by the trial court on the ground that there was a bar to the institution or continuance of a prosecution against the assessee under Section 279(1A) of the Act if the Commissioner waived the penalty imposable on the assessee under sub Section (4A) of Section 271. It was noticed by the court that the assessee's appeal against the imposition of penalty had been allowed by the Income-tax Appellate Tribunal, which did not act under Section 271(4A). The order of discharge was, therefore, held to be not sustainable.

(16) In the result the present petition is, allowed and the order of Learned Chief Judicial Magistrate, Kurukshetra, as well as the order of the learned Sessions Judge are set aside. The matter is remitted to the Chief Judicial Magistrate, Kurukshetra with a direction to proceed further in accordance with law in the matter from the stage at which it was on the date of the order of discharge.

S.C.K.

Before V.S. Aggarwal, J.

STATE OF PUNJAB,—Petitioner

versus

HARI DASS & ANOTHER,—Respondents

CWP No. 11791 of 1996

The 17th November, 1998

Constitution of India, 1950—Arts. 226/227—Industry, Building and Roads Department not shown to be performing purely sovereign functions of the State—Is held to be an industry—Dominant nature test as laid down by the Supreme Court go against petitioner because welfare activities or economic activities have not been undertaken by the Government.

Held, that it has not been shown that functions purely were sovereign. The Building and Roads Department, once it is not shown to be performing purely sovereign functions of the State, therefore, was rightly held to be an industry. The dominant nature test as laid down by the Supreme Court in the case of *Bangalore Water Supply and Sewerage Board* v. *A. Rajappa and others,* 1978(2)

SCC 213, would clearly go against the petitioner because welfare activities or economic adventures undertaken by the Government have been excluded. Consequently, it must follow that the Labour Court rightly held the petitioner to be an industry. In this regard reference can well be made to the Division Bench decision of this Court in the case of *State of Punjab* v. *Hari Chand and another*, CWP No. 11790 of 1996 decided on 11th November, 1997. The same question pertaining to the PWD (B&R) Department was under consideration. The Division Bench held the same to be an industry. There is no ground to take a different view.

(Para 10)

Constitution of India, 1950—Art. 226—*Res judicata*—Maintainability of second reference—Earlier reference declined holding that B&R Department is not an industry—B&R Department is held to be an industry—Second reference maintable—Not barred by principles of res judicata—Erroneous decisions on point of law not to operate as *res judicata.*

Held, that the erroneous decision on the point of law will not operate as *res judicata.* Supreme Court considered this question in the case of *Mathura Prasad Sarjoo Jaiswal and others* v. *Dossibai N.B. Jeejeebhoy*, AIR 1971 Supreme Court, 2355 and held that an erroenous decision in law will not operate as *res judicata.*

(Para 11)

S.K. Sharma, Sr. DAG, Punjab, *for the petitioner.*

K.S. Dadwal, Advocate, *for respondent No. 1.*

JUDGMENT

V.S. Aggarwal, J.

(1) By this common judgment, two Civil Writ Petition Nos. 11791 and 13993 of 1996 can conveniently be disposed of together because the questions involved in both these petitions are identical.

(2) State of Punjab assails the order passed by the Presiding Officer, Labour Court, Jalandhar. The relevant facts in the case of *State of Punjab* v. *Hari Dass and another* are that Hari Dass had alleged that he was employed as a Beldar in the Public Works Department (Buildings and Roads) Provincial Division, Hoshiarpur on 10th August, 1990. He worked continuously upto 8th July, 1981. His services were terminated without any notice, charge-sheet or

retrenchment compensation. He was getting Rs. 385 per month as his wages. He gave a demand notice and a reference was made to the Labour Court. The said reference was declined by the Labour Court only on the ground that the Public Works Department is not an industry. A fresh reference was made in view of the judgement of the Supreme Court wherein the Supreme Court has categorically stated that the Public Works Department is an industry. In the reply filed, State of Punjab has contested the same. It was insisted that the Public Works Department (Buildings and Roads) is not an industry within the meaning of the Industrial Disputes Act. The workman is stated to have not completed 240 days and, therefore, the reference was not maintainable. Plea was raised that the workman had been engaged for a specific period, for a specific job and, therefore, it was not a case of retrenchment.

