Wednesday, July 04, 2012

Running clinic from residence not a commercial activity: Delhi High Court

Crl.M.C.No.1474/2007

IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.M.C.No.1474/2007 & Crl.M.A.5115-16/2007 % Judgment reserved on :13 th March, 2012 Judgment delivered on:02 nd July,2012

CORAM: HON'BLE MR. JUSTICE SURESH KAIT SURESH KAIT, J. Crl. M.A. No. 5116/2007(exemption) Allowed, subject to all just exceptions. Application stands disposed of. CRL.M.C.No.1474/2007 & Crl.M.A.5115/2007 1. The instant petition is being filed while challenging the complaint filed by the MCD under Section 347/461 of the Delhi Municipal Corporation Act, 1957 (hereinafter referred as ''the said Act'') against the petitioner. 2. Mr. Rajat Aneja, learned counsel for petitioner submitted that allegations in the complaint against the petitioner are as under:-Crl.M.C.No.1474/2007 Page 2 of 14 That according to the Prosecution Report of Sh.Hasruddin Khan, Jr. Engineer (Bldg), West Zone, dated 09.09.2004, the accused Dr. D.V. Chug, Owner/Occupier of the property No. H.14, Rajouri Garden, New Delhi, was found committing the following offence on 09.09.2004 at 11:00AM under Section 347 of the Delhi Municipal Corporation Act, 1957 (hereinafter called the Act), which is punishable under Section 461 of the DMC Act. That Dr. D.V.Chug, Owner/Occupier of the Property No.H.14, Rajouri Garden, New Delhi, has changed the use of the property from residential to commercial by running clinic of Dr. D. V. Chug, without written permission of the Commissioner, MCD. The sanctioned/ permissible use of this property is residential only. 3. Learned counsel has drawn the attention of this Court to the notice issued by the respondent No.2, which is at page No.23 wherein it is stated that the petitioner committed the offence under Section 347 DMC Act by changing the use of property from residential to commercial by running a clinic of doctor; whereas the MCD sanctioned the permissible use of this property as residential. 4. Undisputedly, the petitioner is a doctor, who was running his clinic from his own residence. Allegations in the complaint against him are that he was using his residential premises for the commercial activity. 5. The issue arise in the instant petition, whether, running of clinic from the residential premises, would come in commercial activity. Crl.M.C.No.1474/2007 Page 3 of 14 6. Learned counsel submitted that the petitioner is now 80 years of age as on date and the said clinic was closed down ten years back. Therefore, no purpose would be served by allowing the proceedings against the petitioner. 7. Learned counsel has relied upon Dr.Devendra M. Surti v. The State of Gujarat : AIR 1969 SC 63 wherein the Apex Court has observed as under:- "6. Under s. 2(8) of the Act an 'establishment' is defined as meaning 'a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment to which this Act applies'. Section 2(24) again defines a "Residential hotel", s. 2(25) a "Restaurant or eating house" and s. 2(27) similarly defines a "Shop". Section 2(29) defines a "Theatre". It is clear therefore that the legislature has taken care separately to define each one of the categories of 'the establishments mentioned in s. 2(8) of the Act. It is, true that s. 2(4) of the Act has used words of very wide import and grammatically it may include even a consulting room where a doctor examines his patients with the help of a solitary nurse or attendant. But, in our opinion, in the matter of construing the language of s. 2(4) of the Act we must adopt the principle of noscitur a sociis. This rule, means that, when two or more words which are susceptible of analogous meaning are coupled to-ether they are understood to be used in their cognate sense. The words take as it were their colour from each other, that is, the more general is restricted to a, sense analogous to, a less general. "Associated words take their meaning from one another under the doctrine of noscitur a sociis, the philosophy of which is that Crl.M.C.No.1474/2007 Page 4 of 14 the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broiderthan the maximum Ejusdein Generis." (Words and Phrases. Vol. XIV, p. 207). For instance, in Reed v. Ingham(1) it was upon the principle of the maxim nosscitur a sociis, that a steam tug of eighty-seven tons burden engaged in moving another vessel was not a craft within the meaning of the statute. Again, in Scales v. Pickering(-) the question was what was the meaning of the word "footway" when used in a private Act which empowered a water company to break up the, soil and pavement of roads. highways, footways, commons, streets, lanes, alleys', passages and public places. provided they did not enter upon any private lands without the consent of the owner. It was contend that this authorised the company to break up the soil of a private field in which there was a public footway, but it was held otherwise.

