Before Mukul Mudgal, C.J., Jasbir Singh & Rajive Bhalla, JJ.

DR. A.C. NAGPAL AND OTHERS,—*Petitioners*

versus

STATE OF HARYANA AND OTHERS,—*Respondents*

C.W.P No. 1058 of 1999

22nd April, 2010

Constitution of India, 1950—Art. 226—Haryana Municipal Act, 1973—Ss. 128(1)(d) & 200(x)—Haryana Municipal (Dangerous and Offensive Trades) Bye Laws, 1982—Bio-Medical Waste (Management and Handling) Rules, 1998—Notification dated 20th July, 1998 issued by State Government amending Bye-Laws & including petitioners' clinics in Schedule at Sr. No. 45 & 46 of 1982 Bye-Laws—High Court declaring amendment ultra vires the provisions of 1973 Act—Reference to Full Bench—Entries 45 & 46 referable to Clause (x) of S.200 of 1973 Act—S. 128(1)(d) provides for a ban on user of a building used for a place of business emanating offensive or unwholesome smells, gases, noises and smoke—S. 200(x) provides that State Government may make bye-laws for registration, inspection and proper regulation of buildings which are used for treatment of infectious diseases—Petitioners already complying with 1998 Rules and taking care of safety measures—Expression 'place of business' occuring in S.128(1)(d)—Definition of—Nursing home could not be termed as a place of business analogous to melting of tallow, dressing of raw hides and similar vocations which habitually and in normal course of business emit offensive odours—Correctness of decision in Indian Medical Association's case affirmed.

Held, that Section 128(1)(d) being a substantive provision, refers to a place of business from which offensive or unwholesome smells, gases, noises or smoke emanate, while Section 200(x) refers to the procedural aspects of registration, inspection and proper regulation of buildings ordinarily utilized for the residence or treatment of persons suffering from infectious diseases.

(Para 5)

Further held, that since the bye-laws expressly trace their power to Section 128 and it was so urged by the State before the Division Bench in **Indian Medical Association Jagadhri-Yamuna Nagar Branch** *versus* **State of Haryana and others,** no fault can be found with the reasoning of the Division Bench and indeed this Bench endorses and adopts the reasoning of the Division Bench in Indian Medical Association's case.

(Para 7)

Further held, that the usage of a nursing home may occasionally have unpleasant olfactory emanation but could not be termed as a place of business analogous to melting of tallow, dressing of raw hides and similar vocations which habitually and in the normal course of business emit offensive odours. We are consequently in entire agreement with the above reasoning of the Division Bench both on the interpretation of S. 128(1)(d) and the definition of place of business and hereby affirm the said reasoning. Accordingly, we are of the view that the judgment in Indian Medical Association's case does not deserve over-ruling by a larger Bench and lays down the correct position of law.

(Paras 9 & 10)

Arvind Singh, Advocate, *for the petitioners in CWP No. 1058 of 1999.*

Vipul Jindal, Advocate, *for the petitioner in CWP No. 1821 of 1999.*

Anil Rathee, *Addl. A.G., Haryana.*

JUDGMENT

MUKUL MUDGAL CHIEF JUSTICE, (ORAL)

(1) This judgment shall dispose of two petitions, i.e. Civil Writ Petitions No. 1058 of 1999 and 1821 of 1999 as both arise from an order of reference dated 30th January, 2001, by a Division Bench of this Court. For facility of dictating judgment, facts are being taken from CWP No. 1058 of 1999.

(2) The Reference was made to the Full Bench by the order dated 30th Jaunary, 2001. The Reference order passed by Division Bench of this Court doubted the correctness of the decision of an earlier Division Bench In **Indian Medical Association Jagadhri-Yamuna Nagar Branch** versus **State of Haryana and others,** Civil Writ Petition No. 898 of 1999, rendered on 26th July, 1999. The said judgment declared the amendment in the bye-laws by Notification dated 20th July, 1998, as ultra vires the provisions of the Haryana Municipal Act, 1973, in so far as entries 45 and 46 were concerned. The learned Division Bench in the referral order has questioned the correctness of the said judgment on the ground that the impugned entries were clearly referable to clause (x) of Section 200 of the Haryana Municipal Act. Reference to a Full Bench had also been made on the ground that the expression 'place of business' occuring in Section 128(1)(d) of the said Act has not been given the correct meaning. The Division Bench on the basis of the above perceived error referred the matter to a larger Bench.