(3) The learned Labour Court framed the issues and held that the principle of *res judicata* is not attracted. It was held that the petitioner PWD (B&R) Department is an industry and that services were terminated without any enquiry and the respondent workman had completed more than 240 days in the preceding 12 months before his retrenchment. Accordingly, the reference was allowed. The termination order of respondent-workman was set aside Keeping in view the delay and the earlier reference that had been answered, it was held that the workman would be entitled to 1/3rd of wages after 27th October, 1988 till 20th July, 1995 and full wages from that date onwards. Of course, he was not reinstated.

(4) Similar were the facts in the case of *Executive Engineer, Central Works Division, PWD B&R Branch, Hoshiarpur* v. *Hardev Singh*. Herein, there was no earlier reference which had been declined. The learned Labour Court on 7th September, 1995 accepted the reference and set aside the order of termination. It was directed that he be taken back into service with continuity of service and with one third of the back wages with benefit of increments.

(5) Learned counsel appearing on behalf of the State urged that in the present case retrenchment had been made because the work for which the workman had been engaged was completed. The proposition of law in this regard cannot be disputed that if it was so, the same could be considered. But in the present case there is no such material that had been brought before this Court or before the Labour Court to show that the work for which the workman

was engaged had been completed. Therefore, this particular plea is simply stated to be rejected.

(6) The main argument advanced was that the Public Works Department (Buildings and Roads) is not an industry and, therefore, no relief could be granted to the workman.

(7) The leading case on the subject is *Bangalore Water Supply and Sewerage Board* vs. *A. Rajappa and others*, (1). The dominant nature test for deciding whether the department is an 'industry' or not has been summarised in para 143 of the judgment of the Supreme Court which is as under :—

"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) quality 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."

(8) This question had been considered by the Supreme Court

(1) 1978 (2) S.C.C. 213

subsequently in the case of *Des Raj etc.* v. *State of Punjab and others* (2). The question for consideration was if the Irrigation Department was an "industry" or not ? The Supreme Court scanned through the earlier decisions of the Supreme Court and referred to the dominant nature test already referred to above. It was held that it was an industry. Earlier Full Bench decision of this Court was not approved. Supreme Court held as under :—

> "The Administrative Report of the facts found by the High Court in the instant case have attempted to draw out certain special features. The legal position has been indicated in the earlier part of our judgment. On the tests, as already laid down in the judgments, we do not think these facts found in this case can take out the Irrigation Department outside the purview of the definition of 'industry'. We have already referred to the Dominant Nature test evolved by Krishna Iyer, J. The main functions of the Irrigation Department when subjected to the Dominant Nature test clearly come within the ambit of industry.".

(9) More recently, the Supreme Court in the case of *General Manager, Telecom* v. *S. Srinivasan Rao and others* (3) was considered as to whether the Telecome department of the Union of India is an industry or not ? It was held to be so and the Supreme Court further held as under :—

> "A two-Judge Bench of this Court in Theyyam Joseph's case (1996) 8 SCC 489 (supra) held that the functions of the Postal Department are part of the sovereign functions of the State and it is, therefore, not an 'industry' within the definition of Section 2(j) of the Industrial Disputes Act, 1947. Incidently, this decision was rendered without any reference to the seven-Judge Bench decision in Bangalore Water Supply (supra). In a later two-Judge Bench decision in Bombay Telephone Canteen Employees' Association case—AIR 1997 SC 2817, this decision was followed for taking the view that the Telephone Nigam is not an 'industry'. Reliance was placed in Theyyam Joseph's case (1996) 8 SCC (supra) for that view. However, in Bombay Telephone Canteen

(2) A.I.R. 1988 S.C. 1182
(3) 1998 (1) R.S.J. 43

Employees Association case (i.e. the latter decision), we find a reference to the Bangalore Water Supply case. After referring to the decision in Bangalore Water Supply, it was observed that if the doctrine enunciated in Bangalore Water Supply is strictly applied, the consequence is catastrophic'. With respect, we are unable to subscribe to this view for the obvious reason that it is in direct conflict with the seven Judge Bench decision in Bangalore Water Supply case (supra) by which we are bound. It is needless to add that it is not permissible for us, or for that matter any Bench of lesser strength, to take a view contrary to that in Bangalore Water Supply (supra) or to by pass that decision so long as it holds the field. Moreover, that decision was rendered long back-nearly two decades earlier and we find no reason to think otherwise. Judicial discipline requires us to follow the decision in Bangalore Water Supply case (1978) 2 SCC 213. We must, therefore, add that the decision in Theyyam Joseph (1996) 8 SCC 489 and Bombay Telephone Canteen Employees' Association. AIR 1997 Supreme Court 2817 cannot be treated as laying down the correct law....."