"Construing the word 'footway,' " said Best C. J. "from the company in which it is found the legislature appears to have meant those paved footways in large towns which are too narrow to admit of horses and carriages." And Park J. added : "The word 'footway' here noscitur a sociis." In the present case, certain essential features or attributes are invariably associated with the words "business and trade" as understood in the popular and conventional sense, and it is the colour of these attributes which is taken by the other words used in the definition of s. 2(4') of the Act, though. their normal import may be much wider. We are therefore of opinion that the professional establishment of a doctor cannot come within the definition of s. 2(4) of the Act unless the activity carried on was also commercial in character. As to what exactly is meant by "Commerce" it may be difficult to define but in an early case-McKav v. Crl.M.C.No.1474/2007 Page 5 of 14 Rutherfurd(3), Lord Camp-bell gave a useful definition : "Commerce is that activity where a capital is laid out on any work and a risk run of profit or loss; it is a commercial venture". It is true that the definition of Lord Campbell is the conventional definition attributed to trade or commerce but it cannot be taken to be wholly valid for the purpose of construing industrial legislation in a modem welfare State. It is clear that the presence of the profit motive or the investment of capital tradition associated to the notion of trade and commerce cannot be given an undue importance in construing the definition of 'Commercial establishment' under s. 2(4) of the Act. In our opinion, the correct test of finding whether a professional activity falls within s. 2(4) of the Act is whether the activity is systematically and habitually undertaken for production or distribution of goods or for rendering material services to the community or any part of the community with the help of employees in the manner of a trade or business in such an undertaking. It is also necessary in this connection to construe the word "profession" under s. 2(4) of the Act. In Commissioner's of Inland Revenue v. Maxse(1), Scrutton L.J. stated as follows:- "I am very reluctant finally to propound a comprehensive definition. A set of facts not present to the mind of the judicial propounder, and not raised in the case before him, may immediately arise to confound his proposition. But it seems to me as at present advised that a 'profession' in the present use of language involves the idea of an Occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the, operator, as distinguished from an occupation which IS substantially the production Crl.M.C.No.1474/2007 Page 6 of 14 or sale or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time. The word 'profession' used to be confined to the three learned professions, the Church, Medicine and Law. IL has now, I think, a wider meaning." The matter was again considered in another case where the question was whether a company doing the work of naval architect could be said to be carrying on a profession in a naval architecture. The case was William Esplen, Son, and Swainston, Ld. v. Inland Revenue Commissioner's 1919-2 KB 731 where Rowlatt J. observed as follows:-"..... but :in my opinion the company is not carry in,-- on the profession of naval architects within the meaning of the section, because for this purpose it is of the essence of a profession that the profits should be dependent mainly upon the personal qualifications of the person by whom it is carried on, and that can only be an individual." 7. It is therefore clear that a professional activity must be an -activity carried on by an individual by his personal skill and intelligence. There is a fundamental distinction therefore between a professional activity and an activity of a commercial character and unless the profession carried on by the appellant also partakes of the character of a commercial nature, the appellant cannot fall within the ambit of S. 2 (4) of the Act. In The National Union of Commercial Employees and another v. M. R. Meher, Industrial Tribunal, Bombay(1) it was held by this Court that the work of solicitors is not an industry within the meaning of s. 2(J) of the Industrial Disputes Act, 1947 and therefore any dispute raised by the employees of the solicitors against them cannot be made the subject of reference to the Industrial Tribunal. In Crl.M.C.No.1474/2007 Page 7 of 14 dealing with this question, Gajendragadkar, J., speaking for the Court, observed as follows at page 163 of ,the Report:- "When in the Hospital case ((1960) 2 S.C.R. 866) this Court referred to the Organisation of the undertaking involving the co-operation of capital and labour or the employer and his employees, it obviously meant the co-operation essential and necessary for the purpose of rendering material service or for the purpose of production. It would be realised that the concept of -industry postulates partnership between capital and labour or between the employer and his employees. It is under this partnership that the employer contributes his capital and the employees their labour and the joint contribution of capital and labour leads directly to the production which the industry has in view. In other words, the co-operation between capital and labour or between -the employer and his employees which is treated as a working test in determining whether any activity amounts to an industry, is the co- operation which is directly involved in the production of goods or in the rendering of service. It cannot be suggested that every form or aspect of human

activity in which capital and labour cooperate or employer and employees assist each other is an industry. The distinguishing feature of an industry is that for the production of goods or for the rendering of service, cooperation between capital and labour or between the employer and his employees must be direct and must be essential." Again, at page 166 of the Report Gajendragadkar, J. proceeds to state " Does a solicitor's firm satisfy that test ? Sacrificially considered, the solicitor's firm is no doubt organised as an industrial concern would be organised. There are different categories of Crl.M.C.No.1474/2007 Page 8 of 14 servants employed by a firm, each category being assigned separate duties and functions. But it must be remembered that the service rendered by a solicitor functioning either individually or working together with partners is service which is essentially individual; it depends upon the professional equipment, knowledge and efficiency of the solicitor concerned. Subsidiary work which is purely of an incidental type and which is intended to assist the solicitor in doing his job has no direct relation to the professional service ultimately rendered by the solicitor. For his own convenience, a solicitor may employ a clerk because a clerk would type his opinion; for his convenience, a solicitor may employ menial servant to keep his chamber clean and in order; and it is likely that the number of clerks may be large if the concern is prosperous and so would be the number of menial servants. but the work done either by the typist or the stenographer or by the menial servant or other employees in a solicitor's firm is not directly concerned with the service which the solicitor renders to his client and cannot, therefore, be said to satisfy the test of cooperation between the employer and the employees which is relevant to the -purpose. There can be no doubt that for carrying on the work of a solicitor efficiently, accounts have to be kept and correspondence carried on and this work would need the employment of clerks and accountants. But has the work of the clerk who types correspondence or that of the accountant who keeps account,; any direct or essential nexus or connection with the advice which it is the duty of the solicitor to give to his client? The answer to this question must, in our opinion, be in the negative. There is, no doubt, a kind of cooperation between the solicitor and his employees, but that cooperation has, no direct or immediate relation to Crl.M.C.No.1474/2007 Page 9 of 14 the professional service which the solicitor renders to his client. ..... Looking at this question in a broad and general way, it is not easy to conceive that a liberal Profession like that of an attorney could have been intended by the Legislature to fall within the definition of 'industry' under s. 2 (J). The very concept of the liberal professions has its own special and distinctive features which do not readily permit the inclusion of the liberal professions into the four corners of industrial law. The essential basis of an industrial dispute is that it is a dispute arising between capital and labour in enterprises where capital and labour combine to produce commodities or to render service. This essential basis would be absent in the case of liberal professions. A person following a liberal profession does not carry on his profession in any intelligible sense with the active cooperation of his employees and the principal, if not the sole, capital which he brings into his profession is his special or peculiar intellectual and educational equipment. That is why on broad and general considerations which cannot be ignored, a liberal profession like that of an attorney must, we think, be deemed to be outside the definition of 'Industry' under section2(1)." Applying a similar line of reasoning we are of opinion that the dispensary of the appellant would fall within the definition of S. 2(4) of the Act if the activity of the appellant is organised in the manner in which a trade or business is generally organised or arranged and if the activity is systematically or habitually undertaken for rendering material services to the community at large or a part of such community with the help of the employees and if such an activity generally involves co-operation Crl.M.C.No.1474/2007 Page 10 of 14 of the employer and the employees. To put it differently, the manner in which the activity in question is organised or arranged, the condition of the co-operation between the employer and the employees being necessary for its success and its object being to render material service to the community can be regarded as some of the features which render the carrying on of a professional activity to fall within the ambit of S. 2(4) of the Act. Tested in the light of these principles, we hold that the case of the appellant does not fall within the purview of the Act and the conviction of the appellant of the offence under S. 52(e) of the Act read with S. 62 of the Act and r. 23(1) of the Rules is illegal." 8. He also relied upon a decision rendered by Coordinate Bench of this Court in Crl.M.C.Nos.1459-64/2006 titled Parivar Seva Sansthan & Ors v. The State wherein vide order dated 20.10.2009 it has been observed as under:- "9. Coming to the second submission of the counsel for the petitioner that with the enforcement of the Notification dated 7.5.1999, the petitioner society could run the activity of nursing home in the residential premises and therefore, there was no violation of Section 14 of the DDA Act which could be complained of by the respondent. For better appreciation of this contention, Section 14 and Section 29 of the DDA Act are reproduced as under:- "14. User of land and buildings in contravention of plans:-After the coming into operation of any of the plans

in a zone no person shall use or permit to be used and land or building in that zone otherwise than in conformity with such plan.Crl.M.C.No.1474/2007 Page 11 of 14 Provided that it shall be lawful to continue to use upon such terms and conditions as may be prescribed by regulations made in this behalf any land or building for the purpose and to the extent for and to which it is being used upon the date on which such plan comes into force. „29.Penalties (1) Any person who whether any his own instance or at the instance of any other person or anybody (including a department of Government) undertakes or carries out development of any land in contravention of the master plan or zonal development plan or without the permission, approval or sanction referred to in section 12 or in contravention of any condition subject to which such permission, approval or sanction has been granted, shall be punishable- (a) with rigorous imprisonment which may extend to three years, if such development relates to utilizing, selling or otherwise dealing with any land with a view to the setting up of a colony without a lay out plan; and (b) with simple imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both, in any case, other than those referred to in clause (a). (2) Any person who uses any land or building in contravention of the provisions of section 14 or in contravention of any terms and conditions prescribed by regulations under the proviso to that section shall be punishable with fine which may extend to five thousand rupees and in the case of a continuing offence, with further fine which may extend to two hundred and fifty rupees for very day during which such offence continues after conviction for the first commission of the offence.Crl.M.C.No.1474/2007 Page 12 of 14 (3) Any person who obstructs the entry of a person authorized under section 28 to enter into or upon any land or building or molests such person after such entry shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.” 11. With the said notification in place the respondent DDA could not have filed a complaint complaining non-conforming use of residential premises being put to use for running a nursing home/ guest house and banks unless running of such activity was not found to be in conformity with the other conditions concerning the width of the road and the size of the plot etc. A bare perusal of the entire complaint would show that nowhere in the complaint, the respondent DDA has specifically disclosed as to what was the size of the plot in which the nursing home was being run by the accused society and what was the width of the road facing the plot wherefrom the nursing home was being run and in the absence of the same the complaint filed by the respondent DDA lacked the basic facts and material which could have disclosed commission of an offence on the part of the petitioners contravening Section 14 of the DDA Act read with said Notification. It is not in dispute that inspection of the premises of the society was carried out by the field staff of the DDA after the enforcement of the said notification and therefore, the field staff in their inspection report ought to have disclosed the width of the road and the exact size of the plot wherefrom the accused society was running the nursing home and since no such particulars have been disclosed in the inspection report or in the complaint, therefore, the complainant respondent prima facie failed to disclose any Crl.M.C.No.1474/2007 Page 13 of 14 violation on the part of the petitioners under Section 14 of the DDA Act.” 9. On the other hand, ld. counsel for MCD has fairly conceded that as on today running of a doctor’s clinic from the residential premises is permissible and is not an offence. However, at the time of filing the complaint against the petitioner, it was not permissible. 10. He further submitted, be that as it may, the petitioner has closed down its clinic, that satisfy the complaint. 11. On considering the submissions of ld. counsel appearing for the parties, I am of the considered view that the professional establishment of a doctor cannot come within the definition of commercial activity. Commerce is that activity where a capital is put into; work and risk run of profit or loss. If the activities are undertaken for production or distribution of goods or for rendering material services, then it comes under the definition of commerce. The word ‘profession’ used to be confined to the three learned professions; the Church, Medicine and Law. There is a fundamental distinction between the professional activities and commercial activities. 12. Moreso, in the case Parivar Sewa Sansthan (supra) has held that running of ‘Nursing Home’ in residential premises does not come under the commercial activity. 13. More so, the petitioner has already suffered about 8 years as he has been facing trial since then. Crl.M.C.No.1474/2007 Page 14 of 14 14. Therefore, in view of the reasons recorded above, instant petition is allowed. 15. Consequently, the proceedings pending against the petitioner before learned Trial Court are hereby set aside. 16. Bail bonds are cancelled. Surety stands discharged. 17. Crl.M.A.No.5115/2007 does not require further adjudication and stand disposed of accordingly. 18. Dasti. SURESH KAIT, J JULY 02, 2012 Mk