(3) Learned counsel for the parties informed us that the judgment in **Indian Medical Association's case** (*supra*) has been fully accepted by the State of Haryana and had become final. Learned counsel for the petitioners has also informed us that the provisions of Section 200 (x) of the said Act are being complied with by the petitioners. He has further stated that in any event, the safety of any emanation of waste/bye-products of the petitioner's concern is ensured and is now governed by Bio-Medical Waste (Management and Handling) Rules, 1998.

(4) Sections 128(1)(d) and 200(x) of the said Act reads as follows:

> "128. **Regulation of offensive and dangerous Trade.**— (1) No place within a municipality shall be used for any of the following purposes, namely,
>
> (a) xxx
>
> (b) xxx
>
> (c) xxx
>
> (d) any other manufactory engine-house, store-house, or place of business from which offensive or unwholesome smells, gases, noises or smoke arise.

200. General Bye-laws.—The State Government shall make bye-laws applicable to all or any of the municipalities as it may, by notification, specify, by which the committees shall—

(a) to (w) xxx

(x) provide for the registration, inspection and proper regulation of building ordinarily utilized for the residence or treatment of persons suffering from infectious diseases and for the limiting of the number of such persons, who reside in such buildings or part of such buildings."

(5) It is evident that both the aforesaid provisions operate in different contexts. Section 128(1)(d), being a substantive provision, refers to a place of business from which offensive or unwholesome smells, gases, noises or smoke emanate, while Section 200(x) refers to the procedural aspects of registration, inspection and proper regulation of buildings ordinarily utilized for the residence or treatment of persons suffering from infectious diseases. Accordingly, we are of the view that the referral is required to be answered by affirming the correctness of the decision in **Indian Medical Association's case** (*supra*) for the following reasons :—

"(a) Sections 128(1)(d) provided for a ban on user of a building used for a place of business emanating offensive or unwholesome smells, gases, noises and smoke and ;

Section 200(x) provides that the State Government may make bye-laws for the registration, inspection and proper regulation of buildings which are used for treatment of infectious diseases which persons suffer from.

(b) The petitioners have already complied with the Bio-Medical Waste (Management and Handling) Rules, 1998, and therefore, safety measures are fully taken care of.

(c) The State had accepted the correctness of judgment in **Indian Medical Association's case** (*supra*).

(6) Furthermore the clause 2 & 6 of the Bye Laws impugned before the Hon'ble Division Bench in **Indian Medical Association's case**

(*supra*) expressly stated that the licence had to be obtained under S. 128. The said Bye Laws 2 & 6 read as under :—

"Clauses 2 and 6 of the Bye-Laws :

2. A licence under Section 128 of the Haryana Municipal Act, 1973, for premises to be used for any of the purposes mentioned in sub-section (1) of that section may be granted by the committee, on the application of the owners or occupier of such premises, and shall be issued by an officer, appointed by the committee, in form A appended to these bye-laws on payment of fees specified in the schedule to these bye-laws and in other cases as may be approved by the Deputy Commissioner under sub-section (3) of Section 128 and on the conditions detailed in bye-laws 6 :

Provided that licence fee for each such trade or different types of business carried on in one place and listed in the serial numbers in the Schedule to these by-laws shall require separate licence for cash serial number excepting those serial numbers in which it is indicated otherwise.

xx xx xx

6. Every licence issued under bye-law 2 shall be subject to the following conditions, namely :

(a) that the licensee shall, at all reasonable times, without notice permit any person authorised by the committee, in this behalf, to inspect the licensed premises :

(b) that the licensee shall always keep the licence at the licensed premises and shall, on demand, produce it for inspection to any person duly authorised by the committee under clause (a) :

(c) that the licensee shall make adequate arrangement to the satisfaction of the committee for the extinction of any outbreak of fire including provision of adequate fire extinguishing appliances :

(d) that the licensee shall at all times keep the licensed premises in a clean and sanitary condition and shall provide them with adequate drinking water facilities, ventilation, suitable drains, latrines, urinals and other sanitary conveniences for the use of workmen employed therein to the satisfaction of the Municipal Medical Officer of Health :

(e) (i) that the licensee shall not, without the permission of the committee in writing use the licensed premises for residential purposes :

(ii) that the licensee shall not install the workshop or factory or carry on manufacture in commercial shop or workshop or factory driven by hand or with the aid of electric power or oil engine or steam engine or boiler or oil fired furnance or electric furnance in residential area.

(f) that the licensee shall not permit any work to be carried on at the licensed premises which give rise of loud and offensive noises between 7.00 p.m. and 6.00 a.m. in summer and between 7.00 p.m. and 7.00 a.m. in winter unless he has been specifically permitted in writing by the committee in this behalf ;

(g) that in premises where oil engines are used, rooms containing kerosene oil, petroleum and other inflammable oil shall not have any interal connection with the engine room :

(h) that in the case of storage of dangerously inflammable material, the licensee shall be required to observe the prohibitions and direc tions issued from time to time by the committee under Sections 192 and 193 of the Haryana Municipal Act, 1973 ;

(i) that in the case of flour mill, the licensee shall store all grains or pulses received for milling in a suitable room or rooms which shall be used for no other purpose and shall be rat-proof, and all flour or pulses produced by milling shall be similarly stored :

(j) that the licensee shall adopt the best practicable means to the satisfaction of the committee for rendering innoxious all gases, affluvia or vapours emitted during the process of working and shall in every case cause such gases, affluvia or vapours to be discharged into the external air in such a manner and at such height as to admit of the proper diffusion of these gases, without producing any unwholesome or injurious effects in the neighbourhood, or shall cause such gases, to pass through an exhaust pipe

(or other outlet for such gases) through fire or into a condensing apparatus and then through fire in such a manner as to consume effectually such gases so as to deprive the same of all noxious or injurious properties ;

(k) that in premises where, in the process of manufacture, smoke is produced from combustion of coal, the licensee shall use such apparatus which will, so far as practicable, consume the smoke."

(7) Since the bye-laws expressly trace their power to Section 128 and it was so urged by the State before the Division Bench in **Indian Medical Association's case** (*supra*), no fault can be found with the reasoning of the Division Bench and indeed this Bench endorses and adopts the reasoning of the Division Bench in **Indian Medical Association's case** (*supra*).

(8) In so far as the meaning to be given to the phrase "place of business" is concerned, the Division Bench in the referral order has merely stated that the decision in **Indian Medical Association's case** (*supra*) *qua* the place of business is not correct without stating as to what the error is. The Division Bench in **Indian Medical Association's case** (*supra*) had discussed the issue relating to 'place of business' as under :—

"On a conjoint reading of substantive part of Section 128(1) and clauses (a) to (f), it becomes clear that with a view to regulate and restrict the use of the places within the municipal limits for undertaking commercial and trading activities, which are either offensive or dangerous to the living beings, the Legislature has made a provision for licence and also empowered the Municpal Committee to refuse the grant of licence if it comes to the conclusion that such activity would cause annoyance or would be dangerous to the persons residing in or frequenting the immediate neighbourhood. It also provides for imposition of penalty in the form of fine for use of any premises for the purposes enumerated in clauses (a) to (f) without proper licence. The Bye-laws prescribe the procedure for grant of licence under Section 128 and also lay down the conditions subject to which such licence can be granted."

"In this context, it is important to bear in mind that the Nursing Homes are meant to serve public at large by providing medical treatment at the hands of professionals. The activities relating to Nursing Homes do have a commercial angle, inasmuch as, the people taking treatment in private Nursing Homes are charged fee and cost of treatment much higher than the Government Hospitals and clinics and from this point of view, the running of a Private Nursing Home may be treated as a trade for enactment like the Industrial Disputes Act, 1947—**Bangalore Water Supply and Sewerage Board** *versus* **A. Rajappa and others, AIR 1978 SC 548** or a service within the meaning of Consumer Protection Act, 1986—**Indian Medical Association** *versus* **V.P. Shantha and others, AIR 1996 SC 550,** but by no stretch of imagination, such activity can be treated as synonymous or akin to melting of tallow, dressing of raw hides, boiling of bones, offal or blood, soap house, oil-boiling house, dying house, tannery, brickfield, brick-kiln, charcoal-kiln pottery or line-kiln, manufactory, engine house, yard or depot for trade in unslaked lime, hay, straw, thatching-grass, wood charcoal or coal, or a store-house for any explosive like petroleum, inflammable oil or spirit. Therefore, the amendment made in the Bye-laws for inclusion of private Nursing Homes in the schedule is clearly *ultra vires* to Section 128 of the Act."

(9) We fully agree with the above view of the Division Bench. The usage of a nursing home may occasionally have unpleasant olfactory emanation but could not be termed as a place of business analogous to melting of tallow, dressing of raw hides and similar vocations which habitually and in the normal course of business emit offensive odours.

(10) We are consequently in entire agreement with the above reasoning of the Division Bench both on the interpretation of S. 128(1)(d) and the definition of place of business and hereby affirm the said reasoning. Accordingly, we are of the view that the judgment in **Indian Medical Association's case** (*supra*) does not deserve over-ruling by a larger Bench and lays down the correct position of law. The reference is accordingly answered and stands disposed of. Nothing survives in these writ petitions and the same also stand disposed of in terms of judgment in Indian Medical Association's case (*supra*)

R.N.R.