(10) In the present case, it has not been shown that functions purely were sovereign. The Building and Roads Department, once it is not shown to be performing purely soverign functions of the State, therefore, was rightly held to be an industry. The dominant nature test as laid down by the Supreme Court in the case of *Bangalore Water Supply and Sewerage Board's case* (supra) would clearly go against the petitioner because welfare activities or economic adventures undertaken by the government have been excluded. Consequently, it must follow that the Labour Court rightly held the petitioner to be an industry. In this regard, reference can well be made to the Division Bench decision of this Court in the case of *State of Punjab* vs. *Hari Chand and Another*, CWP No. 11790 of 1996 decided on 11th November, 1997. The same question pertaining to the PWD (B&R) Department was under consideration. The Division Bench held the same to be an industry. There is no ground to take a different view.

(11) However, on behalf of the State, in the case of Hari Dass it was alleged that earlier there was a reference which had been declined holding that the PWD (B&R) Department was not an

industry and, therefore, the second reference was not maintainable. It was contended that it was barred by the principle of *res judicata*. However, it has not been disputed that the same was based on the earlier decision of the Full Bench of this Court and it was also not being disputed that the said decision has not been approved by the Supreme Court. When such is the position, then the erroenous decision on the point of law will not operate as *res judicata*. Supreme Court considered this question in the case of *Muthura Prasad Sarjoo Jaiswal and others* v. *Dossibai N. B. Jeejeebhoy* (4) and held that an erroneous decision in law will not operate as *res judicata* and in paragraph 9 of the judgment it was observed as under :—

> ".....A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as *res judicata*. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute the question cannot opeate as *res judicata* between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise."

(12) Similar question again came up for consideration in the case of *Jai Singh Jairam Tyagi etc.* v. *Maman Chand Ratilal Agarwal and others* (5). It was held by the Supreme Court that where the executing Court had refused to exercise jurisdiction and to execute the decree on the ground that the decree was a nullity as the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, had no application to buildings in Cantonment areas, that defect having been removed and all decrees obtained on the basis of the Bombay Rent Law applied to the Bombay Cantonment. It cannot be said that the earlier decision operated as *res judicata*. Similarly, in the present case, when the earlier decision was erroneous and contrary to law, it will not operate as *res judicata*. The learned Labour Court rightly had not awarded any compensation or wages for that period.

(13) No other point has been urged.

(4) A.I.R. 1971 S.C. 2355
(5) A.I.R. 1980 S.C. 1201

(14) For these reasons, both the civil writ petitions being without merit must fail and are accordingly dismissed.

J.S.T.

Before N.K. Sodhi, J.

MAHLA,—Petitioner

versus

ROOP RAM AND OTHERS,—Respondents

C.R. No. 1938 of 1997

The 3rd September, 1998

Haryana Panchayati Raj Act, 1994—S. 176(4)—Haryana Panchayati Raj Election Rules, 1994—Constitution of India, 1950—Art. 227—Whether elections to Gram Panchayat can be set aside on the ground that the electoral authorities committed irregularities during the course of elections—Held, elections can be challenged only on two grounds mentioned in S. 176, that returned candidate committed a corrupt practice or irregularities and illegalities were committed during the course of counting—Merely because the electoral authorities committed some irregularities during the course of the election does not furnish ground u/s 176 to set aside the election—Order of Election Tribunal quashed in exercise of revisional jurisdiction.

Held, that a perusal of Section 176 of the Haryana Panchayati Raj Act, 1994 would show that the only two grounds on which an election can be challenged are : (a) that the returned candidate committed a corrupt practice within the meaning of sub-section (5); (b) that some irregularities and illegalities were committed during the course of counting on which pleading the court may order scrutiny and recounting of votes and declare the candidate who is found to have largest number of valid votes in his favour to be duly elected. In the present case, the Tribunal has found that the returned candidate did not commit any corrupt practice. