functions and public service institutions.

B.4. PHASE 4 — RESTRICTIVE TURN / NARROWING

22. It is also relevant to see how Courts interpreted the term 'industry', when it came to commercial institutions and research bodies. Applying the 'systematic activity and the material services' test, commercial bodies and research institutions like Ahmedabad Textile Industry Research Association and FICCI were treated as industry, showing the law had become divergent and case specific.

23. Previously in ***Ahmedabad Textile Industry's Research Assn. v. State of Bombay,*** (1961) 2 SCR 480 ***(Ahmedabad Textile),*** the Supreme Court applied the working principle in Hospital Mazdoor Sabha (supra) to decide whether a textile-industry funded research association employing technical and other staff was an 'industry'. The association ran a research institute carrying out scientific studies linked to the textile trade, aimed at improving efficiency, rationalisation, cost reduction, work

methods, and workplace conditions (including fatigue, accidents and occupational diseases). On analysing the activity, the Court found the undertaking to be organised like business/trade, intended to help member mills improve profitability, and therefore held that the association's activity fell within the definition of 'industry'. The relevant portion from pages 487 and 488 is extracted below:

> *"...We are of opinion, considering the objects and the Rules and Regulations of the appellant Association, that it answers the tests laid down in the Hospital case and must be held to be an undertaking within the meaning of Section 2(j). It is an activity systematically undertaken; its object is to render material services to a part of the community (namely, member mills) — the material services being the discovery of processes of manufacture etc. with a view to secure greater efficiency, rationalisation and reduction of costs of the member mills; it is being carried on with the help of employees (namely, technical personnel) who have no rights in the results of the research carried on by them as employees of the Association; it is organised or arranged in a manner in which a trade or business is generally organised; it postulates cooperation between employers (namely, the Association) and the employees (namely, the technical personnel and others) which is necessary for its success, for the employers provide monies for carrying on the activities of the Association and its object clearly is to render material service to a part of the community by discovery of processes of manufacture etc. with a view to secure greater efficiency, rationalisation and reduction of costs. The activities of this Association therefore have in our opinion little in common with the activities of what may be called a purely educational institution. It is true that the employees who have raised the present industrial dispute do not actually contribute to the research, which is carried on under the appellant Association; but the manner in which the Association is organised and the fact that the technical personnel who carry on the research are also employees who have no rights in the results of their research, clearly show that the undertaking as a whole is in the nature of business and trade organised with the object of discovering ways and means by which the member mills may obtain larger profits in connection with their industries. In these circumstances we have no hesitation in coming to the conclusion that the appellant Association is carrying on an activity which clearly comes within the definition of the word 'industry' in Section 2(j) and which cannot be assimilated to a purely educational institution. In this view of the matter, when a dispute arose between the appellant and some of its employees, it was an industrial dispute and could be properly referred for adjudication under the Act."*
>
> [Emphasis added]

24. From an early stage, the Court began to confine the concept in relation to professional activities within the concept of 'industry.' In relation to professional establishments, the restrictive line of authority treated a solicitor's or law firm's

office. Though supported by clerks, typists and other staff, as falling outside the definition of 'industry.'

25. Reference is drawn to ***National Union of Commercial Employees v. M.R. Meher,*** 1962 Supp (3) SCR 157 ***(Solicitor's Case),*** where the Supreme Court held that a solicitor's firm was not an 'industry', emphasising that the service rendered by a solicitor is 'essentially individual', that the work of clerks, typists and other staff is merely 'incidental', and that any cooperation between the solicitor and his employees lacks the 'direct and immediate relation' to the professional service required by Section 2(j). The relevant extracts from pages 166 – 168 are reproduced below:

> *"Does a solicitors' firm satisfy that test? Superficially considered, the solicitors' firm is no doubt organised as an industrial concern would be organised. There are different categories of servant employed by a firm, each category being assigned separate duties and functions. <u>But it must be remembered that the service rendered by a solicitor functioning either individually or working together with partners is service which is essentially individual; it depends upon the professional equipment, knowledge and efficiency of the solicitor concerned</u>.....There is, no doubt, a kind of co-operation between the solicitor and his employees, but that co-operation has no direct or immediate relation to the professional service which the solicitor renders to his client....*
>
> *...The essential basis of an industrial dispute is that it is a dispute arising between capital and labour in enterprises where capital and labour combine to produce commodities or to render service. This essential basis would be absent in the case of liberal professions. <u>A person following a liberal profession does not carry on his profession in any intelligible sense with the active cooperation of his employees and the principal, if not the sole, capital which he brings into his profession is his special or peculiar intellectual and educational equipment.</u> That is why on broad and general considerations which cannot be ignored, a liberal profession like that of an attorney must, we think, be deemed to be outside the definition of 'industry' under Section 2(j)."*
>
> [Emphasis added]

26. In ***University of Delhi & Anr v. Ram Nath & Ors,*** AIR 1963 SC 1873 **(*Delhi University*)** this Hon'ble Court adopted a restrictive approach to the expression 'industry.' The case arose from the termination of two bus drivers employed in a transport facility run by the University for the convenience of female students.

While the Labour Court had granted retrenchment compensation, the Supreme Court held that the University was not an "industry." The Court reasoned that (i) the University's predominant function was imparting education, (ii) teachers were not "workmen," and (iii) the remaining non-teaching staff were few and performed merely incidental duties. On that basis, the bus drivers were held not to be employed in an "industry." The relevant portion of the judgement at pages 707, 709 and 720 is extracted below:

> *"Having regard to the fact that the word "industry" as defined in the Act takes within its sweep any calling or service or employment, it cannot be denied that there is prima facie some force in the argument urged by the respondents; but in testing the validity of this argument, it will immediately become necessary to enquire whether the work carried on by an educational institution can be said to be work carried on by it with the assistance of labour or cooperation of teachers. The main function of educational institutions is to impart education to students and if it is held that the imparting of education is industry in reference to which the educational institution is the employer, it must follow that the teachers who cooperate with the institution and assist it with their labour in imparting education are the employees of the institution, and so, normally, one would expect that the teachers would be employees who would be entitled to the benefits of the Act...*
>
> *5...It is common ground that teachers employed by educational institutions, whether the said institutions are imparting primary, secondary, collegiate or postgraduate education, are not workmen under Section 2(s), and so, it follows that the whole body of employees with whose cooperation the work of imparting education is carried on by educational institutions do not fall within the purview of Section 2(s), and any disputes between them and the institutions which employed them are outside the scope of the Act. In other words, if imparting education is an industry under Section 2(j), the bulk of the employees being outside the purview of the Act, the only disputes which can fall within the scope of the Act are those which arise between such institutions and their subordinate staff, the members of which may fall under Section 2(s). In our opinion, having regard to the fact that the work of education is primarily and exclusively carried on with the assistance of the labour and cooperation of teachers; the omission of the whole class of teachers from the definition prescribed by Section 2(s) has an important bearing and significance in relation to the problem which we are considering. It could not have been the policy of the Act that education should be treated as industry for the benefit of a very minor and insignificant number of persons who may be employed by educational institutions to carry on the duties of the subordinate staff. Reading Sections 2(g)(j) and (s) together, we are inclined to hold that the work of education carried on by educational institutions like the University of Delhi is not an industry within the meaning of the Act.*

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...It would thus be clear that if the test of the character of the predominant activity of the institution which was applied to the Corporation is applied to the University of Delhi, the answer would be plainly against the respondents. The predominant activity of the University of Delhi is outside the Act, because teaching and teachers connected with it do not come within its purview, and so, the minor and incidental activity carried on by the subordinate staff which may fell within the purview of the Act cannot alter the predominant character of the institution."

[Emphasis added]

27. So far as the inclusion of clubs within the ambit of industry is concerned, ***Madras Gymkhana Club Employees' Union v. Gymkhana Club,*** (1968) 1 SCR 742 (***Madras Gymkhana Club***), is worth looking at. This Hon'ble Court narrowed the definition further Court that held that the expression 'undertaking' in Section 2(j) cannot be read in isolation but must be understood as carrying a definite economic and commercial flavour, meaning thereby that (i) the activity should be analogous to trade or business, (ii) organised through employer–employee cooperation for the production or distribution of material goods/wealth, or for rendering material/utility-type services of a commercially valuable character, and (iii) not merely a self-serving, members-only social or recreational activity. This restrictive reasoning was subsequently followed in the ***Cricket Club of India v. Bombay Labour Union,*** (1969) 1 SCR 600 (***Cricket Club of India***), and both these decisions were later overruled in ***Bangalore Water Supply***. The relevant portion of the observations in *Madras Gymkhana Club* at pages 751 and 755 – 758 is reproduced below:

"The changes made in the meaning of the expressions used in the definition of industry in the Act, disclose a procrustean approach to the problem. The words must mean something definite, but some of the tests were found unsatisfactory to cover new cases as the creation of new tests clearly shows. For example, the emphasis resulting from the extension of the definition in its latter part to include services of employees, received little recognition in the later cases. Too much insistence upon partnership between employers and employees is evident in the Solicitor case and too little in the Association case. And yet it is impossible to think that this test is universal. What partnership can exist between the Company and/or Board of Directors on the one hand and the menial staff employed to sweep floors on the other? What direct and essential nexus is there between such employees and production? <u>This proves that what must be established is the existence of an industry viewed from the angle of what the employer is doing and if the</u>

definition from the angle of the employer's occupation is satisfied, all who render service and fall within the definition of workman come within the fold of industry irrespective of what they do. There is then no need to establish a partnership as such in the production of material goods or material services. Each person doing his appointed task in an organisation will be a part of the industry whether he attends to a loom or merely polishes door handles. The fact of employment as envisaged in the second part is enough provided there is an industry and the employee is a workman. The learned professions are not industry not because there is absence of such partnership but because viewed from the angle of the employer's occupation, they do not satisfy the test. A solicitor earns his livelihood by his own efforts. If his work requires him to take help from menials and other employees who carry out certain assigned duties, the character of the solicitor's work is not altered. What matters is not the nexus between the employee and the product of the employer's efforts but the nature of the employer's occupation. If his work cannot be described as an industry his workmen are not industrial workmen and the disputes arising between them are not industrial disputes. The cardinal test is thus to find out whether there is an industry according to the denotation of the word in the first part. The second part will then show what will be included from the angle of employees. We shall now apply this approach to the definition in the light of the earlier decisions of this Court insofar as they are consistent and then determine whether the club in this case can come within the meaning of 'industry' as determined by us.

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22. The principles so far settled come to this. Every human activity in which enters the relationship of employers and employees, is not necessarily creative of an industry. Personal services rendered by domestic and other servants, administrative services of public officials, service in aid of occupations of professional men, such as doctors and lawyers, etc. employment of teachers and so on may result in relationships in which there are employers on the one side and employees on the other but they must be excluded because they do not come within the denotation of the term 'industry'. Primarily, therefore, industrial disputes occur when the operation undertaken rests upon cooperation between employers and employees with a view to production and distribution of material goods, in other words, wealth, but they may arise also in cases where the cooperation is to produce material services. The normal cases are those in which the production or distribution is of material goods or wealth and they will fall within the expressions trade, business and manufacture. The word 'trade' in this context bears the meaning which may be taken from Halsbury's Laws of England, Third Edn. Vol. 38 p. 8

> *(a) exchange of goods for goods or goods for money;*
>
> *(b) any business carried on with a view to profit, whether manual, or mercantile, as distinguished from the liberal arts or learned professions and from agriculture;*

and business means an enterprise which is an occupation as distinguished from pleasure. Manufacture is a kind of productive industry in which the

making of articles or material (often on a large scale) is by physical labour or mechanical power. Calling denotes the following of a profession or trade.

These words have a clear signification and are intended to lay down definite tests. Therefore the principal question (and the only legitimate method) is to see where under the several categories mentioned, a particular venture can be brought. Of these categories 'undertaking' is the most elastic. According to Webster's dictionary, 'undertaking' means 'anything undertaken or 'any business, work or project which one engages in or attempts, as an enterprise'. It is this category which has figured in the cases of this Court. It may be stated that this Court began by stating in Banerji's case that the word 'undertaking' is not to be interpreted by association with the words that precede or follow it, but after the Solicitor's(2) and the University cases, it is obvious that liberal arts and learned professions, educational undertakings and professional services dependent on the personal qualifications and ability of the donor of services are not included. Although business may result in service the service is not regarded as material. That is how the service of a Solicitor firm is distinguished from the service of a building corporation. Otherwise what is the difference between the services of a typist in a factory and those of another typist in a Solicitor's office or the service of a bus driver in a municipality and of a bus driver in a University? The only visible difference is that in the one case the operation is a part of a commercial establishment producing material goods or material services and in the other there is a non-commercial undertaking. The distinction of an essential or direct connection does not appear to be so strong as the distinction that in the one case the result is the production of material goods or services and in the other not.

It is, therefore, clear that before the work engaged it can be described as an industry, it must bear the definite character of 'trade' or 'business' or 'manufacture' or 'calling' or must be capable of being described as an undertaking resulting in material goods or material services. Now in the application of the Act, the undertaking may be an enterprise of a private individual or individuals. On the other hand, it may not. It is not necessary that the employer must always be a private individual who carries on the operation with his own capital and with a view to his own profit. The Act in terms contemplates cases of industrial disputes where the Government or a local authority or a public utility service may be the employer. The expansion of Governmental or municipal activity in fields of productive industry is a feature of all developing welfare states. This is considered necessary because it leads to welfare without exploitation of workmen and makes the production of material goods and services cheaper by eliminating profits. Government and local authorities act as individuals do and the policy of the Act is to put Government and local authorities on a par with private individuals. But Government cannot be regarded as an employer within the Act if the operations are governmental or administrative in character. The local authorities also cannot be regarded as industry unless they produce material goods or render material services and do not share by delegation

in governmental functions or functions incidental thereto. There is no essential difference between educational institutions run by municipalities and those run by universities. And yet a distinction is sought to be made on the dichotomy or regal and municipal functions. Therefore, the word 'undertaking' must be defined as 'any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade.' This is the test laid down in Banerji's case and followed in the Baroda Borough Municipality case. Its extension in the Corporation case was unfortunate and contradicted the earlier cases.

Next where the activity is to be considered as an industry, it must not be casual but must be distinctly systematic. The work for which labour of workmen is required, must be productive and the workmen must be following an employment, calling or industrial avocation. The salient fact in this context is that the workmen are not their own masters but render service at the behest of masters. This follows from the second part of the definition of industry. Then again when private individuals are the employers, the industry is run with capital and with a view to profits. These two circumstances may not exist when Government or a local authority enter upon business, trade. manufacture or an undertaking analogous to trade.

The labour force includes not only manual or technical work- men but also those whose services are necessary or considered ancillary to the productive labour of others but does not include any one who, in an industrial sense, will be regarded, by reason of his employment or duties. as ranged on the side of the employers. Such are persons working in a managerial capacity or highly paid supervisors.

Further the words are 'industrial dispute' and not 'trade dispute'. Trade is only one aspect of industrial activity; business and manufacture are two others. The word also is not industry in the abstract which means diligence or assiduity in any task or effort but a branch of productive labour. This requires cooperation in some form between employers and workmen and the result is directly the product of this association but not necessarily commercial. The expressions 'terms of employment' and 'Conditions of labour' indicate the kind of conflict between those engaged in industry on opposite but cooperating sides. These words take in dispute as to the share in which the receipts in a commercial venture shall be divided and generally cover hours of work and rest, recognition of representative bodies of workmen, payment for piece work, wage ordinary and overtime, benefits, holidays, etc. The definition takes in disputes between employees and employees such as demarcation disputes and disputes between employers and employers such as wage warfare in an area where labour is scarce and disputes of a like character. The whole paraphernalia of settlement, conciliation, arbitration (voluntary as well as compulsory) agreements, awards etc. shows that human labour has value beyond what the wages represent and therefore is entitled to corresponding 'rights in an industry and employers must give them their due. Industry is the nexus between

employers and employees and it is this nexus which brings two distinct bodies together to produce a result. We do not think that the test that the workmen must not share in the product of their labours adopted in one case can be regarded as universal. There may be occasions when the workmen may receive a share of the produce either as part of their wages or as bonus or as a benefit."

[Emphasis added]

28. A larger bench of the Supreme Court in ***The Management of Safdarjung Hospital, New Delhi v. Kuldip Singh Sethi,*** (1970) 1 SCC 735 ***(Safdarjung),*** disapproved the test and views taken in the ***Hospital Mazdoor Sabha,*** and adopted a narrower view. The Hon'ble Court said that 'industry' was treated as trade/business/ manufacture/undertaking analogous to trade/business to produce material goods/wealth and material services, with emphasis on commercial character. The Court was hearing three sets of appeals, where the common question involved was whether the activities carried on by these hospitals were "industry' or not. The relevant portion of the judgment is quoted hereinbelow:

"12. Although the two definitions are worded differently the purport of both is the same. It is not necessary to view our definition in two parts. The definition read as a whole denotes a collective enterprise in which employers and employees are associated. It does not exist either by employers alone or by employees alone. It exists only when there is a relationship between employers and employees, the former engaged in business, trade, undertaking, manufacture or calling of employers and the latter engaged in any calling, service. employment, handicraft or industrial occupation or avocation. There must, therefore, be an enterprise in which the employers follow their avocations as detailed in the definition and employ workmen who follow one of the avocations detailed for workmen. The definition no doubt seeks to define 'industry' with reference to employers' occupation but includes the employees, for without the two there can be no industry. An industry is only to be found when there are employers and employees, the former relying upon the services of the latter to fulfil their own occupations.

13. But every case of employment is not necessarily productive of an industry. Domestic employment, administrative services of public officials, service in aid of occupations of professional men, also disclose relationship of employers and employees but they cannot be regarded as in the course of industry.

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15. Therefore an industry is to be found when the employers are carrying on any business, trade, undertaking, manufacture or calling of employers. If they are not, there is no industry as such. What is meant by these expressions

was discussed in a large number of cases which have been considered elaborately in the Gymkhana Club case. The conclusion in that case may be stated :

> *'Primarily, therefore, industrial disputes occur when the operation undertaken rests upon cooperation between employers and employees with a view to production and distribution of material goods, in other words, wealth, but they may arise also in cases where the co- operation is to produce material services. The normal cases are those in which the production or distribution is of material goods or wealth and they will fall within the expressions trade, business and manufacture.'*

16. The words 'trade', 'business', 'manufacture' and 'calling' were next explained thus :

> *'The word 'trade' in this context bears the meaning which may be taken from Halsbury's Laws of England, Third Edn. Vol. 38 p. 8-*
>
> *(a) exchange of goods for goods or goods for money;*
>
> *(b) any business carried on with a view to profit, whether manual, or mercantile, as distinguished from the liberal arts or learned professions and from agriculture;*

and business means an enterprise which is an occupation as distinguished from pleasure. Manufacture is a kind of productive industry in which the making of articles or material (often on a large scale) is by physical labour or mechanical power. Calling denotes the following of a profession or trade.'

17. It may be added here that in National Association of Local Government Officers v. Bolton Corporations at page 183 et seq Lord Wright observes that 'trade' is a term of the widest scope. This is true. We speak of the occupation of men in buying and selling, barter or commerce as trade. We even speak of work, especially of skilled work as, trade, e.g. the trade of goldsmiths. But the word as used in the statute must be distinguished from professions although even professions have 'trade unions'. The word 'trade' includes persons in a line of business in which persons are employed as workmen. Business too is a word of wide import. In one sense it includes all occupations and professions. But in the collocation of the terms and their definitions these terms have a definite economic content of a particular type and on the authorities of this Court have been uniformly accepted as excluding professions and are only concerned with the production, distribution and consumption of wealth and the production and availability of material services. Industry has thus been accepted to mean only trade and business, manufacture, or undertaking analogous to trade or business for the production of material goods or wealth and material services.

Why professions must be held outside the ambit of industry may be explained. A profession ordinarily is an occupation requiring intellectual skill, often coupled with manual skill. Thus a teacher uses purely intellectual skill while a painter uses both. In any event, they are not engaged in an

occupation in which employers and employees co-operate in the production or sale of commodities or arrangement for their production or sale or distribution and their services cannot be described as material services.

18. What is meant by 'material services' needs some explanation too. Material services are not services which depend wholly or largely upon the contribution of professional knowledge, skill or dexterity for the production of a result. Such services being given individually and by individuals are services no doubt but not material services. Even an establishment where many such operate cannot be said to convert their professional services into material services. Material services involve an activity carried on through co- operation between employers and employees to provide the community with the use of something such as electric power, water, transportation, mail delivery, telephones and the like. In providing these services there may be employment of trained men and even professional men, but the emphasis is not on what these men do but upon the productivity of a service organised as an industry and commercially valuable. Thus the services of professional men involving benefit to individuals according to their needs, such as doctors, teachers, lawyers, solicitors etc. are easily distinguishable from an activity such as transport service. The latter is of a commercial character in which something is brought into existence quite apart from the benefit to particular individuals. It is the production of this something which is described as the production of material services."

[Emphasis added]

29. The Court in *Safdarjung* first tried to explain 'material services' by saying what they are not, i.e., they are not services which depend wholly or largely on the individual professional knowledge, skill or dexterity of a person to achieve a result. On this reasoning, services rendered by doctors, teachers, lawyers, solicitors etc. were treated as professional services directed to individual needs, and therefore, although they are 'services', they were said not to be 'material services'; and even if many such professionals work in one establishment, their work does not become 'material services' merely because it is organised under one roof.

30. The Court then stated what 'material services' are, i.e, services that are produced through organised activity involving cooperation between employer and employees to provide the community with the 'use of something' that is commercially valuable, where the emphasis is on the systemic production of the service, not on the individual contribution of trained or professional persons working within it.

31. ***Safdarjung*** then held the government hospital activity outside 'industry', and this view was reiterated in the ***Management of Hospitals, Orissa v. Workmen,*** (1972) 4 SCC 216**,** (***Orissa Hospital***) case and followed in ***Dhanrajgirji Hospital v. Workmen,*** (1975) 4 SCC 621 (***Dhanrajgiri Hospital***).

32. Attention may also be drawn to ***The Bombay Panjrapole, Bhuleshwar v. The Workmen & Anr,*** (1972) 1 SCR 202 (***Bombay Panjrapole***), where the Supreme Court while considering whether the activities of a charitable institution devoted to the care of sick and disabled animals could fall within the meaning of an "*industry*" under the ID Act. Although the institution had originally been established for charitable purposes, its activities had expanded over time with the establishment of a dairy farm, where a substantial portion of the milk produced was sold in the market. A dispute arose between the institution and its workmen regarding the revision of wage scales and service conditions, which led to a reference before the Industrial Tribunal. The Tribunal held that the activities of the Panjrapole constituted an "*industry*", a finding that was subsequently upheld by the Bombay High Court and affirmed by the Supreme Court. The Court emphasised that the relevant inquiry was the nature of the organised activity carried on with the involvement of labour, and not merely the charitable origin of the institution. It further clarified that the way the animals had been acquired, or the absence of a conventional profit motive, did not detract from the industrial character of the organised dairy activity. The relevant extract at page 223 is reproduced below:

> *"…We have already referred to the fact that the value of milk 'Supplied to the sick and infirm cattle was infinitesimal compared to that sold in the market. The expenses incurred in connection with the treatment of sick and infirm animals was also negligible compared to the total expenses of the institution. The number of men employed for such treatment was very small at all times. The mere fact therefore that the Panjrapole never purchased milch cows and never purchased stud bulls except once makes no difference to the question as to whether their activity of maintaining cows and bulls could only be considered as an investment. It was certainly carried on as a business although it was not pursued in the same way as astute businessmen only out to make profit would, namely, get rid of the animals which were no longer fit for any use. The value of the milk supplied for the last 3 or 4 years was well in excess of Rs. 2 lakhs per annum and this could only be possible if the cows and buffaloes had been*

kept and maintained not merely to keep them alive but with the idea of getting as much production out of them as possible..."

33. By the end of this phase, Courts were divided on several basic issues, such as whether the definition was two-fold or unified, whether economic or commercial character was necessary, how wide the ambit of 'material services' was, whether professions, educational institutions, hospitals, and clubs were covered, and which activities were to be treated as sovereign functions. Consequently, the law began developing divergent lines at the same time. The reconciliation of the divergent views happened in *Bangalore Water Supply*.

C. ANALYSIS OF BANGALORE WATER SUPPLY

34. The backdrop of the reference of the matter to a bench of 7 Judges[1] appears to be what was already burgeoning litigation in 1978 on the scope definition of "*industry*" and the lack of unanimity in the numerous decisions thus far. In *Bangalore Water Supply*, the Court was neither embarking on a *de-novo* adjudication of the scope of the term, nor looking to "*spring a creative surprise on the industrial community by a stroke of freak originality*".[2] Rather, the intent was to be guided by the variety of criteria laid down in the cases thus far and render a comprehensive, clear and conclusive declaration as to what is an 'industry' under the ID Act.

35. In embarking on this stated intent of rendering a conclusive declaration, the 7-Judge Bench wrote four (4) judgements:

a. The judgement dated 21.02.1978, authored by Justice V. R. Krishna Iyer, on behalf of himself, Justice P.N. Bhagwati, and Justice D. A. Desai, which constitutes the substratum of the Court's decision including providing the primary triple test, and ruling on whether a number of activities would fall within or outside the scope of 'industry' (paragraphs 1-145). Justice Krishna Iyer's judgment expressly affirms the cases of *Hospital Mazdoor Sabha*; *Banerji, and Nagpur Corporation*, and expressly overrules *Delhi University*; *Gymkhana*; *Solicitor's Case*; *Cricket Club of India*, and critically, *Safdarjung Hospital*;

b. A concurring judgement dated 21.02.1978 by Chief Justice M. H. Beg (as he then was), which provided additional reasons, and expressed a minor dissent with respect to whether professions would be brought within the ambit of industry (paragraphs 146-170);

c. A concurring judgement dated 07.04.1978 by the then Chief Justice Y. V. Chandrachud, supplying its own reasons and disagreeing with basis of the dissent authored by the other two Justices (paragraphs 171-183), and

d. A dissenting judgement dated 07.04.1978 authored by Justice Jaswant Singh on behalf of himself and Justice V. D. Tulzapurkar (paragraphs 184-187).

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[1] See *Bangalore Water Supply*, paragraph 9.
[2] See *Bangalore Water Supply*, paragraph 10

36. The fact that there are sufficient nuances, and more than one possible perspective on the same issue and even arriving at the same conclusion, is evident from the plurality of opinions expressed in *Bangalore Water Supply*.

C.1. ISSUES BEFORE THE 7-JUDGES IN BANGALORE WATER SUPPLY

37. The Court framed the following issues and sub-issues:

> *"23. Now let us itemise, illustratively, the posers springing from the competing submissions, so that the contentions may be concretised.*
> *(1)(a) Are establishments, run without profit motive, industries?*
> *(b) Are charitable institutions industries?*
> *(c) Do undertakings governed by a no-profit-no-loss rule, statutorily or otherwise fastened, fall within the definition in Section 2(j)?*
> *(d) Do clubs or other organisations (like the Y.M.C.A.) whose general emphasis is not on profit making by fellowship and self-service, fit into the definitional circle?*
> *(e) To go to the core of the matter, is it an inalienable ingredient of 'industry' that it should be plied with a commercial object?*
>
> *(2)(a) Should co-operation between employer and employee be direct in so far as it relates to the basic service or essential manufacture which is the output of the undertaking?*
> *(b) Could a lawyer's chamber or chartered accountant's office, a doctor's clinic or other liberal profession's occupation or calling be designated as industry?*
> *(c)Would a university or college or school or research institute be called an industry?*
>
> *(3)(a) Is the inclusive part of the definition in Section 2(j) relevant to the determination of an industry ? If so, what impact does it make on the categories?*
> *(b) Do domestic service drudges who slave without respite — become 'industries' by this extended sense?*
>
> *(4) Are governmental functions, stricto sensu, industrial and if not, what is the extent of the immunity of instrumentalities of government?*
>
> *(5) What rational criterion exists for a cut-back on the dynamic potential and semantic sweep of the definition, implicit in the industrial law of a progressive society geared to greater industrialisation and consequent concern for regulating relations and investigating disputes between employers and employees as industrial processes and relations become more complex and sophisticated and workmen become more right conscious?*
> *(6) As the provision now stands, is it scientific to define 'industry' based on the nature - the dominant nature - of the activity, i.e. on the terms of the*

work, remuneration and conditions of service which bond the two wings together into an employer-employee complex?"

C.2. PRINCIPLES OF INTERPRETATION AND FACTORS TO BE CONSIDERED WHILE INTERPRETING 'INDUSTRY'

38. For determining these issues, the Court identified certain principles and factors that must inform the analysis:

a. As principles of interpretation of statutes that would apply, the Court holds that the statute must be read as a whole, and have regard to its historical background, objects and reasons, international thoughtways, and contextual connotation.[3]

i. The court "*should not be beguiled by similar words in dissimilar statutes, contexts, subject-matters or socio-economic situations. The same words may mean one thing in one context and another in a different context. This is the reason why decisions on the meaning of particular words or collection of words found in other statutes are scarcely of much value when we have to deal with a specific statute of our own; they may persuade, but cannot pressure.*"[4]

b. The Court also holds that legal concepts must be treated as temporally relativist, and there cannot be absolutes, giving caution that ignoring this would be inimical to developmental change.[5] ***Banerji*** (SCR, at Pg. 309), also emphasising this, was quoted with approval at paragraph 27 of J Iyer's judgment, stating that the dynamics of industrial law, even if incongruous with popular understanding is an important proposition:

> "*Legislation had to keep pace with the march of times and to provide for new situations. Social evolution is a process of constant growth, and the State cannot afford to stand still without taking adequate measures by means of legislation to solve large and momentous problems that arise in the industrial field from day to day almost*"

[3] Paragraph 10 of J. Iyer's judgment and paragraphs 150, 151, 153 and 154 of CJ Beg's judgment
[4] Paragraph 28
[5] Paragraph 11. See also *Banerji*, quoted at paragraph 26 and paragraphs 152 and 153 of CJ Beg's judgment

CJ Beg agreed with J Iyer that "*Progressive, rational and beneficial modes of interpretation import and fit into the body of the old what may be new. It is a process of adaptation for giving new vitality in keeping with the progress of thought in our times.*"[6] CJ Beg further held that "*even in a modern statute the meaning of a term such as "industry" may change with a rapidly changed social and economic structure*" and for the said proposition quoted the decision in *The Senior Electric Inspector v Laxmi Narayan Chopra*[7]*,*

c. A critical factor that weighs in the mind of the Court was the backdrop of the legislation – i.e. the dual goal of (i) contentment and welfare of workers, and (ii) peace in the industry. **The Court repeatedly dubs the ID Act as a worker-oriented statute and holds that the construction must be tailored accordingly**.[8] This is arrived at from the functional focus of the legislation and the social perspective of Part IV of the Constitution:

   i. The court refers to Entry 22, List III of the Seventh Schedule of the Constitution, which speaks of "*industrial and labour disputes*" and notes that the preamble of the act refers to the 'investigation and settlement of industrial disputes'.[9]

   ii. "*18. ...the personality of the whole statute, be it remembered, has a welfare basis, it being a beneficial legislation which protects labour, promotes their contentment and regulates situations of crisis and tension where production may be imperilled by untenable strikes and blackmail lock-out. ...* ***Its goal is amelioration of the conditions of workers, tempered by a practical sense of peaceful co-existence, to the benefit of both*** *— not a neutral position but restraints on laissez faire and concern for the welfare of the weaker lot. Empathy with the statute is necessary…*"[10] [Emphasis added]

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[6] Para 152 of CJ Beg's judgment
[7] (1962) 3 SCR 146
[8] Paragraphs 12, 17 and 39.
[9] Paragraph 17
[10] Paragraph 18

iii. The emphasis on a worker-oriented approach is evident from another striking passage in the judgement, which aptly captures the essence of the rationale that pervades the rest of the ruling:

> "*21. ... A pluralist society with a capitalist backbone, notwithstanding the innocuous adjective 'socialist' added to the Republic by the Constitution (Forty-second Amendment Act, 1976) regards profit-making as a sacrosanct value. Elitist professionalism and industrialism is sensitive to the 'worker' menace and inclines to exclude such sound and fury as 'labour unrest' from its sanctified precincts by judicially de-industralising (sic) the activities of professional men and interest groups to the extent feasible. Governments, in a mixed economy, share some of the habits of thought of the dominant class and doctrines like sovereign functions, which pull out economic enterprises run by them, come in handy. The latent love for club life and charitable devices and escapist institutions bred by clever capitalism and hierarchical social structure, shows up as inhibitions transmuted as doctrines, interpretatively carving out immunities from the 'industrial' demands of labour by labelling many enterprises 'non-industries'. Universities, clubs, institutes, manufactories and establishments managed by eleemosynary[11] or holy entities, are instances. To objectify doctrinally subjective consternation is casuistry[12]*." [Emphasis added]

iv. Isaacs and Rich JJ. observed in ***Melbourne Corporation*** that matters even indirectly prejudicially affecting the workers are within the sphere of dispute (Pg. 70, para 175(4)(a)):

> "*Long hours proceed from the competition of employer with employer in the same trade. Employers ought to be prevented from competing in this way at the expense of their workmen.*" [Emphasis added]

C.3. KEY FEATURES OF "INDUSTRY" – THE TRIPLE TEST

39. The Court identified a **triple test to identify an activity as an "*industry*" that would be all pervasive.** This triple test **is adopted** nearly verbatim in the definition of industry under Section 2(p) of the Industrial Relations Code, 2020. These three features are explained below:

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[11] Relating to or dependent on charity; charitable
[12] Use of clever but unsound reasoning, especially in relation to moral questions; sophistry

C.3.1. A continuous, organised, systemic, purposeful pursuit

> *"13. ... An industry is a continuity, is an organized activity, is a purposeful pursuit — not any isolated adventure, desultory excursion or casual, 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. For those who know English and are not given to the luxury of splitting semantic hairs, this conclusion argues itself. 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 common sense guide to construction, 'undertaking' must be read down to conform to the restrictive characteristic shared by the society of words before and after. Nobody will torture 'undertaking' in Section 2(j) to mean meditation or musheira which are spiritual and aesthetic undertakings. Wide meanings must fall in line and discordance must be excluded from a sound system. From Banerji (supra) to Safdarjung (supra) and beyond, this limited criterion has passed muster and we see no reason, after all the marathon of argument, to shift from this position.*"
>
> [Emphasis added]

C.3.2. Existence of the Employer-Employee relationship, and organised by the co-operation between employer and employee;

> "*14. Likewise, 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 and the scheme of the Act, and as a necessary postulate of industrial disputes and statutory resolution thereof.*"
>
> [Emphasis added]

C.3.3. The activity is for the production and/ or distribution of goods and services calculated to satisfy human wants and wishes geared primarily towards economic utilities, material goods and services:

> "*15. An industry is not a futility but geared to utilities in which the community has concern. And in this mundane world where law lives now, economic utilities material goods and services, not transcendental flights nor intangible achievements — are the functional focus of industry. Therefore, no temporal utilities, no statutory industry, is axiomatic. If society, in its advance, experiences subtler realities and assigns values to them, jurisprudence may reach out to such collective good. Today, not tomorrow, is the first charge of pragmatic law of western heritage. So we are confined to material, not ethereal end products*."
>
> [Emphasis added]

C.4. PRINCIPLES GOVERNING WHAT WOULD FALL WITHIN AND OUTSIDE OF "INDUSTRY"; AFFIRMATION OF *BANERJI, NAGPUR CORPORATION* AND *HOSPITAL MAZDOOR SABHA*

C.4.1. Wide Amplitude of the term "industry"

40. The Court holds that not a narrow, but an enlarged acceptation is intended. Citing with approval the judgement in ***Banerji***, the Court held that popular parlance, or in other words, what the common man does not consider as 'industry' need not necessarily stand excluded from the statutory concept (and *vice versa*). The statutory definitions of employer (Section 2(g)), industry (Section 2(j)), industrial dispute (Section 2(k)), workman (Section 2s)) are the statutory dictionary that would govern. The statute is deliberately drawn wider (and in some respects drawn narrower). The Court further affirms that 'industry' extends beyond mere trade or business. ***Banerji***, at SCR Pg. 307, 308 and 311 was quoted as below[13]:

> "*Do the definitions of 'industry', 'industrial dispute' and 'workman' take in the extended significance, or exclude it ? Though the word 'undertaking' in the definition of 'industry' is wedged in between business and trade on the one hand and manufacture on the other, and though therefore it might mean only a business or trade undertaking, still it must be remembered that if that were so, there was no need to use the word separately from business or trade.* ***The wider import is attracted even more clearly when we look at the latter part of the definition which refers to "calling, service, employment, or industrial occupation or avocation of workmen". "Undertaking" in the first part of the definition and "industrial occupation or avocation" in the second part obviously mean much more than what is ordinarily understood by trade or business.*** *The definition was apparently intended to include within its scope what might not strictly be called a trade or business venture.*" [Emphasis added]
>
> *"There is nothing, however, to prevent a statute from giving the word "industry" and the words "industrial dispute" a wider and more comprehensive import in order to meet the requirements of rapid industrial progress and to bring about in the interests of industrial peace and economy, a fair and satisfactory adjustment of relations between employers and workmen in a variety of fields of activity. It is obvious that the limited concept of what an industry meant in early times must now yield place to an enormously wider concept so as to take in various and varied forms of industry, so that disputes arising in connection with them might be settled quickly without much dislocation and disorganisation of the needs of the society and in a manner more adapted to conciliation and settlement than a*

[13] Paragraph 26, affirmatively citing *Banerji*. See also paragraph 36.

determination of the respective rights and liabilities according to strict legal procedure and principles." (Quoted by CJ Beg)

"*In the ordinary or non-technical sense, according to what is understood by the man in the street, industry or business means an undertaking where capital and labour co-operate with each other for the purpose of producing wealth in the shape of goods, machines, tools etc., and for making profits. The concept of industry in this ordinary sense applies even to agriculture, horticulture, pisciculture and so on and so forth. It is also clear that every aspect of activity in which the relationship of employer and employee exists or arises does not thereby become an industry as commonly understood. We hardly think in terms of an industry, when we have regard, for instance, to the rights and duties of master and servant, or of a Government and its secretariat, or the members of the medical profession working in a hospital. It would be regarded as absurd to think so; at any rate the layman unacquainted with advancing legal concepts of what is meant by industry would rule out such a connotation as impossible. There is nothing however to prevent a statute from giving the word "industry" and the words "industrial dispute" a wider and more comprehensive import in order to meet the requirements of rapid industrial progress and to bring about in the interests of industrial peace and economy, a fair and satisfactory adjustment of relations between employers and workmen in a variety of fields of activity.* ***It is obvious that the limited concept of what an industry meant in early times must now yield place to an enormously wider concept so as to take in various and varied forms of industry****, so that dispute arising in connection with them might be settled quickly without much dislocation and disorganisation of the needs of society and in a manner more adapted to conciliation and settlement than a determination of the respective rights and liabilities according to strict legal procedure and principles. The conflicts between capital and labour have now to be determined more from the standpoint of status than of contract. Without such an approach, the numerous problems that now arise for solution in the shape of industrial disputes cannot be tackled satisfactorily, and this is why every civilised government has thought of the machinery of conciliation officers, Boards and Tribunals for the effective settlement of disputes*"

[Emphasis added]

41. Apart from referring to *Banerji,* CJ Beg also refers to ***Hospital Mazdoor Sabha*** to consider to the object and scope of the statute to favour the wide interpretation of the word "*industry*". The relevant portion of ***Hospital Mazdoor Sabha*** referred to by CJ Beg is reproduced hereinunder:

"If the object and scope of the statute are considered there would be no difficulty in holding that the relevant words of wide import have been deliberately used by the Legislature in defining "Industry" in Section 2(j). The object of the Act was to make provision for the investigation and settlement of industrial disputes, and the extent and scope of the provisions

would be realised if we bear in mind the definition of "industrial disputes" given by Section 2(k), of "wages" by Section 2(rr), "workmen" by Section 2(s), and of "employer" by Section 2(g).”

42. J Iyer’s judgment notes that the ID Act had its beginnings in Australia,[14] and also relies heavily on certain Australian judgments. One such judgement is ***Melbourne Corporation***. The opinion of Isaacs and Rich JJ, in this judgment, is cited approvingly for the proposition that the term industry must have a wide construction:

> “*39. … The inevitable conclusion, as it seems to us, from this is that in 1894 it was well understood that “trade disputes”, which at one time had a limited scope of action, without altering their inherent and essential nature, so developed as to be recognised better under the name of “industrial disputes” or “labour disputes”, and to be more and more founded on the practical view that human labour was not a mere asset of capital but was a co-operating agency of equal dignity — a working partner — and entitled to consideration as such.*
>
> *40. The same two Judges choose to impart a wide construction to the word ‘industry’, for they ask:*
> *‘How can we, conformably to recognized rules of legal construction, attempt to limit, in an instrument of self-government for this Continent, the simple and comprehensive words “industrial disputes” by any apprehension of what we might imagine would be the effect of a full literal construction, or by conjecturing what was in the minds of the framers of the Constitution, or by the forms industrial disputes have more recently assumed ? “Industrial warfare” is no mere figure of speech. It is not the mere phrase of theorists. It is recognized by the law as the correct description of internal conflicts in industrial matters. It was adopted by Lord Loreburn L.C. in Conway v. Wade. Strikes and lock-outs are by him correctly described as “weapons”.”*

C.4.2. Absence of Capital does not negative industry; profit motive and quid pro quo for services received are not relevant; and whether the activity is performed by private enterprises/individuals or government is also not relevant

43. Next, the Court also holds that the presence or absence of ‘Capital’ is not necessarily determinative, when seen in the context of statutory industries, involving public

[14] Paragraph 8

utilities.[15] For arriving at this conclusion, the Court again affirmatively cites ***Banerji*** (SCR, Pg. 312):

> "*A public utility service such as railways, telephones and the supply of power, light or water to the public may be carried on by private companies or business corporations. Even conservancy or sanitation may be so carried on, though after the introduction of local self-government this work has in almost every country been assigned as a duty to local bodies like our Municipalities or District Boards or Local Boards. A dispute in these services between employers and workmen is an industrial dispute, and the proviso to Section 10 lays down that where such a dispute arises and a notice under Section 22 has been given, the appropriate Government shall make a reference under the sub-section. If the public utility service is carried on by a corporation like a Municipality which is the creature of a statute, and which functions under the limitations imposed by the statute, does it cease to be an industry for this reason?* ***The only ground on which one could say that what would amount to the carrying on of an industry if it is done by a private person ceases to be so if the same work is carried on by a local body like a Municipality is that in the latter there is nothing like the investment of any capital or the existence of a profit earning motive as there generally is in a business. But neither the one nor the other seems a sine quo non or necessary element in the modern conception of industry***."
>
> [Emphasis added]

44. Based on the above, J. Iyer's judgment also draws the principle that it may not be relevant whether a private body is performing the activity or the government (say, through a municipality). In other words, it is the nature of the activity that is determinative, and not who performs it. This finding is otherwise contained in the ***Hospital Mazdoor Sabha*** judgement (SCR, Pg. 878), which is cited affirmatively:

> "*It is the character of the activity which decides the question as to whether the activity in question attracts the provision of Section 2(j) ; who conducts the activity and whether it is conducted for profit or not do not make a material difference.*"

45. J Iyer's judgement also cites *Banerji* for holding that charitable activities also need not necessarily cease to be industry, nor does the presence or absence of the profit motive be considered a *sine qua non* for determining industry. ***Banerji*** (SCR, Pg. 313) holds thus as regards charitable activities of municipalities:

> "*Some of these functions may appertain to and partake of the nature of an industry, while others may not. For instance, there is a necessary element of*

[15] Paragraph 30

distinction between the supply of power and light to the inhabitants of a Municipality and the running of charitable hospitals and dispensaries for the aid of the poor. In ordinary parlance, the former might be regarded as an industry but not the latter. The very idea underlying the entrustment of such duties or functions to local bodies is not to take them out of the sphere of industry but to secure the substitution of public authorities in the place of private employers and to eliminate the motive of profitmaking as far as possible. The levy of taxes for the maintenance of the services of sanitation and the conservancy or the supply of fight and water is a method adopted and devised to make up for the absence of capital. The undertaking or the service will still remain within the ambit of what we understand by an industry though it is carried on with the aid of taxation, and no immediate material gain by way of profit is envisaged"

46. To arrive at its holding that profit motive is not a *sine qua non* of industry, either functionally or definitionally, the opinion of Powers J., in ***Melbourne Corporation*** is approvingly cited as follows:

"*So far as the question in this case is concerned, as the argument proceeded the ground mostly relied upon (after the Councils were held not to be exempt as State instrumentalities) was that the work was not carried on by the municipal corporations for profit in the ordinary sense of the term, although it would generally speaking be carried on by the Councils themselves to save contractors' profits. <u>If that argument were sufficient, then a philanthropist who acquired a clothing factory and employed the same employees as the previous owner had employed would not be engaged in an occupation about which an industrial dispute could arise, if he distributed the clothes made to the poor free of charge or even if he distributed them to the poor at the bare cost of production.</u> If the contention of the respondents is correct, a private company carrying on a ferry would be engaged in an industrial occupation. If a municipal corporation carried it on, it would not be industrial. The same argument would apply to baths, bridge-building, quarries, sanitary contracts, gas-making for lighting streets and public halls, municipal building of houses or halls, and many other similar industrial undertakings. Even coal-mining for use on municipal railways or tramways would not be industrial work if the contention of the respondents is correct. If the works in question are carried out by contractors or by private individuals it is said to be industrial, but not industrial within the meaning of the Arbitration Act or Constitution if carried out by municipal corporations. I cannot accept that view.*"[16]

[Emphasis added]

[16] Paragraph 34

47. The opinion of Higgins J. in ***Melbourne Corporation*** is also quoted:

> *"The purpose of profit-making can hardly be the criterion. If it were, the labourers who excavated the underground passage for the Duke of Portland's whim, or the labourers who build (for pay) a tower of Babel or a Pyramid, could not be parties to an 'industrial dispute'."*[17]

48. The Court, in ***Nagpur Corporation***, negatived the contention that there must be an element of *quid pro quo* involved, for the activity to be considered an industry, which was approved in J. Iyer's judgement:[18]

> "*54. It is useful to remember that the Court rejected the test attempted by Counsel in the case : (SCR pp. 958-59)*
>
> *'It is said that unless there is a quid pro quo for the service it cannot be an industry. This is the same argument, namely, that the service must be in the nature of trade in a different garb.'*
>
> *We agree with this observation and with the further observation that there is no merit in the plea that unless the public who are benefited by the services pay in cash, the services so rendered cannot be industry. Indeed, the signal service rendered by the Corporation of Nagpur (supra) is to dispel the idea of profit-making. Relying on Australian cases which held that profit-making may be important from the income-tax point of view but irrelevant from an industrial dispute point of view, the Court approved of a critical passage in the dissenting judgment of Isaacs, J. in the School Teachers' Association case (supra) :*
>
> *'The contention sounds like an echo from the dark ages of industry and political economy.... Such disputes are not simply a claim to share the material wealth (and concluded) : SCR p. 960*
>
> *Monetary considerations for service is, therefore, not an essential characteristic of industry in a modern State."*
>
> [Emphasis added]

C.4.3. Branches of work that can be said to be analogous to the carrying out of a trade or business

49. J Iyer's judgment notes that ***Banerji*** conceptualised a useful postulate, that "*industries*" will cover "*branches of work that can be said to be analogous to the carrying out of a trade or business"*. To explain the expansive scope of this phrase, tying it in with the Triple Test and the holdings contained in ***Banerji*** discussed above, J. Iyer's judgement holds as follows:

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[17] Paragraph 39
[18] Paragraph 54

> "*38. ... The prescient words are: branches of work that can be said to be analogous to the carrying out of a 'trade or business'. The same judgment has negatived the necessity for profit-motive and included charity impliedly, has virtually equated private sector and public sector operations and has even perilously hinted at 'professions' being 'trade'. In this perspective, the comprehensive reach of 'analogous' activities must be measured. The similarity stressed relates to 'branches of work'; and more; the analogy with trade or business is in the 'carrying out' of the economic adventure. So, the parity is in the modus operandi, in the working — not in the purpose of the project nor in the disposal of the proceeds but in the organisation of the venture, including the relations between the two limbs, viz., labour and management. If the mutual relations, the method of employment and the process of co-operation in the carrying out of the work bear close resemblance to the organization, method, remuneration, relationship of employer and employee and the like, then it is industry, otherwise not. This is the kernel of the decision.* ***An activity oriented, not motive based, analysis***."
>
> [Emphasis added]

50. Concluding its observations about ***Banerji***, J Iyer's judgement notes that the phrase "*branches of work that can be said to be analogous to the carrying out of a trade or business"* limited the import of "*undertakings*", in that spiritual undertakings, casual undertakings, domestic undertakings, war waging, policing; justicing; legislating; tax collecting and the like were *prima facie* pushed out. Wars are not merchantable, nor justice saleable, nor divine grace marketable.[19] J Iyer's judgment, independently deals with the aforementioned categories of activities to provide for their exclusion, under the category of 'sovereign function' as explained subsequently.

C.4.4. Public / civil servants engaged in public administration are outside the ambit of industrial conflict

51. Though it was not in issue before the Court in *Bangalore Water Supply*, the Court also clarified that the public servants in the key sectors of administration stand out of the industrial sector. To arrive at this conclusion, the Court referred, *inter alia*, to Article 6 of the Convention 98 concerning the Application of the Principles of the

[19] Paragraph 37

Right to Organise and to Bargain Collectively of the International Labour Organisation.[20]

C.4.5. Crown exemption or Sovereign Functions

52. J Iyer's judgment recognises that notwithstanding the width of term "*industry*", there must, for other compelling reasons, categories of activities that must be kept out of the scope thereof.[21] The relevant extracts are below:

> "40. … *One such criterion, in the monarchical vocabulary of English Jurisprudence, is Crown exemption, re-incarnating in a Republic as inalienable functions of constitutional government. No government, no order; no order, no law; no rule of law, no industrial relations. So, core functions of the State are paramount and paramountcy is paramountcy. But this doctrinal exemption is not expansionist but strictly narrowed to necessitous functions. Isaacs and Rich JJ., dwell on this topic and, after quoting Lord Watson's test of inalienable functions of a constitutional government, state :*
>
> > *'Here we have the discrimen of Crown exemption. If a municipality either is legally empowered to perform and does perform any function whatever for the Crown, or a is lawfully empowered to perform and does perform any function which constitutionally is inalienably a Crown function — as, for instance, the administration of justice — the municipality is in law presumed to represent the Crown, and the exemption applies. Otherwise, it is outside that exemption, and, if impliedly exempted at all, some other principle must be resorted to. The making and maintenance of streets in the municipality is not within either proposition.' "*
>
> [Emphasis added]

53. J Iyer's judgement refers to ***Nagpur Corporation***, which ruled on scope of the 'sovereign functions' exception, as well as the limits thereof. Explaining the scope, J. Iyer's judgement held:

> *"50. The Court proceeded to carve out the negative factors which, notwithstanding the literal width of the language of the definition, must, for other compelling reasons, be kept out of the scope of industry. For instance, sovereign functions of the State cannot be included although what such functions are has been aptly termed 'the primary and inalienable functions of a constitutional government'. Even here we may point out the ineptitude of relying on the doctrine of regal powers. That has reference, in this context, to the Crown's liability in tort and has nothing to do with Industrial Law.* ***In any case, it is open to Parliament to make law which governs the State's relations with its employees. Articles 309 to 311 of the Constitution of***

[20] Paragraphs 45-46.
[21] Paragraphs 40, 50.

> ***India, the enactments dealing with the Defence Forces and other legislation dealing with employment under statutory bodies may, expressly or by necessary implication, exclude the operation of the Industrial Disputes Act, 1947.*** *That is a question of interpretation and statutory exclusion ; but****, in the absence of such provision of law, it may indubitably be assumed that the key aspects of public administration like public justice stand out of the circle of industry.*** *Even here, as has been brought out from the excerpts of ILO documents, it is not every employee who is excluded but only certain categories primarily engaged and supportively employed in the discharge of the essential functions of constitutional government. In a limited way, this head of exclusion has been recognised throughout.*
>
> *51. Although we are not concerned in this case with those categories of employees who particularly come under departments charged with the responsibility for essential constitutional functions of government,* ***it is appropriate to state that if there are industrial units severable from the essential functions and possess an entity of then own it may be plausible to hold that the employees of those units are workmen and those undertakings are industries****. A blanket exclusion of every one of the host of employees engaged by government in departments falling under general rubrics like, justice, defence, taxation, legislature, may not necessarily be thrown out of the umbrella of the Act. We say no more except to observe that closer exploration, not summary rejection, is necessary."*
>
> [Emphasis added]

54. It is important to note, here, that J Iyer's judgement did not engage in an expansive discourse on the contours of the 'sovereign functions' exception, except to state that the exception is not absolute. From the above, it is evident that J Iyer's judgement recognises the concept of severability of functions of a government department that is otherwise engaged in essential functions.

55. Justice Beg while concurring with the judgment of J. Iyer, elaborated that to artificially exclude State run industries from the ambit of the ID Act will be incorrect. The relevant portion of Justice Beg's judgment is reproduced hereinbelow:

> *"168. Hence, to artificially exclude State-run industries from the sphere of the Act, unless statutory provisions, expressly or by a necessary implication have that effect, would not be correct. The question is one which can only be solved by more satisfactory legislation on it. Otherwise, Judges could only speculate and formulate tests of "industry" which cannot satisfy all. Perhaps to seek to satisfy all is to cry for the moon."*

56. Justice Chandrachud in his judgment agreed with Justice Krishna Iyer's judgment in relation to including certain sovereign functions or government functions within the definition of industry. Justice Chandrachud held that the nature of activity is the determining factor for considering it an industry and not who undertakes the said activity. Relevant portion of Justice Chandrachud's judgment is extracted for reference:

> *"179. One of the exceptions carved out by the Court is in favour of activities undertaken by the Government in the exercise of its inalienable functions under the Constitution, call it regal, sovereign or by any other name. I see no justification for excepting these categories of public utility activities from the definition of "industry". If it be true that one must have regard to the nature of the activity and not to who engages in it, it seems to me beside the point to enquire whether the activity is undertaken by the State, and further, if so, whether it is undertaken in fulfilment of the State's constitutional obligations or in discharge of its constitutional functions. In fact, to concede the benefit of an exception to the State's activities which are in the nature of sovereign functions is really to have regard not so much to the nature of the activity as to the consideration who engages in that activity; for, sovereign functions can only be discharged by the State and not by a private person. If the State's inalienable functions are excepted from the sweep of the definition contained in Section 2(j), one shall have unwittingly rejected the fundamental test that it is the nature of the activity which ought to determine whether the activity is an industry. Indeed, in this respect, it should make no difference whether, on the one hand, an activity is undertaken by a corporate body in the discharge of its statutory functions or, on the other, by the State itself in the exercise of its inalienable functions. If the water supply and sewerage schemes or fire fighting establishments run by a Municipality can be industries, so ought to be the manufacture of coins and currency, arms and ammunition and the winning of oil and uranium. The fact that these latter kinds of activities are, or can only be, undertaken by the State does not furnish any answer to the question whether these activities are industries. When undertaken by a private individual they are industries. Therefore, when undertaken by the State, they are industries. The nature of the activity is the determining factor and that does not change according to who undertakes it. Items 8, 11, 12, 17 and 18 of the First Schedule read with Section 2(n)(vi) of the Industrial Disputes Act render support to this view. These provisions which were described in Hospital Mazdoor Sabha as "very significant" at least show that, conceivably, a defence establishment, a mint or a security press can be an industry even though these activities are, ought to be and can only be undertaken by the State in the discharge of its constitutional obligations or functions. The State does not trade when it prints a currency note or strikes a coin. And yet, considering the nature of the activity, it is engaged in an industry when it does so."*
>
> [Emphasis added]

57. Justice Jaswant Singh and Justice Tulzapurkar disagreed with the other judges to include hospital run "as a part of the functions of the Government or local bodies like municipalities" and educational and research institutions run by the Government within the definition of industry. According to Justice Jaswant Singh and Justice Tulzapurkar, the true test of inclusion of an activity within the pale of industry is:

> *"185. ... We are inclined to think that the definition is limited to those activities systematically or habitually undertaken on commercial lines by private entrepreneurs with the co-operation of employees 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."*

C.4.6. The Nagpur Corporation Tests – (a) primary and predominant activity, (b) integrated activity

58. ***Nagpur Corporation***, which gave two seminal guidelines, which were affirmed in J. Iyer's judgement:

a. The primary and predominant activity test (***Dominant Nature test***), and
b. The ***Integrated Activity*** test.

These tests are articulated in the conclusion of ***Nagpur Corporation*** (SCR pg. 961) as follows:

> *"The result of the discussion may be summarized thus : (1) The definition of "industry" in the Act is very comprehensive. It is in two parts : one part defines it from the standpoint of the employer and the other from the standpoint of the employee. If an activity falls under either part of the definition, it will be an industry within the meaning of the Act. (2) The history of industrial disputes and the legislation recognizes the basic concept that the activity shall be an organized one and not that which pertains to private or personal employment. (3) The regal functions described as primary and inalienable functions of State though statutorily delegated to a corporation are necessarily excluded from the purview of the definition. Such regal functions shall be confined to legislative power, administration of law and judicial power. (4) If a service rendered by an individual or private person would be an industry, it would equally be an industry in the hands of a corporation. (5) If a service rendered by a corporation is an industry, the employees in the departments connected with that service, whether financial, administrative or executive, would be entitled to the benefits of the Act. (6) If a department of a municipality discharged many functions, some pertaining to industry as defined in the Act and other non-industrial*

> *activities,* ***the predominant functions of the department shall be the criterion for the purpose of the Act.****"*
>
> [Emphasis added]

59. J Iyer's judgement notes that in addition to the aforesaid two tests, a third element of irrelevance of statutory duty is also discussed in the ***Nagpur Corporation*** case:

> "*68. Running right through are three tests: (a) the paramount and predominant duty criterion -(p. 971); (b) the specific service being an integral, non-severable part of the same activity (p. 960) and (c) the irrelevance of the statutory duty aspect.*
>
> *'It is said that the functions of this department are statutory and no private individual can discharge those statutory functions. The question is not whether the discharge of certain functions by the Corporation have statutory backing, but whether those functions can equally be performed by private individuals. The provisions of the Corporation Act and the by-laws prescribe certain specifications for submission of plans and for the sanction of the authorities concerned before the building is put up. The same thing can be done by a co-operative society or a private individual. Co-operative societies and private individuals can allot lands for building houses in accordance with the conditions prescribed by law in this regard.* ***The services of this department are therefore analogous to those of a private individual with the difference that one has the statutory sanction behind it and the other is governed by terms of contracts.*** *(SCR p. 972)"*
>
> [Emphasis added]

60. Based on the application of the Dominant Nature and the Integrated Activity tests, J Iyer's judgement noted, with approval that following departments of the Corporation were held to be "*industry*" in the Court in ***Nagpur Corporation***:

a. Education Department of the Corporation:

> "*62. Now we revert to the more crucial part of Corporation of Nagpur (supra). It is meaningful to notice that in that case, the Court, in its incisive analysis, department by department of variform municipal services, specifically observed : (SCR p. 972)*
>
> *'Education Department : This department looks after the primary education, i.e., compulsory primary education within the limits of the Corporation. (See the evidence of witness 1 for party 1). This service can equally be done by private persons. This department satisfies the other tests. The employees of this department coming under the definition of "employees" under the Act would certainly be entitled to the benefits of the Act.'* "

b. **Tax Department of the Corporation**:

"*65. By these tokens, which find assent from us, the tax department of the local body is 'industry'. The reason is this : (SCR p. 965)*

The scheme of the Corporation Act is that taxes and fees are collected in order to enable the municipality to discharge its statutory functions. If the functions so discharged are wholly or predominantly covered by the definition of "industry", it would be illogical to exclude the tax department from the definition. While in the case of private individuals or firms services are paid in cash or otherwise, in the case of public institutions, as the sei vices are rendered to the public, the taxes collected from them constitute a fund for performing those sei vices. As most of the services rendered by the municipality come under the definition of "industry", we should hold that the employees of the tax department are also entitled to the benefits under the Act."

c. Health Department of the Corporation:

"*66. The health department of the municipality too is held in that case to be 'industry' — a fact which is pertinent when we deal later with hospitals, dispensaries and health centres : (SCR p. 969):*

This department looks after scavenging, sanitation, control of epidemics, control of food adulteration and running of public dispensaries. Private institutions can also render these services. It is said that the control of food adulteration and the control of epidemics cannot be done by private individuals and institutions. We do not see why. There can be private medical units to help in the control of epidemics for remuneration. Individuals may get the food articles purchased by them examined by the medical unit and take necessary action against guilty merchants. So too, they can take advantage of such a unit to prevent epidemics by having necessary inoculations and advice. This department also satisfies the other tests laid down by us, and is an industry within the meaning of the definition of "industry" in the Act."

d. General Administration Department:

"*67. Even the General Administration Department is 'industry'. Why? (SCR pp. 973-74):*

Every big company with different sections will have a general administration department. If the various departments collated with the department are industries, this department would also be a part of the industry. Indeed the efficient rendering of all the services would depend upon the proper working of this department, for, otherwise there would be confusion and chaos. The State Industrial Court in this case has held that all except five of the departments of the Corporation come under the definition of "industry" and if so, it follows that this department, dealing predominantly with industrial departments, is also an industry. Hence the employees of this department are also entitled to the benefits of this Act."

61. Having culled out these broad principles, J Iyer's judgement proceeded to rule on whether certain activities would be considered industries or not, either affirming or overruling prior judgments of the Court.

C.5. TREATMENT OF DIFFERENT ACTIVITIES AS INDUSTRIES

SUMMARY OF JUDGMENTS OF THE HON'BLE JUDGES IN BANGALORE WATER SUPPLY

	Whether held to be "*Industry*" or not			
ACTIVITY	**Justice Iyer**	**Chief Justice Beg**	**Justice Chandrachud**	**Justice Singh and Justice Tulzapurkar**
Sovereign Function	Partially yes	Partially yes	Partially yes	No comments
Education	Yes	No comments	No comments	No
Charitable Institutions	Yes except the third category	No comments	Yes	No
Liberal Professions	Yes	No comments	No	No
Research institutes	Yes	No comments	No comments	No
Clubs	Yes	No comments	Yes	No comments
Hospitals	Yes	No comments	Yes	No
Cooperatives	Yes	No comments	No comments	No comments

C.5.1. Education

62. J. Iyer's judgement holds, with considerable force, that education would constitute an industry, and in doing so, cites the dissenting judgement of Isaacs J. in the Australian case of *Federated States School Teachers' Association of Australia v. State of Victoria*, (1929) 41 CLR 569 (***School Teachers' Association*** case):[22]

[22] Paragraphs 56-58

" 'The basic question raised by this case, strange as it may seem, is whether the occupation of employees engaged in education, itself universally recognised as the key industry to all skilled occupations, is 'industrial' within the meaning of the Constitution.'

57. The employers argued that it was fallacious to spin out 'industry' from 'education' and the logic was a specious economic doctrine. Isaacs. J., with unsparing sting and in fighting mood, stated and refuted the plea :

> *'The theory was that society is industrially organised for the production and distribution of wealth in the sense of tangible, ponderable, corpuscular wealth, and therefore an "industrial dispute" cannot possibly occur except where there is furnished to the public — the consumers — by the combined efforts of employers and employed, wealth of that nature. Consequently, say the employers, "education" not being "wealth" in that sense, there never can be an "industrial dispute" between employers and employed engaged in the avocation of education, regardless of the wealth derived by the employers from the joint co-operation. The contention sounds like an echo from the dark ages of industry and political economy. It not merely ignores the constant currents of life around us, which is the real danger in deciding questions of this nature, but it also forgets the memorable industrial organization of the nations, not for the production or distribution of material wealth, but for services, national service, as the service of organized industry must always be. Examination of this contention will not only completely dissipate it, but will also serve to throw material light on the question in hand generally. The contention is radically unsound for two great reasons. It erroneously conceives the object of national industrial organization and thereby unduly limits the meaning of the terms "production" and "wealth" when used in that connection. But it further neglects the fundamental character of "industrial disputes" as a distinct and insistent phenomenon of modern society. Such disputes are not simply a claim to share the material wealth jointly produced and capable of registration in statistics. At heart they are a struggle, constantly becoming more intense on the part of the employed group engaged in co-operation with the employing group in rendering services to the community essential for a higher general human welfare, to share in that welfare in a greater degree .... That contention, if acceded to, would be revolutionary.... How could it reasonably be said that a comic song or a jazz performance, or the representation of a comedy, or a ride in a tramcar or motor-bus, piloting a ship, lighting a lamp or showing a moving picture is more "material" as wealth than instruction, either cultural or vocational ? Indeed, to take one instance, a workman who travels in a tramcar a mile from his home to his factory is no more efficient for his daily task than if he walked ten yards, whereas his technical training has a direct effect in increasing output. If music or acting or personal transportation is admitted to be "industrial" because each is*

productive of wealth to the employer as his business undertaking, then an educational establishment stands on the same footing. But if education is excluded for the reason advanced, how are we to admit barbers, hair-dressers, taxi-car drivers, furniture removers, and other occupations that readily suggest themselves ? And yet the doctrine would admit manufacturers of intoxicants and producers of degrading literature and pictures, because these are considered to be "wealth". The doctrine would concede, for instance, that establishments for the training of performing dogs, or of monkeys simulating human behaviour, would be "industrial", because one would have increased material wealth, that is, a more valuable dog or monkey, in the sense that one could exchange it for more money. If parrots are taught to say "Pretty Polly" and to dance on their perch, that is, by concession, industrial, because it is the production of wealth. But if Australian youths are trained to read and write their language correctly and in other necessary elements of culture and vocation making them more efficient citizens, fitting them with more or less directness to take their place in the general industrial ranks of the nation and to render the services required by the community, that training is said not to be wealth and the work done by teachers employed is said not to be industrial.

58. ***So long as services are part of the wealth of a nation — and it is obscurantist to object to it — educational services are wealth, are 'industrial'. We agree with Isaacs, J.***"

xxx *xxx* *xxx*

60. We have extensively excerpted from the vigorous dissent because the same position holds good for India which is emerging from feudal illiteracy to industrial education. In Gandhi's India basic education and handicraft merge and in the latter half of our century higher education involves field studies, factory training, house-surgeoncy and clinical education; and, sans such technological training and education in humanities, industrial progress is self-condemned. If education and training are integral to industrial and agricultural activities, such services are part of industry even if highbrowism may be unhappy to acknowledge it. It is a class-conscious, inegalitarian outlook with an elitist aloofness which makes some people shrink from accepting educational institutions, vocational or other, as industries. The definition is wide, embraces training for industry which, in turn ensconces all processes of producing goods and services by employer-employee co-operation. Education is the nidus of industrialization and itself is industry.

[Emphasis added]

63. J. Iyer's judgement held thus that education is a service that adds to the wealth of a nation, and consequently, must be treated at par with other industries that add

wealth. In essence, it is the applicability of third[23] of the Triple Test that is shown to be satisfied vis-a-vis education in the discussion above. J. Iyer's judgement then proceeds to consider the correctness of ***Delhi University*** which then held the field that education would not be an industry. ***Delhi University*** concluded that education could not be an industry, based on the following three premises:[24]

a. Teachers are not workmen under Section 2(s) of the ID Act, and a vast majority of employees whose cooperation is required for carrying on the work of imparting education fall outside Section 2(s), thereby rendering the educational institute outside the realm of an industry;

b. The predominant activity of the University was teaching and since only the incidental activity of the subordinate staff could fall within its scope but that could not alter the predominant character of the institution, and

c. The distinctive purpose and object of education would make it very difficult to assimilate it to the position of any trade, business or calling or service within the meaning of Section 2(j), and that the activity is carried out as a mission, without a profit motive.

64. Overruling ***Delhi University*** on each of these counts, J. Iyer's judgement held as follows:

> "*95. We may deal with these contentions in a brief way, since the substantial grounds on which we reject the reasoning have already been set out elaborately. The premises relied on is that the bulk of the employees in the University is the teaching community. Teachers are not workmen and cannot raise disputes under the Act. The subordinate staff being only a minor category of insignificant numbers, the institution must be excluded, going by the predominant character test. It is one thing to say that an institution is not an industry. It is altogether another thing to say that a large number of its employees are not 'workmen' and cannot therefore avail of the benefits of the Act and so the institution ceases to be an industry. The test is not the predominant number of employees entitled to enjoy the benefits of the Act. The true test is the predominant nature of the activity. In the case of the university or an educational institution, the nature of the activity is, ex hypothesi, education which is a service to the community. Ergo, the university is an industry. The error has crept in, if we may say so with great*

[23] The activity is for the production and/ or distribution of goods and services calculated to satisfy human wants and wishes geared primarily towards economic utilities, material goods and services.
[24] Paragraphs 90 to 94

respect, in mixing up the numerical strength of the personnel with the nature of the activity.

96. Secondly there are a number of other activities of the University Administration, demonstrably industrial which are severable although ancillary to the main cultural enterprise. For instance, a university may have a large printing press as a separate but considerable establishment. It may have a large fleet of transport buses with an army of running staff. It may have a tremendous administrative strength of officers and clerical cadres. It may have karamcharis of various hues. As the Corporation of Nagpur (supra) has effectively ruled, these operations, viewed in severalty or collectively, may be treated as industry. It would be strange, indeed, if a university has 50 transport buses, hiring drivers, conductors, cleaners and workshop technicians. How are they to be denied the benefits of the Act, especially when their work is separable from academic teaching, merely because the buses are owned by the same corporate personality? We find, with all defence, little force in this process of nullification of the industrial character of the University's multiform operations.

97. The next argument which has appealed to the Court in that case is that education develops the personality of the pupil and this process, if described as industry, sounds grotesque. We are unable to appreciate the force of this reasoning, if we may respectfully say so. It is true that our societal values assign a high place of honour to education, but how does it follow from this that education is not a service? The sequitur is not easily discernible. The pejorative assumption seems to be that 'industry' is something vulgar, inferior, disparaging and should not be allowed to sully the sanctified subject of education. In our view, industry is a noble term and embraces even the most sublime activity. At any rate, in legal terminology located in the statutory definition it is not money-making, it is not lucre-loving, it is not commercialising, it is not profit hunger. On the other hand, a team of painters who produce works of art and sell them or an orchestra group which travels and performs and makes money may be an industry if they employ supportive staff of artistes or others. There is no degrading touch about 'industry', especially in the light of Mahatma Gandhi's dictum that 'Work is Worship'. Indeed the colonial system of education, which divorced book learning from manual work and practical training, has been responsible for the calamities in that field. For that very reason, Gandhiji and Dr. Zakir Hussain propagated basic education which used work as modus operandus for teaching. We have hardly any hesitation in regarding education as an industry.

98, The final ground accepted by the Court is that education is a mission and vocation, rather than a profession or trade or business. The most that one can say is that this is an assertion which does not prove itself. Indeed, all life is a mission and a man without a mission is spiritually still-born. The high mission of life is the manifestation of the divinity already in man. To christen education as a mission, even if true, is not to negate its being an

industry. We have to look at educational activity from the angle of the Act, and so viewed the ingredients of education are fulfilled. Education is, therefore, an industry and nothing can stand in the way of that conclusion.

xxx xxx xxx

101. Our conclusion is that the University of Delhi case (supra) was wrongly decided and that education can be and is, in its institutional form, an industry."

[Emphasis added]

C.5.2. Charitable Institutions

65. The analysis of whether charitable institutions would be considered 'industry' was already preceded by a detailed and specific, and trite, finding that the presence or absence of a profit motive is not necessarily determinative of whether the activity is an industry. In this backdrop, J. Iyer's judgement identified three categories of charitable institutions and briefly explains the applicability of the Triple Test to the same:

"*104. The first is one where the enterprise, like any other, yields profits but they are siphoned off for altruistic objects. The second is one where the institution makes no profit but hires the services of employees as in other like businesses but the goods and services, which are the output, are made available, at low or no cost, to the indigent needy who are priced out of the market. The third is where the establishment is oriented on a humane mission fulfilled by men who work, not because they are paid wages, but because they share the passion for the cause and derive job satisfaction from their contribution.* ***The first two are industries, the third not.*** *What is the test of identity whereby these institutions with eleemosynary inspiration fall or do not fall under the definition of industry?*

105. All industries are organized, systematic activity. Charitable ad¬ ventures which do not possess this feature, of course, are not industries. Sporadic or fugitive strokes of charity do not become industries. All three philanthropic entities, we have itemised, fall for consideration only if they involve co-operation between employers and employees to produce and/or supply goods and/or services. We assume, all three do. The crucial difference is over the presence of charity in the quasi-business nature of the activity. Shri Tarkunde, based on Safdarjung (supra), submits that, ex hypothesi, charity frustrates commerciality and thereby deprives it of the character of industry."

[Emphasis added]

66. The first category, i.e. one where the enterprise, like any other, yields profits but they are siphoned off for altruistic objects, is held to be an industry on the following basis:

> "*106. It is common ground that the first category of charities is disqualified for exemption. If a business is run for production and or supply of goods and services with an eye on profit, it is plainly an industry. The fact that the whole or substantial part of the profits so earned is diverted for purely charitable purposes does not affect the nature of the economic activity which involves the co-operation of employer and employee and results in the production of goods and services. The workers are not concerned about the destination of the profits. They work and receive wages. They are treated like any other workmen in any like industry. All the features of an industry, as spelt out from the definition by the decisions of this Court, are fully present in these charitable businesses. In short, they are industries. The application of the income for philanthropic purposes, instead of filling private coffers, makes no difference either to the employees or to the character of the activities. Good Samaritans can be clever industrialists*."

67. The second category, i.e. where the institution makes no profit but hires the services of employees as in other like businesses, but the goods and services which are the output are made available at low or no cost, is held to be an industry for these reasons:

> "*107. The second species of charity is really an allotropic modification of the first. If a kind-hearted businessman or high-minded industrialist or service-minded operator hires employees like his non-philanthropic counterparts and, in co-operation with them, produces and supplies goods or services to the lowly and the lost, the needy and the ailing without charging them any price or receiving a negligible return, people regard him as of charitable disposition and his enterprise as a charity. <u>But then, so far as the workmen are concerned, it boots little whether he makes available the products free to the poor. They contribute labour in return for wages and conditions of service. For them the charitable employer is exactly like a commercial-minded employer. Both exact hard work, both pay similar wages, both treat them as human machine cogs and nothing more.</u> The material difference between the commercial and the compassionate employers is not with reference to the workmen but with reference to the recipients of goods and services. <u>Charity operates not vis-a-vis the workmen in which case they will be paying a liberal wage and generous extras with no prospect of strike.</u> The beneficiaries of the employer's charity are the indigent consumers. <u>Industrial law does not take note of such extraneous factors but regulates industrial relations between employers and employers, employers and workmen and workmen and workmen. From the point of view of the workmen there is no charity.</u> For him charity must begin at home. <u>From these strands of thought flows the conclusion that the second group</u>*

may legitimately and legally be described as industry. The fallacy in the contrary contention lies in shifting the focus from the worker and the industrial activity to the disposal of the end product. This law has nothing to do with that. The income-tax law may have, social opinion may have.

108. Some of the appellants may fall under the second category just described. While we are not investigating into the merits of those appeals, we may as well indicate, in a general way, that the Gandhi Ashram, which employs workers like spinners and weavers and supplies cloth or other handicraft at concessional rates to needy rural consumers, may not qualify for exemption. Even so, particular incidents may have to be closely probed before pronouncing with precision upon the nature of the activity. If cotton or yarn is given free to workers, if charkhas are made available free for families, if fair price is paid for the net product and substantial charity thus benefits the spinners, weavers and other handicraftmen, one may have to look closely into the character of the enterprise. If employees are hired and their services are rewarded by wages — whether on cottage industry or factory basis — the enterprises become industries, even if some kind of concession is shown and even if the motive and project may be to encourage and help poor families and find them employment. A compassionate industrialist is nevertheless an industrialist. However, if raw material is made available free and the finished product is fully paid for — rather exceptional to imagine — the conclusion may be hesitant but for the fact that the integrated administrative, purchase, marketing, advertising and other functions are like in trade and business. This makes them industries. Noble objectives, pious purposes, spiritual foundations and developmental projects are no reason not to implicate these institutions as industries."

[Emphasis added]

68. The third and final category is held not to be an industry, primarily on the basis that there is no economic relationship between the head / the employer, so to speak, and those who are employed, i.e. emotively flock to render the service. This is explained as thus:

"109. We now move on to economic activities and occupations of an altruistic character falling under the third category.

110. The heart of trade or business or analogous activity is organisation with an eye on competitive efficiency, by hiring employees, systematising pro¬ cesses, producing goods and services needed by the community and obtaining money's worth of work from employees. If such be the nature of operations and employer-employee relations which make an enterprise an industry, the motivation of the employer in the final disposal of products or profits is immaterial. Indeed the activity is patterned on a commercial basis, judged by what other similar undertakings and commercial adventures do. To qualify for exemption from the definition of 'industry' in a case where

there are employers and employees and systematic activities and production of goods and services, we need a totally different orientation, organisation and method which will stamp on the enterprise the imprint of commerciality. Special emphasis, in such cases, must be placed on the central fact of employer-employee relations. If a philanthropic devotion is the basis for the charitable foundation or establishment, the institution is headed by one who whole-heartedly dedicates himself for the mission and pursues it with passion, attracts others into the institution, not for wages but for sharing in the cause and its fulfilment, then the undertaking is not 'industrial'. ***Not that the presence of charitable impulse extricates the institution from the definition in Section 2(j) but that there is no economic relationship such as is found in trade or business between the head who employs and the others who emotively flock to render service. In one sense, there are no employers and employees but crusaders all.*** *In another sense, there is no wage basis for the employment but voluntary participation in the production, inspired by lofty ideals and unmindful of remuneration, service conditions and the like. Supposing there is an Ashram or Order with a guru or other head. Let us further assume that there is a band of disciples, devotees or priestly subordinates in the Order, gathered together for prayers, ascetic practices, bhajans, meditation and worship. Supposing, further, that outsiders are also invited daily or occasionally, to share in the spiritual proceedings. And, let us assume that all the inmates of the Ashram and members of the Order, invitees, guests and other outside participants are fed, accommodated and looked after by the institution. In such a case, as often happens, the cooking and the cleaning, the bed-making and service, may often be done, at least substantially by the Ashramites themselves. They may chant in spiritual ecstasy even as material goods and services are made and served. They may affectionately look after the guests, and, all this they may do, not for wages but for the chance to propitiate the Master, work selflessly and acquire spiritual grace. It may well be that they may have surrendered their lucrative employment to come into the holy institution. It may also be that they take some small pocket money from the donations or takings of the institution. Nay more ; there may be a few scavengers and servants, a part-time auditor or accountant employed on wages. If the substantial number of participants in making available goods and services, if the substantive nature of the work, as distinguished from trivial items, is rendered by voluntary wageless sishyas, it is impossible to designate the institution as an industry, notwithstanding a marginal few who are employed on a regular basis for hire. The reason is that in the crucial, substantial and substantive aspects of institutional life the nature of the relations between the participants is non-industrial. Perhaps, when Mahatma Gandhi lived in Sabarmati, Aurobindo had his hallowed silence in Pondicherry, the inmates belonged to this chastened brand. Even now, in many foundations, centres, monasteries, holy orders and Ashrams in the East and in the West, spiritual fascination pulls men and women into the precincts and they work tirelessly for the Maharishi or Yogi or Swamiji and are not wage-earners in any sense of the term. Such people are not workmen and such institutions are not industries despite some menials and some professionals in a vast complex*

being hired. We must look at the predominant character of the institution and the nature of the relations resulting in the production of goods and services. Stray wage-earning employees do not shape the soul of an institution into an industry."

[Emphasis added]

69. Agreeing with this opinion, Justice Beg also held that "*When services are rendered by groups of charitable individuals to themselves or others out of missionary zeal and purely charitable motives, there would hardly be any need to invoke the provisions of the Industrial Disputes Act to protect them. Such is not the type of persons who will raise such a dispute as workmen or employees whatever they may be doing*.".

70. However, Justice Chandrachud held that it is the nature of the activity that should determine whether the activity is an industry or not and not the motive with which such an activity is undertaken. The relevant portion of Justice Chandrachud's judgment is quoted below:

"180. That lends to the consideration whether charitable enterprises can at all be industries. Viewing the problem from the angle from which one must, according to me, view the State's inalienable functions, it seems to me to follow logically that a systematic activity which is organised or arranged in a manner in which trade or business is generally organised or arranged would be an industry despite the fact that it proceeds from charitable motives. It is the nature of the activity that one has to consider and it is upon the application of that test that the State's inalienable functions fall within the definition of "industry". The very same principle must yield the result that just as the consideration as to who conducts an activity is irrelevant for determining whether the activity is an industry, so is the fact that the activity is charitable in nature or is undertaken with a charitable motive. The status or capacity, corporate or constitutional, of the employer would have, if at all, closer nexus, than his motive, with the question whether the activity is an industry. And yet that circumstance, according to me, cannot affect the decision of the question. The motive which propels an activity is yet another step removed and, ex hypothesi, can have no relevance on the question as to what is the nature of the activity. It is never true to say that the nature of an activity is charitable. The subjective motive force of an activity can be charity but for the purpose of deciding whether an activity is an industry, one has to look at the process involved in the activity, objectively. The argument that he who does charity is not doing trade or business misses the point because the true test is whether the activity, considered objectively, is organised or arranged in a manner in which trade or business is normally organised or arranged. If so, the activity would be an industry no matter whether the employer is actuated by charitable motives in undertaking it. <u>The</u>

jural foundation of any attempt to except charitable enterprises from the scope of the definition can only be that such enterprises are not undertaken for profit. But then that, clearly, is to introduce the profit-concept by a side wind, a concept which, I suppose, has been rejected consistently over the years. If any principle can be said to be settled law in this vexed field it is this: the twin consideration of profit motive and capital investment is irrelevant for determining whether an activity is an industry. Therefore, activities which are dominated by charitable motives, either in the sense that they involve the rendering of free or near-free services or in the sense that the profits which they yield are diverted to charitable purposes, are not beyond the pale of the definition in Section 2(j). It is as much beside the point to inquire who is the employer as it is to inquire why is the activity undertaken and what the employer does with his profits, if any."
[Emphasis added]

71. Justice Jaswant Singh and Justice Tulzapurkar disagreed with Justice Iyer in his inclusion of categories 2 and 3 of charities within the definition of industry without giving any detailed reasons for the exclusion.

C.5.3. Liberal Professions

72. Justice Iyer went on to assess the correctness of the ***Solicitor's case***, which had held that the solicitor's firm was not an industry, broadly laying out the parameters that professional activities cannot be considered an industry. To hold this, Gajendragadkar J., speaking for the Court in the ***Solicitor's case*** , stated the reasons as follows: (a) there the cooperation between the professional and his subordinates / employees did not have a direct and essential relationship to the provision of the final service or the final product, and (b) that features of the liberal professions inherently do not answer to being an industry – i.e. there is no active cooperation .[25]

73. J. Iyer first negatives the '*direct and essential relationship*' test, by holding that every employee in a professional office, be it a para-legal, full-fledged professional employee, or a janitor, contributes to the success of the office. He holds so by approving the rationale given by Hidayatullah J. in the ***Madras Gymkhana Club*** case. Taking the example of the different departments and employees across hierarchies that would have to work in tandem for the production and sale of goods

[25] Paragraphs 73-74

to successfully take place, J. Iyer holds that the 'direct and essential relationship' test would not hold water in the following terms[26]:

> *"75. Let us examine these two tests. In the sophisticated, subtle, com¬ plex, assembly-line operations of modern enterprises, the test of 'direct' and 'indirect', 'essential' and 'inessential', will snap easily. In an American auto¬ mobile manufactory, everything from shipping iron ore into and shipping cars out of the vast complex takes place with myriad major and minor jobs. A million administrative, marketing and advertising tasks are done. Which, out of this maze of chores, is direct ? A battle may be lost if winter wear were shoddy. Is the army tailor a direct contributory ?*
>
> *76. An engineer may lose a competitive contract if his typist typed wrongly or shabbily or despatched late. He is a direct contributory to the disaster. No lawyer or doctor can impress client or court if his public relations job or home work were poorly done, and that part depends on smaller men, adjuncts. Can the great talents in administration, profession, science or art shine if a secretary fades or faults ? The whole theory of direct co-operation is an improvisation which, with great respect, hardly impresses.*
>
> *77. Indeed, Hidayatullah, C.J., in Gymkhana Club Employees' Union scouted the argument about direct nexus, making specific reference to the Solicitors' case (supra) : (SCR p. 751)*
>
> > *.... The service of a solicitor was regarded as individual depending upon his personal qualifications and ability, to which the employees did not contribute directly or essentially. Their contribution, it was held, had no direct or essential nexus with the advice or services. In this way learned professions were excluded.*
>
> *To nail this essential nexus theory, Hidayatullah, C.J., argued : (SCR p. 752)*
>
> > *What partnership can exist between the company and/or Board of Directors on the one hand and the menial staff employed to sweep floors on the other ? What direct and essential nexus is there between such employees and production ?* ***This proves that what must be established is the existence of an industry viewed from the angle of what the employer is doing and if the definition from the angle of the employer's occupation is satisfied, all who render service and fall within the definition of workman come within the fold of industry irrespective of what they do****. There is then no need to establish a partnership as such in the production of material goods or material services. Each person doing his appointed task in an organisation will be a part of the industry whether he attends to a loom or merely polishes door handles. The fact of employment as envisaged in the second part is enough provided there is an industry and the employee is a workman. The learned professions are not industry not because there is absence of such partnership but*

[26] Paragraphs 75 to 78

because viewed from the angle of the employer's occupation, they do not satisfy the test."

[Emphasis added]

74. The same argument regarding the direct and essential relationship is couched in another fashion, which is negatived by J. Iyer in the following terms:

"*86. The more serious argument of exclusion urged to keep the professions out of the coils of industrial disputes and the employees' demands backed by agitations 'red in tooth and claw' is a sublimated version of the same argument. Professional expertise and excellence, with its occupational autonomy, ideology, learning, bearing and morality, holds aloft a standard of service which centres round the individual doctor, lawyer, teacher or auditor. This reputation and quality of special service being of the essence, the co-operation of the workmen in this core activity of professional offices is absent. The clerks and stenos, the bell boys and doormen, the sweepers and menials have no art or part in the soul of professional functions with its higher code of ethic and intellectual proficiency, their contribution being peirpheral and low-grade, with no relevance to the clients' wants and requirements. This conventional model is open to the sociological criticism that it is an ideological cloak conjured up by highborns, a posture of noblesse oblige which is incongruous with raw life, especially in the democratic third world and post-industrial societies.* ***To hug the past is to materialize the ghost.*** *The paradigms of professionalism are gone. In the large solicitors' firms, architects' offices, medical polyclinics and surgeries, we find a humming industry, each section doing its work with its special flavour and culture and code, and making the end product worth its price. In a regular factory you have highly skilled technicians whose talent is of the essence, managers whose ability organizes and workmen whose co-ordinated input is, from one angle, secondary, from another, significant. Let us look at a surgery or walk into a realtor's firm. What physician or surgeon will not kill if an attendant errs or clerk enters wrong or dispenses deadly dose ? One such disaster somewhere in the assembly-line operations and the clientele will be scared despite the doctor's distalled skill. The lawyer is no better and just cannot function without the specialised supportive tools of para-professionals like secretaries, librarians and law-knowing steno-typists or even the messengers and telephone girls. ... Anyway, in the sophisticated organization of expert services, all occupations have central skills, an occupational code of ethics, a group culture, some occupational authority, and some permission to monopoly practice from the community. This incisive approach makes it difficult to 'caste-ify' or 'class-ify' the liberal professions as part and beyond the pale of 'industry' in our democracy. We mean no disrespect to the members of the professions. Even the judicial profession or administrative profession cannot escape the winds of social change. We may add that the modern world, particularly the third world, can hope for a human tomorrow only through professions for the people, through expertise at the service of the millions. Indian primitivism can be banished only by pro bono publico professions in the field of law,*

medicine, education, engineering and what not. But that radicalism does not detract from the thesis that 'industry' does not spare professionals. ***Even so, the widest import may still self-exclude the little mofussil lawyer, the small rural medic or the country engineer, even though a hired sweeper or factotum assistant may work with him.*** *We see no rationale in the claim to carve out islets. Look. A solicitor's firm or a lawyer's firm becomes successful not merely by the talent of a single lawyer but by the co-operative operations of several specialists, juniors and seniors. Likewise the ancillary services of competent stenographers, para-legal supportive services are equally important. The same test applies to other professions. The conclusion is inevitable that contribution to the success of the institution — every professional unit has an institutional goodwill and reputation — comes not merely from the professional or specialist but from all those whose excellence in their respective parts makes for the total proficiency.* ***We have, therefore, no doubt that the claim for exclusion on the score of liberal professions is unwarranted from a functional or definitional angle.*** *The flood-gates of exemption from the obligations under the Act will be opened if professions flow out of its scope.*

87. Many callings may clamour to be regarded as liberal professions. In an age when traditions have broken down and the old world professions of liberal descent have begun to resort to commercial practices (even legally, as in America, or factually, as in some other countries) exclusion under this new label will be infliction of injury on the statutory intent and effect."

[Emphasis added]

75. The argument that there is something inherent in the nature of professions that do not render themselves amenable to the concept of industry is also rejected by Justice Iyer. He offers strong criticism against the idea that professions, such as the legal and medical, are haloed, quoting George Bernard Shaw's witticism that all professions are conspiracies against the laymen/laity. Quoting different publications, J Iyer highlights that a cloak of the 'profession' is often used to carry out otherwise commercial activities without being termed as a 'job' or a 'trade', or even appear to be paid directly for the services rendered.[27] He notes that professional associations are essentially organisational counterparts of traders' guilds, in that they are occupational self-interest organisations, and there have been shifts in emphasis on parts of professionals from control over quality to control of price. Noting other elements of the commercialisation of the professions, J, Iyer also

[27] paragraphs 79-80

states that even justicing is service and, but for the exclusion from industry on the scope of sovereign function, might qualify for being regarded as industry. He concludes that no legal principle supports the carving out an exception of professions from the scope of industry.[28]

76. J. Iyer's judgement on liberal professions concludes that though inherently professions would answer to the definition of an 'industry', an exception may be made to individual professionals because their offices may not be considered organised (first of the Triple Test), but would be closer to a personal avocation with the assistance of part time or full time assistance. He also emphasises that the goal of the Act is resolution of industrial disputes and not to enter into the business of every little professional. He concludes:

> *"88.* ***The result of this discussion is that the Solicitors' case (supra) is wrongly decided and must, therefore, be overruled.*** *We must hasten, however, to repeat that a small category, perhaps large in numbers in the mofussil, may not squarely fall within the definition of industry. A single lawyer, a rural medical practitioner or urban doctor with a little assistant and/or menial servant may ply a profession but may not be said to run an industry. That is not because the employee does not make a contribution nor because the profession is too high to be classified as a trade or industry with its commercial connoations but because there is nothing like organised labour in such employment. The image of industry or even quasi-industry is one of a plurality of workmen, not an isolated or single little assistant or attendant. The latter category is more or less like personal avocation for livelihood taking some paid or parttime from another. The whole purpose of the Industrial Disputes Act is 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. The ordinary spectacle of a cobbler and his assistant or a cycle repairer with a helper, we come across in the pavements of cities and towns, repels the idea of industry and industrial dispute. For this reason, which applies all along the line, to small professions, petty handicraftsmen, domestic servants and the like, the solicitor or doctor or rural engineer, even like the butcher, the baker and the candle-stick maker, with an assistant or without, does not fall within the definition of industry. In regular industries, of course, even a few employees are enough to bring them within Section 2(j). Otherwise automated industries will slip through the net.*"
>
> [Emphasis added]

[28] Paragraphs 81 to 85

77. Justice Chandrachud agrees with the inclusion of professions within the ambit of industry, though not as forcefully as in the judgment of Justice Iyer. However, he opined that in the absence of any legislative action towards exempting the categories, it will be difficult for the judiciary to exempt these categories:

> *"181. Judged by these tests, I find myself unable to accept the broad formulation that a solicitor's establishment cannot be an industry. A solicitor, undoubtedly, does not carry on trade or business when he acts for his client or advises him or pleads for him, if and when pleading is permissible to him. He pursues a profession which is variously and justifiably described as learned liberal or noble. But, with great respect, I find it difficult to infer from the language of the definition in Section 2(j), as was done by this Court in National Union of Commercial Employees v. M.R. Meher, Industrial Tribunal, Bombay [AIR 1962 SC 1080 : 1962 Supp 3 SCR 157 : (1962) 1 LLJ 241 : 22 FJR 25] that the legislature could not have intended to bring a liberal profession like that of an attorney within the ambit of the definition of industry. In Hospital Mazdoor Sabha the Court while evolving a working principle stated that an industrial activity generally involves, inter alia, the cooperation of the employer and the employee. That the production of goods or the rendering of material services to the community must be the direct and proximate result of such co-operation is a further extension of that principle and it is broadly by the application thereof that a solicitor's establishment is held not to attract the definition clause. These refinements are, with respect, not warranted by the words of the definition, apart from the consideration that in practice they make the application of the definition to concrete cases dependent upon a factual assessment so highly subjective as to lead to confusion and uncertainty in the understanding of the true legal position. Granting that the language of the definition is so wide that some limitation ought to be read into it, one must step at a point beyond which the definition will skid into a domain too rarefied to be realistic. Whether the co-operation between the employer and the employee is the proximate cause of the ultimate product and bears direct nexus, with it is a test which is almost impossible of application with any degree of assurance or certitude. It will be as much true to say that the solicitor's assistant, managing clerk, librarian and the typist do not directly contribute to the intellectual end product which is a creation of his personal professional skill as that, without their active assistance and co-operation it will be impossible for him to function effectively. The unhappy state of affairs in which the law is marooned will continue to baffle the skilled professional and his employees alike as also the Judge who has to perform the unenviable task of sitting in judgment over the directness of the co-operation between the employer and the employee, until such time as the legislature decides to manifest its intention by the use of clear and indubious language. Beside the fact that this Court has so held in National Union of Commercial Employees the legislature will find a plausible case for exempting the learned and liberal professions of lawyers, solicitors, doctors, engineers, chartered accountants and the like from the*

> *operation of industrial laws. But until that happens, I consider that in the present state of the law it is difficult by judicial interpretation to create exemptions in favour of any particular class."*
>
> [Emphasis added]

78. Justice Jaswant Singh and Justice Tulzapurkar disagreed with the other judges on the inclusion of "*liberal and learned professions like that of doctors, lawyers and teachers*" within the scope of industry.

C.5.4. Research Institutes

79. Justice Iyer notes that whilst in the case of *Ahmedabad Textile,* the research institute was brought within the fold of 'industry', in the subsequent decision in ***Safdarjung***, the Kurji Holy Family Hospital (conducting research and training) was held not to be an industry. J. Iyer holds that the ratio of ***Safdarjung*** was wrongly decided, and that research institutes must be considered an industry.[29] The reasoning for this is largely that the Triple Test is satisfied, akin to reasons as to why hospitals and health services are also industry (which are discussed subsequently when specifically considering ***Safdarjung***):

> *"113. Does research involve collaboration between employer and employee ? It does. The employer is the institution, the employees are the scientists, para-scientists and other personnel.* ***Is scientific research service? Undoubtedly it is. Its discoveries are valuable contributions to the wealth of the nation. Such discoveries may be sold for a heavy price in the industrial or other markets.*** *Technology has to be paid for and technological inventions and innovations may be patented and sold. In our scientific and technological age nothing has more cash value, as intangible goods and invaluable services, than discoveries. For instance, the discoveries of Thomas Alva Edison made him fabulously rich. It has been said that his brain had the highest cash value in history for he made the world vibrate with the miraculous discovery of recorded sound. Unlike most inventors, he did not have to wait to get his reward in heaven; he received it munificently on this gratified and grateful earth, thanks to conversion of his inventions into money aplenty. Research benefits industry. Even though a research institute may be a separate entity disconnected from the many industries which funded the institute itself, it can be regarded as an organisation, propelled by systematic activity, modelled on co-operation between employer and employee and calculated to throw up discoveries and inventions and useful solutions which benefit individual industries and the nation in terms of goods and services and wealth. It follows that research institutes, albeit run without profit-motive, are industries.*

[29] Paragraph 112

114. True Shri Tarkunde is right if Safdarjung (supra; is rightly decided. The concluding portions of that decision proceed on the footing that research and training have an exclusionary effect. That reasoning, as we have already expounded, hardly has our approval."

[Emphasis added]

C.5.5. Clubs

80. While considering whether Clubs would fulfil the triple test and accordingly fall within the definition of industry, Justice Iyer analysed the following attributes of the functioning of different kinds of clubs to conclude that clubs fall within the definition of industry:

a. There is productive cooperation between the employer and employee in a club (such as a social club) and thus, there is a possibility of conflict between them.

b. Clubs such as proprietary clubs, sports clubs, art clubs and other brands of recreational associations are typical examples of employers hiring employees for wages for rendering services and/or supplying goods on a systematic basis at specified hours.

c. There is co-operation between the club management, i.e., the employer and the cooks, waiters, bell boys, pickers etc, i.e., the employees.

d. Clubs are social institutions serving a section of the society.

The relevant portion of J Iyer's judgment is reproduced hereinbelow:

"115. Are clubs industries? The wide words used in Section 2(j) if applied without rational limitations, may cover every bilateral activity even spiritual, religious, domestic, conjugal, pleasurable or political. But functional circumscriptions spring from the subject-matter and other cognate considerations already set out early in this judgment. Industrial law, any law, may insanely run amok if limitless lexical liberality were to inflate expressions into bursting point or proliferate odd judicial arrows which at random sent, hit many an irrelevant mark the legislative archer never meant. To read down words to yield relevant sense is a pragmatic art, if care is taken to eschew subjective projections masked as judicial processes. The true test, as we apprehend from the economic history and functional philosophy of the Act is based on the pathology of industrial friction and explosion impeding community production and consumption and imperilling peace and welfare. This social pathology arises from the exploitative potential latent in organized employer-employee relations. So, where the dichotomy of employer and workmen in the process of material production is present, the service of economic friction and need for conflict resolution show up. The Act is meant to obviate such confrontation and

"industry" cannot functionally and defunctionally exceed this object. The question is whether in a club situation — or of a cooperative or even a monastery situation, for that matter — a dispute potential of the nature suggested exists. If it does, it is an industry, since the basic elements are satisfied. If productive cooperation between employer and employee is necessary, conflict between them is on the cards, be it a social club, mutual benefit society, panjarapole, public service or professional office. Tested on this touchstone, most clubs will fail to qualify for exemption. For clubs — gentlemen's clubs, proprietory clubs, service clubs, investment clubs, sports clubs, art clubs, military clubs or other brands of recreational associations — when X-rayed from the industrial angle, project a picture on the screen typical of employers hiring employees for wages for rendering services and/or supplying goods on a systematic basis at specified hours. There is a cooperation, the club management providing the capital, the raw material, the appliances and auxiliaries and the cooks, waiters, bell boys, pickers, barmaids or other servants making available enjoyable eats, pleasures and other permissible services for price paid by way of subscriptions or bills charged. The club life, the warm company, the enrichment of the spirits and freshening of the mind are there. But these blessings do not contradict the co-existence of an "industry" in the technical sense. Even tea-tasters, hired for high wages, or commercial art troupes or games teams remunerated fantastically, enjoy company, taste, travel and games; but, elementally, they are workmen with employers above and together constitute not merely entertainment groups but industries under the Act. The protean hues of human organization project delightfully different designs depending upon the legal prism and the filtering process used. No one can deny the cultural value of club life; neither can anyone blink at the legal result of the organization."

[Emphasis added]

81. However, certain clubs do not fall within the ambit of industry if they are self-serving and only a handful of employees (mostly part time are employed). The relevant portion of J Iyer's judgement is reproduced hereinbelow:

"119. Even these people's organs cannot be non-industries unless one strict condition is fulfilled. They should be — and usually are — self-serving. They are poor men's clubs without the wherewithal of a Gymkhana or Cricket Club of India [Cricket Club of India Ltd. v. Bombay Labour Union, AIR 1969 SC 276 : (1969) 1 SCR 600 : (1969) 1 Lab LJ 277] which reached this Court for adjudication. Indeed, they rarely reach a Court being easily priced out of our expensive judicial market. These self-service clubs do not have hired employees to cook or serve, to pick or chase balls, to tie up nets or arrange the cards table, the billiards table, the bar and the bath or do those elaborate business management chores of the well-run city or country clubs. The members come and arrange things for themselves. The secretary, an elected member, keeps the key. Those interested in particular pursuits organize those terms themselves. Even the small accounts or clerical items

are maintained by one member or other. On special evenings all contribute efforts to make a good show, excursion, joy picnic or anniversary celebration. The dynamic aspect is self-service. In such an institution, a part-time sweeper or scanvenger or multi-purpose attendant may sometimes exist. He may be an employee. This marginal element does not transform a little association into an industry. We have projected an imprecise profile and there may be minor variations. The central thrust of our proposition is that if a club or other like collectivity has a basic and dominant self-service mechanism, a modicum of employees at the periphery will not metamorphose it into a conventional club whose verve and virtue are taken care of by paid staff, and the members' role is to enjoy. The small man's Nehru Club, Gandhi Granthasala, Anna Manram, Netaji Youth Centre, Brother Music Club, Muslim Sports Club and like organs often named after national or provincial heroes and manned by members themselves as contrasted with the upper bracket's Gymkhana Club, Cosmopolitan Club, Cricket Club of India, National Sports Club of India whose badge is pleasure paid for and provided through skilled or semi-skilled catering staff. We do not deal with hundred per cent social service clubs which meet once in a way, hire a whole evening in some hotel, have no regular staff and devote their energies and resources also to social service projects. There are many brands and we need not deal with every one. Only if they answer the test laid down affirmatively they qualify."

[Emphasis added]

82. The decisions in ***Madras Gymkhana Club*** and ***Cricket Club of India*** are specifically **overruled** by the majority. According to CJ Hidayatullah in *Madras Gymkhana,* clubs are not industries. The relevant portion of ***Madras Gymkhana Club*** discussed in J. Iyer's judgment is quoted hereinbelow:

"121. The Madras Gymkhana Club a blue-blooded members' club, has the socialite cream of the city on its rolls. It offers choice facilities for golf, tennis and billiards, arranges dances, dinners and refreshments, entertains and accommodates guests and conducts tournaments for members and non-members. These are all activities richly charged with pleasurable service. For fulfilment of these objects the club employs officers, caterers, and others on reasonable salaries. Does this club become an industry? The label matters little; the substance is the thing. A night-club for priced nocturnal sex is a lascivious "industry". But a literary club, meeting weekly to read or discuss poetry, hiring a venue and running solely by the self-help of the participants, is not. Hidayatullah, C.J., in Gymkhana ruled that the club was not an "industry". Reason? "An industry is thus said to involve co-operation between employer and employees for the object of satisfying material human needs but not for oneself nor for pleasure nor necessarily for profit."

"It is not of any consequence that there is no profit motive because that is considered immaterial. It is also true that the affairs of the club are organised in the way business is organised, and that there is production

of material and other services and in a limited way production of material goods mainly in the catering department. But these circumstances are not truly representative in the case of the club because the services are to the members themselves for their own pleasure and amusement and the material goods are for their consumption. In other words, the club exists for its members. No doubt occasionally strangers also take benefit from its services but they can only do so on invitation of members. No one outside the list of members has the advantage of these services as of right. Nor can these privileges be bought. In fact they are available only to members or through members. (SCR p. 759)

If today the club were to stop entry of outsiders, no essential change in its character vis-à-vis the members would take place. In other words, the circumstances that guests are admitted is irrelevant to determine if the club is an industry. Even with the admission of guests being open the club remains the same, that is to say, a member's self-serving institution. No doubt the material needs or wants of a section of the community is catered for but that is not enough. This must be done as part of trade or business or as an undertaking analogous to trade or business. This element is completely missing in a members' club. (SCR p. 759)"

122. Why is the club not an industry? It involves cooperation of employer and employees, organised like in a trade and calculated to supply pleasurable utilities to members and others. The learned Judge agrees that "the material needs or wants of a section of the community is catered for but that is not enough. This must be done as part of trade or business or as an undertaking analogous to trade or business. This element is completely missing in a members' club".

123. "This element"? What element makes it analogous to trade? Profit motive? No, says the learned Judge. Because it is a self-serving institution? Yes? Not at all. For, if it is self-service then why the expensive establishment and staff with high salary bills? It is plain as day-light that the club members do nothing to produce the goods or services. They are rendered by employees who work for wages. The members merely enjoy club life, the geniality of company and exhilarating camaraderie, to the accompaniment of dinners, dances, games and thrills. The "reason" one may discover is that it is a members' club in the sense that "the club belongs to members for the time being on its list of members and that is what matters. Those members can deal with the club as they like. Therefore, the club is identified with its members at a given point of time. Thus it cannot be said that the club has an existence apart from the members"."

83. Justice Iyer disagrees with the above reasoning in the following words:

> *"124. We are intrigued by this reason. The ingredients necessary for an industry are present here and yet it is declared a non-industry because the club belongs to members only. A company belongs to the shareholders only; a cooperative belongs to the members only; a firm of experts belongs to the partners only. And yet, if they employ workmen with whose cooperation goods and services are made available to a section of the community and the operations are organised in the manner typical of business method and organisation, the conclusion is irresistible that an "industry" emerges. Likewise, the members of a club may own the institution and become the employers for that reason. It is transcendental logic to jettison the inference of an "industry" from such a factual situation on the ingenious plea that a club "belongs to members for the time being and that is what matters". We are inclined to think that that just does not matter. The Gymkhana case we respectfully hold, is wrongly decided."*
>
> [Emphasis added]

84. According to Justice Iyer, the ***Cricket Club of India*** is a "*huge undertaking with activities wide-ranging, with big budgets, arms of staff and profit-making adventures*". Justice Iyer disagrees with Justice Bhargava's proposition that the ***Cricket Club of India*** is not an industry because the services rendered in the club are provided by hired employees and there is cooperation between employer-employee. The relevant portion of J Iyer's judgment is reproduced hereinbelow:

> *"125. The Cricket Club of India [Cricket Club of India Ltd. v. Bombay Labour Union, AIR 1969 SC 276 : (1969) 1 SCR 600 : (1969) 1 Lab LJ 277] stands in a worse position. It is a huge undertaking with activities wide-ranging, with big budgets, army of staff and profit-making adventures. Indeed, the members share in the gains of these adventures by getting money's worth by cheaper accommodation, free or low priced tickets for entertainment and concessional refreshments; and yet Bhargava, J. speaking for the Court held this mammoth industry a non-industry. Why? Is the promotion of sports and games by itself a legal reason for excluding the organisation from the category of industries if all the necessary ingredients are present? Is the fact that the residential facility is exclusive for members an exemptive factor? Do not the members share in the profits through the invisible process of lower charges? When all these services are rendered by hired employees, how can the nature of the activity be described as self-service, without taking liberty with reality? A number of utilities which have money's worth, are derived by the members. An indefinite section of the community entering as the guests of the members also share in these services. The testimony of the activities can leave none in doubt that this colossal "club" is a vibrant collective undertaking which offers goods and services to a section of the community for payment and there is cooperation between employer and employees in this project. The plea of non-industry is*

un-presentable and exclusion is possible only by straining law to snapping point to salvage a certain class of socialite establishments. Presbyter is only priest writ large. Club is industry manu brevi."

[Emphasis added]

85. Justice Chandrachud concurred with Justice Iyer and held that it is the organized nature of the activity that must be looked into while ascertaining whether an activity falls within the definition of industry or not. The relevant portion of Justice Chandrachud's judgment is extracted hereinbelow:

> *"182. The case of the clubs, on the present definition, is weaker still; and not only do I consider that the definition squarely covers them, except to the limited extent indicated by Brother Krishna Iyer in his judgment, but I see no justification for amending the law so as to exclude them from the operation of the industrial laws. The fact that the running of clubs is not a calling of the club or its managing committee, that the club has no existence apart from its members, that it exists for its members though occasionally strangers also take the benefit of its services and that even with the admission of guests the club remains a members' self-serving institution, seems to me, with respect, not to touch the core of the problem. And the argument that the activity of the clubs cannot be described as trade or business or manufacture overlooks, with respect, that the true test can only be whether the activity is organised or arranged in a manner in which a trade or business is normally organised or arranged. I have already said enough on that question."*
>
> [Emphasis added]

C.5.6. Hospitals / Safdarjung Hospital

86. As already discussed above, in ***Safdarjung***, the Court held that Safdarjung Hospital, the Tuberculosis Hospital and the Kurji Holi Family Hospital are not covered under the purview of industry. The relevant portion of ***Safdarjung*** as quoted in J Iyer's judgment is quoted for reference:

> *"131. Hidayatullah, C.J., considered the facts of the appeals, clubbed together there and held that all the three institutions in the bunch of appeals were not industries. Abbreviated reasons were given for the holding in regard to each institution, which we may extract for precise understanding: (SCC pp. 747-48, paras 34, 37 and 38)*
>
> > *"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 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."*
>
> [Emphasis added]

Thus, CJ Hidayatullah gave importance to the following factors to keep the hospitals outside the ambit of "*industry*":

(i) A hospital is not embarked on an economic activity.

(ii) The hospital is run as a department of the government.

(iii) The hospital is entirely charitable.

(iv) The dominant purpose is research and training.

87. Justice Iyer disagrees with the reasoning given by CJ Hidayatullah on the following grounds:

(i) Running of a hospital is a welfare function and not a sovereign function.

(ii) Hospital facility, research products and training fall within the ambit of services.

(iii) Absence of profit is irrelevant for determining whether an activity is an industry or not.

88. Relevant portion of J Iyer's judgment is quoted hereinbelow:

> *"132. Even a cursory glance makes it plain that the learned Judge took the view that a place of treatment of patients, run as a department of Government, was not an industry because it was a part of the functions of the Government. We cannot possibly agree that running a hospital, which is a welfare activity and not a sovereign function, cannot be an industry. Likewise, dealing with the Tuberculosis Hospital case the learned Judge held that the hospital was wholly charitable and also was a research institute. Primarily, it was an institution for research and training. Therefore, the Court concluded, the institution could not be described as*

industry. Non-sequitur. Hospital facility, research products and training services are surely services and hence industry. It is difficult to agree that a hospital is not an industry. In the third case the same factors plus the prohibition of profit are relied on by the Court. We find it difficult to hold that absence of profit, or functions of training and research, take the institution out of the scope of industry.

[Emphasis added]

89. Justice Iyer further noted that the reasoning in ***Safdarjung*** is self-contradictory, i.e., at one place it says that it is not necessary that there must be profit motive but in the same breath says that the activity must be analogous to trade or business in a "commercial sense" (which may mean profit making). However, if commercial sense refers to the commercial pattern of organisation indicating an employer-employee relationship, then the activity-oriented approach is reasonable. Relevant portion of J Iyer's judgment is reproduced hereinbelow for reference:

"136. Another intriguing reasoning in the judgment is that the Court has stated "it is not necessary that there must be a profit motive but the enterprises must be analogous to trade or business in a commercial sense". However, somewhat contrary to this reasoning we find, in the concluding part of the judgment, emphasis on the non-profit making aspect of the institutions. Equally puzzling is the reference to "commercial sense": what precisely does this expression mean? It is interesting to note that the word "commercial" has more than one semantic shade. If it means profit-making, the reasoning is self-contradictory. If it merely means a commercial pattern of organisation, of hiring and firing employees, of indicating the nature of employer-employee relation as in trade or commercial house, then the activity-oriented approach is the correct one. On that footing, the conclusions reached in that case do not follow. As a matter of fact, Hidayatullah, C.J., had in Gymkhana turned down the test of commerciality: "Trade is only one aspect of industrial activity.... This requires cooperation in some form between employers and workmen and the result is directly the product of this association but not necessarily commercial". Indeed, while dealing with the reasoning in Hospital Mazdoor Sabha he observes: "if a hospital, nursing home or a dispensary is run as a business, in a commercial way, there may be found elements of an industry there". This facet suggests either profit motive, which has been expressly negatived in the very case, or commercial type of activity, regardless of profit, which affirms the test which we have accepted, namely, that there must be employer-employee relations more or less on the pattern of trade or business. All that we can say is that there are different strands of reasoning in the judgment which are somewhat difficult to reconcile. Of course, when the learned Judge states that the use of the first schedule to the Act depends on the condition precedent of the existence of an industry, we agree. But, that by itself does not mean that a hospital cannot be regarded as an industry, profit or no profit, research or

> *no research. We have adduced enough reasons in the various portions of this judgment to regard hospitals, research institutions and training centres as valuable material services to the community, qualifying for coming within Section 2(j). We must plainly state that vis-à-vis hospitals, Safdarjung was wrong and Hospital Mazdoor Sabha was right."*
>
> [Emphasis added]

90. Justice Jaswant and Justice Tulzapurkar diagree with the inclusion of hospitals whether run on charitable basis or as a part of the functions of the Government / local bodies.[30]

C.5.7. Cooperatives

91. Justice Iyer while relying on the reasoning given by the Australian High Court in ***The Queen v Marshall Ex Parte Federated Clerks Union of Australia***, (1975) 132 CLR 595, concluded that co-operative societies are industries because: (i) the society being a legal person is the employer (ii) the members are employees and (iii) activities undertaken are in the nature of trade. The relevant portion of J. Iyer's judgment is quoted hereunder:

> *"126. Cooperative societies ordinarily cannot, we feel, fall outside Section 2(j). After all, the society, a legal person, is the employer. The members and/or others are employees and the activity partakes of the nature of trade. Merely because co-operative enterprises deserve State encouragement the definition cannot be distorted. Even if the society is worked by the members only, the entity (save where they are few and self-serving) is an industry because the member-workers are paid wages and there can be disputes about rates and different scales of wages among the categories i.e. workers and workers or between workers and employer. These societies — credit societies, marketing cooperatives, producers' or consumers' societies or apex societies — are industries.*
>
> *127. Do credit unions, organised on a cooperative basis, scale the definitional walls of industry? They do. The judgment of the Australian High Court in Queen v. Marshall Ex parte Federated Clerks Union of Australia [(1975) 132 CLR 595] helps reach this conclusion. There, a credit union, which was a cooperative association which pooled the savings of small people and made loans to its members at low interest, was considered from the point of view of industry. Admittedly, they were credit unions incorporated as cooperative societies and the thinking of Mason, J. was that such institutions were industrial in character. The industrial mechanism of society according to Starke, J. included "all those bodies 'of men associated, in various degrees of*

[30] Paragraph 185 of the dissenting judgment of Justice Singh and Justice Tulzapurkar

competition and cooperation, to win their living by providing the community with some service which it requires' ". Mason, J., went a step further to hold that even if such credit unions were an adjunct of industry, they could be regarded as industry.

128. It is enough, therefore, if the activities carried on by credit unions can accurately be described as incidental to industry or to the organized production, transportation or distribution of commodities or other forms of material wealth. To our minds the evidence admits of no doubt that the activities of credit unions are incidental in this sense.

129. This was sufficient, in his view, to conclude that credit unions constituted an industry under an Act which has resemblance to our own. In our view, therefore, societies are industries."

[Emphasis added]

C.6. CONCLUSION

92. Justice Iyer summarises his findings, and concludes his judgement in five parts, at paragraphs 140-145. For the sake of accuracy and completeness, the conclusions are extracted below in full:

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

II
141. Although Section 2(j) uses words of the widest amplitude in its two limbs, their meaning cannot be magnified to overreach itself.
(a) 'Undertaking' must suffer a contextual and associational shrinkage as explained in Banerji (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.

III

142. Application of these guidelines should not stop short of their logical reach by invocation of creeds, cults or inner sense of incongruity or outer sense of motivation for or resultant of the economic operations. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between employer and workmen, the range of this statutory ideology must inform the reach of the statutory definition. Nothing less, nothing more.

(a) The consequences are (i) professions, (ii) clubs, (iii) educational institutions, (iv) co-operatives, (v) research institutes (vi) charitable projects ***and (vii) other kindred adventures****, if they fulfil the triple tests listed in I (supra), cannot be exempted from the scope of Section 2(j).*

(b) 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 entertained but in minimal matters, marginal employees are hired without destroying the non-employee character of the unit.

(c) If, in a pious or altruistic mission many employ themselves, free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause, such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours in a free medical centre 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.

IV

143. The dominant nature test :

(a) Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not 'workmen' as in the University of Delhi case (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.***

V
144. We overrule Safdarjung (supra), Solicitors' case (supra). Gymkhana (supra), Delhi University (supra), Dhanrajgirji Hospital (supra) and other rulings whose ratio runs counter to the principles enunciated above, and Hospital Mazdoor Sahha (supra) is hereby rehabilitated."

[Emphasis added]

93. Justice Iyer concludes his judgment with these remarks:

"*We conclude with diffidence because Parliament, which has the commitment to the political nation to legislate promptly in vital areas like Industry and Trade and articulate the welfare expectations in the 'conscience' portion of the Constitution, has hardly intervened to re-structure the rather clumsy, vapourous and tall-and-dwarf definition or tidy up the scheme although judicial thesis and anti-thesis, disclosed in the two-decades-long decisions, should have produced a legislative synthesis becoming of a welfare state and socialistic society, in a world setting where I. L. O. norms are advancing and India needs updating. We feel confident, in another sense, since Counsel stated at the bar that a bill on the subject is in the offing. The rule of law, we are sure, will run with the rule of life — Indian life — at the threshold of the decade of new development in which labour and management, guided by the State, will constructively partner the better production and fair diffusion of national wealth. We have stated that, save the Bangalore Water Supply and Sewerage Board appeal, we are not disposing of the others on the merits. We dismiss that appeal with costs and direct that all the others be posted before a smaller Bench for disposal on the merits in accordance with the principles of law herein laid down.*"

D. ISSUE 1: WHETHER THE TEST LAID DOWN IN PARAGRAPHS 140 TO 144 IN THE OPINION RENDERED BY HON'BLE MR. JUSTICE V.R. KRISHNA IYER IN BANGALORE WATER SUPPLY AND SEWERAGE BOARD'S CASE (SUPRA) TO DETERMINE IF AN UNDERTAKING OR ENTERPRISE FALLS WITHIN THE DEFINITION OF "INDUSTRY" LAYS DOWN CORRECT LAW?

94. The answer to the question cannot be seen in isolation without reference to the two subsequent statutory developments which are noticed in the second part of Issue No. 1. In the absence of these subsequent developments, and if the law had not undergone any amendment, there will be a need to embark on an enquiry as to the correctness of:

(i) the test laid down in *Bangalore Water Supply* and its conformity with the definition of "*industry*" under Section 2(j) of the ID Act, and

(ii) whether there are any other alternate tests to be preferred whichcould be in consonance with the definition of "*industry*".

95. For the purpose of the argument, it is advisable to proceed on the footing that there are no subsequent statutory developments. In which case, the only focus will be on the correctness and fitness of the test propounded in *Bangalore Water Supply*. Notwithstanding the analysis undertaken and perceptions available in the judgment/reference order dated 05.05.2005 in *State of U.P. v Jaibir Singh*, (2005) 5 SCC 1, on the question of majority and other opinions, the question will still remain as stated above.

96. It is understood that the long-drawn contest on the definition of "*industry*" between 1947 and1978 reflects the evolving expansion of activities being undertaken by the governments and the citizens. Activities in the field of education and health services are one set of illustrations. Consistent with (i) the then prevailing economic and social policy of the government premised on The Industries (Development and Regulation) Act, 1951 under a certain understanding of government nationalising various sectors of economic activity, and with (ii) the engagement large segment of workforce in many of these fields of activities, it was necessary to have a

comprehensive framework regulating the employer-employee relationship. The Court was called upon in the *Bangalore Water Supply* case to provide an authoritative view connecting the common features of many of those activities. The Court was, thus, again called upon to provide a set of principles based on which the definition of "*industry*" could be grounded. The set of principles which *Bangalore Water Supply* has enunciated has to be seen in the above historical context. More importantly, the Court engaging on the task of enunciating such set of principles, went into the following matters namely:

(i) the question of certainty and fairness in conditions of employment,

(ii) which will negate exploitation and such related social justice policies

(iii) as also a dispute resolution process to deal with disputes that may arise in the course of disagreements in securing and enforcing conditions of employment,

(iv) as also certainty in the course of undertaking trade, commerce or business.

97. In other words, the question of ensuring industrial peace was an aspect that went into the reasoning and analysis by the Court.

98. What constitutes "*industry*" within the meaning of Section 2(j) of the ID Act cannot be answered without expounding on the meaning of every word or expression stated in the definition, namely, "*business", "trade", "manufacture", "calling", "service"* etc. In the course of locating, identifying and supplying the necessary meaning which would be associated with such words, gathering principles common to all those activities also became relevant. The tests laid down in paragraphs 140 and 141 of *Bangalore Water Supply* are, thus, the combination of all those factors or attributes associated with any and all of the words and expressions used in Section 2(j) of the ID Act. Thus, the principles / tests laid down in paragraphs no. 140 and 141 of *Bangalore Water Supply* do not seem to suffer from any inherent inconsistencies or logical fallacies. It is a different thing altogether that in the application of these principles / tests, there could be serious disagreements, for instance, in the context of philanthropic or charitable activities (and functions of a constitutional government / sovereign functions, discussed later).

99. Section 2(j) of the ID Act did not, either expressly or otherwise, include or exclude by way of illustrations any particular activity as an industry. Keeping that in mind, the provision by itself does not offer any guidance or standard by which exclusions or inclusions could have been debated and considered. It is, thus, seen that the entire exposition of law has been necessitated by the court being called upon to gather all those intrinsic features and attributes of the activities denoted by the words and expressions used in Section 2(j) of the ID Act. In other words, unlike an interpretation with sufficient guidance from the express words or expressions used in a statutory provision, or by the entire corpus of a given legislation, Section 2(j) of the ID Act was a skeletal statutory provision leaving it open for judicial exposition with appropriate contextual application of the Act. The definition of industry under Section 2(j) did not supply all possible meanings and understanding of the activities which may be categorized as industry. The Court thus gave a judicial exposition as would in its understanding be in promotion of the object and purpose of the Act.

100. It is, thus, submitted that the principles laid down in *Bangalore Water Supply* may not be said to be either in conflict with, or not in consonance / inconsistent with, or in disregard of the definition of "*industry*" in Section 2(j) of the ID Act under a social justice premise underlying the entire ID Act.

101. It is important to bear in mind that the association of the word "*industry*" historically connected with the emergence of capitalist economic order, and more particularly a factory, or a place of work where commodities and goods are produced, has led to various debates on the understanding of the word "*industry*". If such association is removed, and the focus is on the "*triple test*" laid down in paragraph 140 of *Bangalore Water Supply*, then the room for doubts can also be said to be laid to rest.

102. The principles and the triple test summarised in Paragraphs Nos. 140 and 141 have been applied to a wide set of activities mentioned in paragraph no. 142. However, without elaborating any kind of allied or similar activities in the body of the Bangalore Water Supply judgement, Paragraph No. 142 adds a novel category of

"*kindred adventures*". It is unclear as to how in a given context a subsequent adjudicating court can decisively deal with the class of "*kindred adventures*" especially when no such "*kindred adventures*" were discussed / elaborated in the judgement itself. Therefore, the reference to "*kindred adventures*" in the summary of the ratio of the judgment contained in Paragraphs Nos. 141 and 142, which is without basis, would lead to an unintended expansive application of the concept of industry resulting in genuine disagreements. Caution may be rightly called for in application of Paragraph no. 142.

103. With respect to Paragraph no. 143, matters relating to sovereign functions etc are dealt with separately in these submissions.

E. AND WHETHER THE INDUSTRIAL DISPUTES (AMENDMENT) ACT, 1982 (WHICH SEEMINGLY DID NOT COME INTO FORCE) AND THE INDUSTRIAL RELATIONS CODE, 2020 (WITH EFFECT FROM 21.11.2025) HAVE ANY LEGAL IMPACT ON THE INTERPRETATION OF THE EXPRESSION "INDUSTRY" AS CONTAINED IN THE PRINCIPAL ACT?

104. The definition of "*industry*" as sought to be substituted by the Industrial Disputes (Amendment) Act, 1982 (**1982 Amendment**), is partly in concurrence with *Bangalore Water Supply*, namely on the test laid down in Paragraph No. 140 but by enumeration of the category of exclusions, the 1982 Amendment is in departure with *Bangalore Water Supply.* The Parliament, through the 1982 Amendment, indicated its disagreement with the expansive approach to define the term industry and sought to narrow down the scope of the definition by excluding several welfare and non-commercial institutions. Although the 1982 Amendment was not brought into force, it reflects clear legislative intent to restrict the scope of the definition of industry.

105. In this context, it will be useful to keep in mind the observations of Justice Beg in paragraph no. 164 of *Bangalore Water Supply* which reads as follows:

"164. I am impressed by the argument that certain public utility services which are carried out by governmental agencies or corporations are treated by the Act itself as within the sphere of industry. If express rules under other enactments govern the relationship between the State as an employer and its servants as employees it may be contended, on the strength of such provisions, that a particular set of employees are outside the scope of the Industrial Disputes Act for that reason. The special excludes the applicability of the general. We cannot forget that we have to determine the meaning of the term "industry" in the context of and for the purposes of matters provided for in the Industrial Disputes Act only."

106. Paragraphs no. 39 and 40 of the 5-judge bench in ***State of U.P. v Jai Bir Singh***, (2005) 5 SCC 1 needs to be seen in this context:

"39. In response to Bangalore Water Supply & Sewerage Board case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] Parliament intervened and substituted the definition of "industry" by including within its meaning some activities of the Government and excluding some other specified governmental activities and "public utility services" involving sovereign functions. For the past 23 years, the amended definition has remained unenforced on the statute-book. The Government has been experiencing difficulty in bringing into effect the new definition. Issuance of notification as required by sub-section (2) of Section 1 of the Amendment Act, 1982 has been withheld so far. It is, therefore, high time for the court to re-examine the judicial interpretation given by it to the definition of "industry". The legislature should be allowed greater freedom to come forward with a more comprehensive legislation to meet the demands of employers and employees in the public and private sectors. The inhibition and the difficulties which are being exercised (sic experienced) by the legislature and the executive in bringing into force the amended industrial law, more due to judicial interpretation of the definition of "industry" in Bangalore Water Supply & Sewerage Board case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] need to be removed. The experience of the working of the provisions of the Act would serve as a guide for a better and more comprehensive law on the subject to be brought into force without inhibition.

40. The word "industry" seems to have been redefined under the Amendment Act keeping in view the judicial interpretation of the word "industry" in the case of Bangalore Water [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] . Had there been no such expansive definition of "industry" given in Bangalore Water case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] it would have been open to Parliament to bring in either a more expansive or a more restrictive definition of industry by confining it or not confining it to industrial activities other than sovereign functions and public welfare activities of the State and its departments. Similarly, employment generated in carrying on of liberal professions could be clearly included or excluded depending on social conditions and demands of social justice. Comprehensive change in law and/or enactment of new law had not been

possible because of the interpretation given to the definition of "industry" in Bangalore Water case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215] . The judicial interpretation seems to have been one of the inhibiting factors in the enforcement of the amended definition of the Act for the last 23 years."

107. It is submitted that it would always be open to Parliament to depart from the declaration of law in *Bangalore Water Supply* and to provide for appropriate legislative framework to deal with the distinct categories / classes of employments and services and also to provide for suitable dispute resolution processes. The exclusions set out in the 1982 Amendment intended to remove various activities whether by way of production of goods or services from the scope of the application of the ID Act, in order that or with a view that such enumerated exclusions deserve to be dealt with under some other legal framework.

108. It must be placed on record that on 12.08.1986, the following question was raised in Parliament:

"3676. SHRI KALI PRASAD PANDEY : Will the Minister of LABOUR be pleased to state:
(a) whether in November, 1985, the then Minister of Labour had indicated that Government were considering to enforce the definition of the term 'industry' as used in the Industrial Disputes (Amendment) Act, 1982 ;"

109. The answer made in response thereto is extracted hereunder:

"THE MINISTER OF STATE OF THE MINISTRY OF LABOUR (SHRI P.A. SANGMA) : (a) to (c). In his letter dated 30th November, 1985 to the Hon-ble Member, the then Minister of Labour had Inter alia stated that a Bill had been introduced in Parliament to provide an alternate Grievance Redressal Mechanism for the employees of hospitals or dispensaries, educational, scientific or training institutions etc. who are being excluded from the coverage of the Industrial Disputes Act and this has not been finalised. It is not possible, at this stage, to indicate the time likely to be taken in finalising the matter. No estimates in respect of number of employees which would be affected are available."

[Emphasis added]

110. We may notice the debates in Parliament during the introduction of the 1982 Amendment, with the intent to provide special legislation for excluded categories of employment. The relevant portion of the debates is reproduced hereinunder:

"SHRI BHAGWAT JHA AZAD: ... Government have received representations that we are unduly restricting the scope of the Act by excluding certain categories of employees from within its purview. Hon. Members will appreciate that there is an inherent difference between undertakings which, in the commonly understood language, fall within the definition of 'industry' and between hospitals, educational institutions and research organisations. Although we have excluded these categories, the idea has not been to take away workers' rights in these sectoral activities because, by and large, we have provided an alternative grievance redressal machinery in the Hospitals and other Institutions Bill, 1982 itself. ...We have received requests from several institutions and organisations engaged in sectoral activities which come in the list of excluded categories requesting us specifically to exclude them for within the purview of the definition of industry as it exists at present in the Industrial Disputes Act, 1947.

SHRI EDUARDO FALEIRO: ... The criticism is raised regarding the second part that it does not include institutions like hospitals, educational, scientific or research or training institutions and such other institutions. In this connection, I would submit to you and through you to the House that an establishment in Faridabad or a jute mill in West Bengal cannot stand and should not stand on the same footing as a hospital or a university. In an atmosphere of a hospital, the interest of the patients is there, in an atmosphere in university, the interests of the students ought to be safeguarded. This does not for a moment mean that the management of any institution can go scot free if any action is taken by them which is detrimental to the interest of the workers. Therefore, I compliment the Government for having already introduced in the Rajya Sabha a Bill to deal with similar matters concerning hospitals and such other institutions which are excluded from the purview of this Act.

SHRI ERA MOHAN: ... Sir, in this Bill, the hospitals, dispensaries, scientific research institutions, educational and training institutions as also charitable trusts have been exempted from the purview of this Bill. But I demand that the interests of employees in these institutions should be looked after by the Government, in whatever manner they like proper and suitable. Similarly the atomic plants, the defence research institutions etc. have been taken out of the orbit of th.is law. It is stated that the Government would bring forward a special legislation for the protection of employees in these institutions. I appeal to the Hon. Minister that he should expedite the formulation of this legislative effort for the benefit of these employees and workers in Atomic Energy installations and Defence Research Organisations."

111. However, as seen above, such an exercise did not fructify, and the amendment was not notified and brought into force, the amendment remained as a stillborn law. However, even in such cases, notwithstanding non-notification of an amendment /

alteration in the law, the Parliamentary intent behind the amendment will sail along with the purpose behind the amendment itself. Consequently, there is some room for an argument that the 1982 Amendment may be used as an intereptative tool for the application of the tests laid down in *Bangalore Water Supply* to the excluded categories.

112. The Industrial Relations Code, 2020, which came into force on 21.11.2025, is also in partial concurrence with the exposition of the term "*industry*" as laid down in *Bangalore Water Supply*, namely on the test laid down in Paragraph No. 140. However, it departs from the exposition to the extent it excludes the following from the meaning of industry:

(i) institutions owned or managed by organisations wholly or substantially engaged in any charitable, social or philanthropic service; or

(ii) any activity of the appropriate Government relatable to the sovereign functions of the appropriate Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space; or

(iii) any domestic service; or

(iv) any other activity as may be notified by the Central Government.

As earlier said, as far as sub clause (ii) above noted, separate submissions are being addressed.

113. The decision of this Hon'ble Court on the definition of "*industry*" under Section 2(j) of the ID Act in the present case will guide the adjudication of all disputes arising and/or pending before any court / tribunal prior to 21.11.2025. All disputes arising 21.11.2025 onwards shall be governed by the Industrial Relations Code, 2020.

F. ISSUE 2: WHETHER SOCIAL WELFARE ACTIVITIES AND SCHEMES OR OTHER ENTERPRISES UNDERTAKEN BY THE GOVERNMENT DEPARTMENTS OR THEIR INSTRUMENTALITIES CAN BE CONSTRUED TO BE "INDUSTRIAL ACTIVITIES" FOR THE PURPOSE OF SECTION 2(J) OF THE ID ACT?

G. ISSUE 3: WHAT STATE ACTIVITIES WILL BE COVERED BY THE EXPRESSION "SOVEREIGN FUNCTION", AND WHETHER SUCH ACTIVITIES WILL FALL OUTSIDE THE PURVIEW OF SECTION 2(J) OF THE ID ACT?

114. Sovereign functions of a Constitutional democracy would include social welfare activities and schemes. Thus, to answer Issues 2 and 3, it is important to first understand the concept of "*sovereign functions*" in Indian jurisprudence.

G.1. EVOLUTION OF THE CONCEPT OF "SOVEREIGN FUNCTION" IN INDIAN JURISPRUDENCE:

G.1.1. In the Realm of Civil Wrongs

115. The concept of sovereign function traces its history to colonial rule in India when East India Company was vested with sovereign powers despite being merely a trading body; and questions came up before various High Courts on tortious liability of the British Crown. It was more deeply entrenched into Indian jurisprudence after enactment of the Government of India Act, 1858. The immunity that was available to Crown under the Common Law based on the doctrine that King can do no wrong, was applied first to the East India Company and subsequent to the Governor-General in council. As has been explained by Sahai J. **in *N. Nagendra Rao & Co. v State of AP,*** (1994) 6 SCC 205 (***Nagendra Rao***):

> "*8. …immunity peculiar to the English system found its way in our system of governance through various judgments rendered during British period, more particularly after 1858, even though the maxim "lex non protest peccare" that is the King can do no wrong had no place in ancient India or in medieval India as the Kings in both the periods subjected themselves to the rule of law and system of justice prevalent like the ordinary subjects of*

the States. According to Manu, it was the duty of the King to uphold the law and he was as much subject to the law as any other person.

'In the Vedic period kingship was purely secular institution. Ancient Indian philosophers were not prepared to recognise the divinity of the unworthy Kings.' [G.P. Verma : State Liability in India]

It was said by Brihaspati:

'Where a servant commissioned by his master does any improper act, for the benefit of his master, the latter shall be held responsible for it."

Even during Muslim rule the fundamental concept under Muslim law like Hindu law was that the authority of King was subordinate to that of the law. It was no different during British rule. The courts leaned in favour of holding the State responsible for the negligence of its officers.'

116. One of the earliest uses of the concept of "*sovereign function*" can be traced back to *Peninsular and Oriental Steam Navigation Company v. Secretary of State for India,* where the Calcutta Supreme Court addressed whether the East India Company could be held liable for the negligence of its servants. The Court drew a fundamental distinction between acts done in the exercise of sovereign powers—which could not have been undertaken by private individuals—and acts carried out in the conduct of commercial or non-sovereign activities. It held that where the State engages in activities analogous to those of private traders or corporations, it may be liable in the same manner as a private entity. Conversely, acts done in exercise of sovereign authority were treated as immune from such liability. This judgment laid the foundation for the sovereign versus non-sovereign classification in Indian jurisprudence.

117. This decision was followed by the Calcutta High Court in ***Nobin Chunder Dey v. Secy. of State for India***, ILR (1875-78) 1 Cal 11, but the Madras High Court in ***Secy. of State for India in Council v. Hari Bhanji***, ILR (1882) 5 Mad 273, and the Bombay High Court in ***P.V. Rao v. Khushaldas S. Advani***, ILR 1950 Bom 1, did not follow the decision. The decision of the Bombay High Court was subsequently approved by this Court in ***Province of Bombay v. Khushaldas S. Advani***, 1950 SCC 551, and it was clearly laid down that the Government would also be liable for torts committed in exercise of sovereign powers except when the act complained of

amounted to an act of State. The position was explained in the concurring opinion of S. R. Das, J.:

> "*197. The question therefore narrows down to this as to whether an action of the character that has been brought against the Province of Bombay could have been brought against the East India Company prior to 1858. In my opinion the answer to this question must be given in the affirmative. All the relevant authorities on this point have been very carefully reviewed by the learned Judges of the Bombay High Court, and I am in entire agreement with the reasons assigned by them in support of their conclusion. It is true that the East India Company was invested with powers and functions of a twofold character. They had on the one hand powers to carry on trade as merchants; on the other hand, they had delegated to them powers to acquire, retain and govern territories to raise and maintain armies and to make peace and war with native powers in India. But the liability of the East India Company to be sued was not restricted altogether to claims arising out of undertakings which might be carried on by private persons; but other claims if not arising out of acts of State could be entertained by the civil courts, if the acts were done under sanction of municipal law and in exercise of powers conferred by such law. The law on this point was discussed very ably by the Madras High Court in Secy. of State for India in Council v. Hari Bhanji [Secy. of State for India in Council v. Hari Bhanji, ILR (1882) 5 Mad 273] . The learned Chief Justice in the course of his judgment contrasted the decision in Secy. of State for India in Council v. Kamachee Boye Saheba [Secy. of State for India in Council v. Kamachee Boye Saheba, (1857-60) 7 Moo IA 476 : 1859 SCC OnLine PC 8] with that in Forester v. Secy. of State for India in Council [Forester v. Secy. of State for India in Council, (1872-73) Supp IA 10 : 1872 SCC OnLine PC 24] . In the first of these cases, on the death of Raja Sivaji who enjoyed the status of a sovereign the East India Company seized the whole of his property as an escheat to the paramount power. A bill was filed by the widow of the deceased to recover possession of the properties. It was held by the Privy Council that the suit was not maintainable.*
>
> *xxx xxx xxx*
>
> *200. Much importance, cannot in my opinion be attached to the observations of Sir B. Peacock in Peninsular and Oriental Steam Navigation Co. v. Secy. of State for India in Council [Peninsular and Oriental Steam Navigation Co. v. Secy. of State for India in Council, (1861) 5 Bom HCR App 1] . In that case the only point for consideration was whether in the case of a tort committed in the conduct of a business the Secretary of State for India could be sued. The question was answered in the affirmative. Whether he could be sued in cases not connected with the conduct of a business or commercial undertaking was not really a question for the court to decide.*"

118. However, subsequently, the decision in ***Peninsular and Oriental Steam Navigation Company*** was approved and explained by a Constitution Bench in ***Kasturi Lal Ralia Ram Jain v State of UP,*** (1965) 1 SCR 375, where this Hon'ble Court was dealing

with a case where gold ornaments seized by police during investigation were lost pending conclusion of investigation. Having examined several cases where *Peninsular and Oriental Steam Navigation Company* was followed [see paragraphs 19-25], this Hon'ble Court concluded at page 390:

> "*In the present case, the act of negligence was committed by the police officers while dealing with the property of Ralia Ram which they had seized in exercise of their statutory powers. Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers; and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained; and so, we inevitably hark back to what Chief Justice Peacock decided in 1861 and hold that the present claim is not sustainable.*"

119. Notably, before closing the opinion, this Hon'ble Court also noted that it was time government considered enacting a legislation on sovereign immunity. This was not a new thought and had already found expression in an earlier decision of this Hon'ble Court in ***State of Rajasthan v Mst. Vidhyawati & Anr,*** (1962) Supp (2) SCR 989, where the question was whether a jeep driver employed by the government could be held liable for negligence or could he claim immunity for performing sovereign function. While analysing tortious liability of the state, this Hon'ble Court observed at page 1007:

> *"…The immunity of the Crown in the United Kingdom, was based on the old feudalistic notions of Justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorizing or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the Common Law immunity never operated in India. Now that we have, by our Constitution, established a Republican form of Government, and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for the tortious act of its servant. The Court has deliberately departed from the Common Law rule that a civil servant cannot maintain a suit against the Crown. In the case of State of Bihar v. Abdul Majid (1), this Court has recognized the right of a government servant to sue the Government for recovery of arrears of salary. When the rule of immunity in favour of the Crown based on common Law in the United*

Kingdom has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution. As the cause of action in this case arose after the coming into effect of the Constitution in, our opinion, it would be only recognizing the old established rule, going back to more than 100 years at least, if we uphold the vicarious liability of the State. Art. 300 of the Constitution itself has saved the right of Parliament or the Legislature of a State to enact such law as it may think fit and proper in this behalf. But so long as the Legislature has not expressed its intention to the contrary, it must be held that the law is what it has been ever since the days of the East India Company."

120. This was followed by a series of cases where government servants were held liable for tortious liability and the functions been carried out by them were held to be non-sovereign. Some such cases include ***Shyam Sunder v. State of Rajasthan****,* (1974) 1 SCC 690, an executive engineer involved in famine relief work died while traveling for work and this Hon'ble Court held famine relief work to be not sovereign function of the State. Then in ***Achutrao Haribhau Khodwa & Ors v. State of Maharashtra & Ors.****,* (1996) 2 SCC 634, the question before this Hon'ble Court was whether government doctor in carrying out surgery was performing sovereign function and this Hon'ble Court answered in negative. It was reasoned that running a hospital is a welfare activity undertaken by the government, but it is not an exclusive function or activity of the Government so as to be classified as sovereign function. Similarly, in ***Common Cause v. Union of India****,* (1999) 6 SCC 667, where question was whether allocating petrol pump is sovereign function immune from tortious liability, the Hon'ble Court answered in negative.

G.1.2. Consideration of Sovereign Functions in Industrial Law

121. Sovereign function in the context of determining whether a function was "*industry*" or not under the ID Act also came up before this Hon'ble Court in ***Nagpur Corporation****,* and the Hon'ble Court held that the Corporation may perform dual functions i.e. sovereign as well as industrial. The relevant portion of the judgment at page 953 is quoted for reference:

"*Before considering the positive aspects of the definition, what is not an industry may be considered. However wide the definition of "industry" may be, it cannot include the regal or sovereign functions of state. This is the agreed basis of the arguments at the Bar, though the learned counsel differed on the ambit of such functions. While the learned counsel for the*

Corporation would like to enlarge the scope of these functions so as to comprehend all the welfare activities of a modern State, the learned counsel for the respondents would seek to confine them to what are aptly termed "the primary and inalienable functions of a constitutional government". It is said that in a modern State the sovereign power extents to all the statutory functions of the State except to the business of trading and industrial transactions undertaken by in its quasi-private personality. Sustenance for this contention is sought to be drawn from Holland's Jurisprudence, wherein the learned author divides the general heading "public Law" into four sub-heads and under the sub-head "Administrative Law" he deals with a variety of topics including welfare and social activities of a State. The treatment of the subject "Public Law" by Holland and other authors, in our view, has no relevance in appreciating the scope of the concept of regal powers which have acquired a definite connotation. Lord Watson, in Coomber v. Justices of Berks ((1883-84) 9 App. Cas. 61,74), describes the functions such as administration of justice, maintenance of order and repression of crime, as among the primary and inalienable functions of a constitutional Government. Isaacs, J., in his dissenting judgment in The Federated State School Teachers' Association of Australia v. The State of Victoria ((1929) 41 C.L.R. 569), concisely states thus at p. 585:

> *"Regal functions are inescapable and inalienable. Such are the legislative power, the administration of laws, the exercise of the judicial power. Non-regal functions may be assumed by means of the legislative power. But when they are assumed the State acts simply as a huge corporation, with its legislation as the character. Its action under the legislation, so far as it is not regal execution of the law is merely analogous to that of a private company similarly authorised."*
>
> *These words clearly mark out the ambit of the regal functions as distinguished from the other powers of a State. It could not have been, therefore, in the contemplation of the Legislature to bring in the regal functions of the State within the definition of industry and thus confer jurisdiction on Industrial Courts to decide disputes in respect thereof. We. therefore, exclude the regal functions of a State from the definition of industry.*

This leads us to the question whether the Corporation can be said to exercise regal functions by legislative delegation. The Corporation functions under a statue and its powers, duties and liabilities are regulated by it. It is a juristic person and it can sue and be sued in its name. The statue constituting it may confer upon it some strictly regal functions and other municipal functions. In Country Council of Middlesex v. Assessment Committee of St. George's Union ((1896) 2 Q.B.D. 143), certain premises were used for the administration of justice and also for municipal purposes. The question raised was whether the said premises were rateable and the Court held that they were rateable in so far as they were occupied for municipal purposes and not rateable in so far as they were occupied for the administration of justice, which was held to be a function of the Crown. So too, the Supreme Court America in Verisimo Vasquez Vilas v. City of Manila (220 U.S. 345,

356; 55 L. Ed. 491, 495) expounded the dual character of a municipal corporation thus :

> *"They exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a governmental sub-division, and for that purpose exercises by delegation a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred."*

Isaacs and Rich, JJ., in The Federated Municipal and Shire Council Employees' Union of Australia V. Melbourne Corporation ((1918-19) 26 C.L.R. 508, 530-531) in the context of the dual functions of State say much to the same effect at p. 530:

> *"Here we have the discrimen of Crown exemption. If a municipality either (1) is legally empowered to perform and does perform any function whatever for the Crown, or (2) is lawfully empowered to perform and does perform any function which constitutionally is inalienable a Crown function - as, for instance, the administration of justice - the municipality is in law presumed to represent the Crown, and the exemption applies. Otherwise, it is outside that exemption, and, if impliedly exempted at all, some other principle must be resorted to. The making and maintenance of streets in the municipality is not within either proposition."*

A corporation may, therefore, discharge a dual function: it may be statutorily entrusted with regal functions strictly so-called, such as making of laws, disposal of certain cases judicially etc., and also with other welfare activities. The former, being delegated regal functions, must be excluded from the ambit of the definition of "industry"."

This decision was subsequently extensively quoted approvingly in *Bangalore Water Supply*.

122. An important point of observation was made by this Hon'ble Court in ***Nagendra Rao***, where this Hon'ble Court observed:

> "*19. 'Sovereignty' and "acts of State" are thus two different concepts. The former vests in a person or body which is independent and supreme both externally and internally whereas latter may be act done by a delegate of sovereign within the limits of power vested in him which cannot be questioned in a Municipal Court. The nature of power which the Company enjoyed was delegation of the "act of State". An exercise of political power by the State or its delegate does not furnish any cause of action for filing a suit for damages or compensation against the State for negligence of its officers. Reason is simple. Suppose there is a war between two countries or there is outbreak of hostilities between two independent States in course of*

which a citizen suffers damage. He cannot sue for recovery of the loss in local courts as the jurisdiction to entertain such suit would be barred as the loss was caused when the State was carrying on its activities which are politically and even jurisprudentially known as 'acts of State'. But that defence is not available when the State or its officers act negligently in discharge of their statutory duties. Such activities are not acts of State. In Sir Anthony Musgrave [(1879-80) 5 AC 102] the Privy Council, while determining liability of the Governor, observed that it cannot

> *"be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that, for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State."*
>
> *The Company was, thus, immune from being sued in courts only in those limited cases where its activities were political and mainly in relation to the Indian State. It did not enjoy any sovereign immunity like the Crown in England.*"

20. Even otherwise the concept of sovereign immunity and the distinction between sovereign and non-sovereign powers were neither relevant either before or after the Constitution came into force. The doctrine of sovereignty as propounded by theorists in medieval period has radically changed. The earlier theory was an outcome of old thinking, in the social set-up then prevailing, where the monarch was the sovereign and all powers legislative, executive or judicial vested in him. It was observed by Laski "that sovereignty was the supreme coercive power and it was by possession of sovereignty that the State was distinguished from all other forms of human association". The original concept of sovereignty was of a unitary State. Hibert in his book on Jurisprudence explained the term 'sovereign' as, "a political superior who is not subject to any other political superior". Holland explained sovereignty to mean, "the sovereignty of the ruling part has two aspects. It is 'external', as independent of all control from without; 'internal' as paramount over all action within". A State or a country or a nation which does not enjoy independence of control from other State or external power, cannot be considered to be a sovereign in the ordinary sense as understood either in medieval period or in the modern period. Manifestation of former is freedom to protect its border, negotiate peace, enter into treaty, etc., whereas latter is the liberty to enact laws, provide machinery for enforcing it, maintain law and order, administer justice etc.

> *"The modern doctrine of sovereignty which heralded the end of the medieval period ... was the rise of the new national States anxious to assert their total independence in a new age of economic expansion and*

to reject all feudal notions of overlordship or papal interference ... virtually unlimited capacity to make new law.

***

Austin's sovereign was postulated as an illimitable, indivisible entity. ... From a conceptual standpoint there is no necessity for a sovereign to be undivided and unlimited. Indeed, in the complex societies that have developed since Bentham's day, particularly the modern collectivist States and federal systems, quite the reverse is true. Bentham thus accepts divided and partial sovereignty." [Lloyd's Introduction to Jurisprudence, 5th Edn.]

According to Dias—

"the attributes of sovereignty are interesting. Such power is indefinite unless limited by express convention or by religious or political motivations. The sovereign may consist of more than one body, each of which is obeyed in different respects. Habitual obedience may thus be divided and partial, i.e., owed in certain areas of conduct. When divided in this way the power of each is limited by the other and each has a limited power to prescribe for the other." [Dias : Jurisprudence, 5th Edn., 1985]

xxx xxx xxx

22. The old and archaic concept of sovereignty thus does not survive. Sovereignty now vests in the people. The legislature, the executive and the judiciary have been created and constituted to serve the people. In fact the concept of sovereignty in the Austinian sense, that king was the source of law and the fountain of justice, was never imposed in the sense it was understood in England upon our country by the British rulers. In Maganbhai Ishwarbhai Patel v. Union of India [(1970) 3 SCC 400] , where the question was if the Government was justified in agreeing to transfer certain village to Pakistan without approval of Parliament, it was observed by a Constitution Bench : (SCC p. 421, para 44)

"[T]he question is one of authority. Who in the State can be said to possess plenum dominium depends upon the Constitution and the nature of the adjustment."

In America the power vests in the court. Therefore, even such actions of the Government which are solely concerned with relations between two independent States are now amenable to scrutiny by courts to be examined on the anvil of constitutional provisions and exercise of authority under constitutional framework."

123. This decision was considered in ***Chief Conservator of Forests & Anr. v. Jagannath Maruti Kondhare & Ors.,*** (1996) 2 SCC 293 (***Jagannath Maruti Kondhare***), where the primary question before the Hon'ble Court was whether forest department of the State of Maharashtra would be an "*industry*" under section 2(j) of the ID Act.

Dealing with the argument that forest department performs a sovereign function, this Hon'ble Court dealt with the observations made in *Nagendra Rao:*

> "*11. As to which function could be, and should be, taken as regal or sovereign function has been recently examined by a Bench of this Court, to which one of us (Hansaria, J.) was a party. This was in N. Nagendra Rao & Co. v. State of A.P. [(1994) 6 SCC 205 : 1994 SCC (Cri) 1609 : JT (1994) 5 SC 572] , in which case Sahai, J. speaking for the Bench examined this question in detail in the background of the stand of the respondent-State pleading absence of vicarious liability because of the doctrine of sovereign immunity. This aspect has been dealt in paras 21 to 24. Para 21 opens by saying that the old and archaic concept of a sovereignty does not survive as sovereignty now vests in the people. It is because of this that in the aforesaid Australian case the distinction between sovereign and non-sovereign functions was categorised as regal and non-regal. In some cases the expression used is State function, whereas in some, governmental function.*
>
> *12. We may not go by the labels. Let us reach the hub. And the same is that the dichotomy of sovereign and non-sovereign functions does not really exist — it would all depend on the nature of the power and manner of its exercise, as observed in para 23 of Nagendra Rao case [(1994) 6 SCC 205 : 1994 SCC (Cri) 1609 : JT (1994) 5 SC 572] . As per the decision in this case, one of the tests to determine whether the executive function is sovereign in nature is to find out whether the State is answerable for such action in courts of law. It was stated by Sahai, J. that acts like defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. They are, therefore, not amenable to the jurisdiction of ordinary civil court inasmuch as the State is immune from being sued in such matters. But then, according to this decision the immunity ends there. It was then observed that in a welfare State, functions of the State are not only the defence of the country or administration of justice or maintaining law and order but extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. Because of this the demarcating line between sovereign and non-sovereign powers has largely disappeared.*
>
> *13. The aforesaid shows that if we were to extend the concept of sovereign function to include all welfare activities as contended on behalf of the appellants, the ratio in Bangalore Water Supply case [(1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207] would get eroded, and substantially. We would demur to do so on the face of what was stated in the aforesaid case according to which except the strictly understood sovereign function, welfare activities of the State would come within the purview of the definition of industry; and, not only this, even within the wider circle of sovereign function, there may be an inner circle encompassing some units which could be considered as industry if substantially severable.*"

124. This Hon'ble Court in ***State of Gujarat v Pratamsingh Narsinh Parmar,*** (2001) 9 SCC 713, considered whether the Forest Department in the State of Gujarat is an "industry" or not. The Court came to the conclusion that the Forest Department is not an industry as it performs a 'sovereign function'. The Court also held that the Ld. Single Judge as well as the Division Bench of the High Court have failed to carefully examine the ratio of this Court's judgment in ***Jagannath Maruti Kondhare***. The relevant portion of the said judgment is reproduced hereunder for reference:

> *5. If a dispute arises as to whether a particular establishment or part of it wherein an appointment has been made is an industry or not, it would be for the person concerned who claims the same to be an industry, to give positive facts for coming to the conclusion that it constitutes "an industry". Ordinarily, a department of the Government cannot be held to be an industry and rather it is a part of the sovereign function. To find out whether the respondent in the writ petition had made any assertion that with regard to the duty which he was discharging and with regard to the activities of the organisation where he had been recruited, we find that there has not been an iota of assertion to that effect though, no doubt, it has been contended that the order of dismissal is vitiated for non-compliance with Section 25-F of the Act. The State in its counter-affidavit, on the other hand, refuted the assertion of the respondent in the writ petition and took the positive stand that the Forest Department cannot be held to be an industry so that the provisions of Section 25-F of the Act cannot have any application. In the absence of any assertion by the petitioner in the writ petition indicating the nature of duty discharged by the petitioner as well as the job of the establishment where he had been recruited, the High Court wholly erred in law in applying the principles enunciated in the judgment of this Court in Jagannath Maruti Kondhare [(1996) 2 SCC 293 : 1996 SCC (L&S) 500] to hold that the Forest Department could be held to be "an industry".*
>
> *6. The learned Single Judge as well as the Division Bench of the High Court have failed to carefully examine the ratio of this Court's judgment in Jagannath Maruti Kondhare case [(1996) 2 SCC 293 : 1996 SCC (L&S) 500] inasmuch as in para 15 of the said judgment, the Court has quoted the assertions made in the affidavit of the Chief Conservator of Forests and then in para 17, the Court held that the scheme undertaken cannot be regarded as a part of the sovereign function of the State. We are afraid that the aforesaid decision cannot have any application to the facts of the present case where there has not been any assertion of fact by the petitioner in establishing that the establishment to which he had been appointed is "an industry". In this view of the matter, we have no hesitation to come to the conclusion that the learned Single Judge as well as the Division Bench committed serious error of law in holding that to the appointment in question, the provisions of the Act apply. We would accordingly set aside the*

judgment of the Division Bench as well as that of the learned Single Judge and hold that the writ petition would stand dismissed.

G.1.3. Consideration of Sovereign Functions in the context of commercial activities undertaken by state/ state agencies

125. One of the most pertinent discussions on the concept of "*sovereign function*" has been undertaken by this Hon'ble Court in ***Balmer Lawrie & Co Ltd & Ors v. Partha Sarthi Sen Roy & Anr***., (2013) 8 SCC 345, where the primary question before the court was whether Balmer Lawrie can be considered state under Article 12 of the Constitution. Distinguishing the two concepts, this Hon'ble Court explained:

> "*18. Often, there is confusion when the concept of sovereign functions is extended to include all welfare activities. However, the court must be very conscious whilst taking a decision as regards the said issue, and must take into consideration the nature of the body's powers and the manner in which they are exercised. What functions have been approved to be sovereign are, the defence of the country, the raising of armed forces, making peace or waging war, foreign affairs, the power to acquire and retain territory etc. and the same are not amenable to the jurisdiction of ordinary civil courts.*
>
> *xxx xxx xxx*
>
> *20. Every governmental function need not be sovereign. State activities are multifarious. Therefore, a scheme or a project, sponsoring trading activities may well be among the State's essential functions, which contribute towards its welfare activities aimed at the benefit of its subjects, and such activities can also be undertaken by private persons, corporates and companies. Thus, considering the wide ramifications, sovereign functions should be restricted to those functions, which are primarily inalienable, and which can be performed by the State alone. Such functions may include legislative functions, the administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon etc. Therefore, mere dealing in a subject by the State, or the monopoly of the State in a particular field, would not render an enterprise sovereign in nature.*
>
> *xxx xxx xxx*
>
> *23. In light of the changing socio-economic policies of this country, and the variety of methods by which government functions are usually performed, the court must examine, whether an inference can be drawn to the effect that such an authority is infact an instrumentality of the State under Article 12 of the Constitution. It may not be easy for the court, in such a case, to determine which duties form a part of private action, and which form a part of State action, for the reason that the conduct of the private authority, may have become so entwined with governmental policies, or so impregnated with governmental character, so as to become subject to the constitutional limitations that are placed upon State action. Therefore, the court must determine whether the aggregate of all relevant factors once considered,*

would compel a conclusion as regards the body being bestowed with State responsibilities."

126. More recently, while examining if statutory body like an urban planning and development authority can be held liable under Consumer Protection Act, 1986, this Hon'ble Court in ***Punjab Urban Planning & Development Authority v. Vidya Chetal,*** (2019) 9 SCC 83, observed:

> "9. …*Further, there is no gainsaying that all statutory obligations are not sovereign functions. Although all sovereign functions/services are regulated and performed under constitutional/statutory instruments, yet there are other functions, though might be statutory, but cannot be called as sovereign functions. These sovereign functions do not contain the consumer service provider relationship in them and are not done for a consideration. Moreover, we need to be mindful of the fact that sovereign functions are undergoing a radical change in the face of privatization and globalization. India being a welfare State, the sovereign functions are also changing. We may note that the government in order to improve the quality of life and welfare of its citizens, has undertaken many commercial adventures.*
>
> *10. Sovereign functions like judicial decision making, imposition of tax, policing etc, strictly understood, qualify for exemption from the Act, but the welfare activities through economic adventures undertaken by the Government or statutory bodies are covered under the jurisdiction of the consumer forums. Even in departments discharging sovereign functions, if there are subunits/wings which are providing services/supply goods for a consideration and they are severable, then they can be considered.*"

127. The concept of "sovereign function" was briefly discussed recently by this Hon'ble Court in ***Coal India Ltd v Competition Commission of India,*** (2023) 10 SCC 345, where this Hon'ble Court was considering whether Coal India would fall within the definition of 'enterprise' under Section 2(h) of the Competition Act, 2002. The Court noted that whilst government departments were included in the definition of "enterprise", the definition itself contained an exception for "*activities of Government relatable to the sovereign functions of the Government including all activities carried onlby the departments of the Central Government dealing with atomic energy, currency, defence and space.*":

> "*82. It is noteworthy that the lawgiver has taken care to expressly include even Departments of the Government separately within the ambit of the word "enterprise". Things could not be more clear. The only activity of the Government, which has been excluded from the scope of Section 2(h) and therefore, the definition of the word "enterprise" is any activity relatable to*

> *the sovereign functions of the Government. Sovereign functions would include, undoubtedly, all activities carried on by the Departments of the Central Government, dealing with Atomic Energy, Currency, Defence and Space.*"

G.2. SOVEREIGN FUNCTION CANNOT AND OUGHT NOT BE PUT INTO A STRAITJACKET FORMULA

128. A survey of above listed cases shows that no exhaustive or closed definition of "*sovereign function*" emerges from Indian jurisprudence. What emerges instead is a narrow, illustrative and functional understanding of sovereign functions, repeatedly emphasized by the Supreme Court as context-dependent and limited to core inalienable State powers. Doctrinally, the jurisprudence shows three clear conclusions:

a. Courts have consistently refused to give an exhaustive definition;

b. They instead provide illustrative categories of inflexible sovereign functions, and

c. The trend is toward progressively narrowing the concept.

129. The jurisprudence outlined above reveals a fundamental principle: the nature of sovereign functions is inherently linked to the evolving role of the State. Activities that may once have been considered uniquely governmental could subsequently move to the realm of private enterprise or through public-private arrangements. Conversely, new forms of governmental responsibility may emerge because of technological, economic, or institutional developments.

130. It is important to move away from or not be confined alone to "*sovereign function*" in the law of civil wrongs. Under the Constitutional framework with clear allocation of powers, authorities, rights and functions, it would be appropriate to talk about purposes which can be pursued through such policy measures and legislations, as would be in the fitness of good governance under the Constitution. All such public purposes and pursuit of such public purposes in promotion of common good of all or sections of the community can be undertaken in terms of the scheme of the Constitution – the Directive Principles of State Policy and the allocation of legislative spheres under the Seventh Schedule to the Constitution, or Constitutional

guiding principles and frameworks. It will, therefore, be proper to switch over to expressions and idioms which would be in consonance with the constitutionally defined framework of powers, authorities, rights and functions.

131. As is evident from the above experience, the indiscriminate application of the triple test laid down in *Bangalore Water Supply* to sovereign/government functions has led to an overbroad import of "*industry*" thereby blurring the distinction between commercial activity and Constitutionally mandated public welfare / governmental / sovereign functions.

132. It is submitted that social welfare programmes are undertaken in discharge of sovereign and Constitutional obligations of the State to promote public welfare and socio-economic development and, therefore, differ fundamentally from economic undertakings engaged in trade, business or commercial production of goods and services. This position is further supported by the legislative policy reflected in the Industrial Dispute (Amendment) Act, 1982 and reaffirmed in the Industrial Relations Code, 2020, both of which indicate Parliament's intention to exclude welfare institutions and sovereign governmental functions from the scope of "*industry*". Thus, such activities ought to remain outside the scope of "*industry*" under the 1947 Act as well as the 2020 Code.

133. It is submitted that attempting to define sovereign functions exhaustively would risk freezing the doctrine in a manner inconsistent with the dynamic character of modern governance. Instead, the correct approach is to recognize that the doctrine must remain flexible and capable of adapting to changing circumstances.

134. However, at the same time, sight cannot be lost of the fact that certain functions remain inherently and inalienably sovereign. These include the core attributes of statehood, such as:

a. defense of the nation;
b. maintenance of public order;
c. administration of justice;

d. legislative and policy-making authority,
e. citizenship and naturalisation,
f. passports and visas, and
g. core regulatory and coercive powers of the State, which may relate to public purpose or common good fields.

135. These functions (such as granting citizenship, issuing passports) arise directly from the sovereign authority of the State and cannot ordinarily be delegated to or replicated by private actors on their own volition or determination. The class of activities which citizens can do on their own volition without State authorisation (subject of course to approvals, licenses, etc) are not functions of the State. Under a Constitutional scheme, governance functions are all public purpose functions. Beyond this, however, the classification of governmental activities must remain open to contextual determination and severability.

136. Given the evolving nature of governmental functions, this Hon'ble Court may also recognize that the executive is institutionally better positioned to determine, in the first instance, the nature and scope of functions that the State considers sovereign or public purpose in a particular context. The executive possesses the practical expertise, and policy responsibility necessary to evaluate the administrative, economic, and institutional implications of such classifications.

137. Judicial review would, of course, remain available to ensure that the executive's determination is not arbitrary or inconsistent with constitutional principles. However, the courts may appropriately refrain from attempting to construct an exhaustive judicial definition of sovereign or governance functions.

138. Since it will be open to the State to determine through legislative or policy measures, pursuit of public purposes or common good, such determinations and decisions will essentially be functions of the State and in that sense, they will be sovereign functions. However, the framework of steps, measures or activities that may be designed has to be in furtherance of the policy, may or may not necessarily carry

with them the sovereign function element. It is therefore important to have an element of severability inherent in the pursuit of public purpose or sovereign functions. To the extent severability can be elastically built into the pursuit of the purpose; lines can be drawn and not otherwise.

139. Nevertheless, despite the above stated concept of sovereign or governance functions, adopting a hyper technical approach in applying principles of severability to hold parts of sovereign function may not always be advisable or feasible. It is submitted that the primary function of state is welfare. Modern Indian state is not confined to traditional sovereign functions such as defence, maintenance of public order, or administration of justice. Rather, it operates as a welfare State tasked with implementing wide-ranging social, economic, and developmental policies. However, activities undertaken by the State frequently involve organizational or operational elements that may superficially resemble industrial or commercial undertakings. Such incidental operational aspects deserve closer scrutiny and cannot be isolated and treated as independent industrial activities which may undermine the broader governmental purpose they serve.

140. It is submitted that an approach that mechanically attempts to sever the "*industrial*" element of a governmental activity from its broader sovereign or welfare objective risks producing results that may also be both doctrinally unsound and practically unworkable. Government programmes frequently require the State to perform a wide range of ancillary functions including logistics, administration, service delivery, and infrastructure management etc. to implement public policy. If each of these components were to be analysed in isolation and classified as an independent industrial activity, the consequence would be the artificial fragmentation of governmental functions, which may lead to undue constraints on the State's ability to design and implement welfare programmes. It is essential that this Hon'ble Court refrains from exhaustively defining sovereign function and at the same time give more credence to functional identity of organization/ enterprise in question to determine whether or not it is performing a sovereign function.

H. CONCLUSION

141. In light of the above discussion:

a. ***Re Issue I:*** The triple test laid down in *Bangalore Water Supply* is a good law in so far as determining industry under the ID Act. The 1982 Amendment may be used as an interpretative tool to avoid overbroad interpretation and indiscriminate application of the triple test to identify an organisation as "*industry*". This interpretation will be applicable to all cases pending and/or filed till 21.11.2025, after which date the Industrial Relations Code, 2020 came into force and shall be accordingly applicable.

b. ***Re Issue II:*** Social welfare activities and schemes or other enterprises undertaken by the Government Departments or their representatives cannot be construed as "*industrial activity*" for the purpose of Section 2(j) of the ID Act. Caution must be taken while applying the triple test to different activities, especially in relation to charitable organisations and government departments carrying out sovereign functions / government functions / Constitutionally mandated functions.

c. ***Re Issue III***: Modern Indian state is not confined to traditional sovereign functions such as defence, maintenance of public order, or administration of justice. Rather, it operates as a welfare State tasked with implementing wide-ranging social, economic, and developmental policies. Such activities undertaken by the State frequently involve organizational or operational elements that may superficially resemble industrial or commercial undertakings. However, such incidental operational aspects deserve closer scrutiny and cannot be isolated and treated as independent industrial activities which may undermine the broader governmental purpose they serve. Thus, given the ever-evolving nature of state function, this Hon'ble Court may also recognize that the executive is institutionally better positioned to determine any activity as sovereign function and restrain itself from exhaustively defining the same. Judicial review would of course remain available to ensure

that the executive's determination is not arbitrary or inconsistent with constitutional principles.

-x-

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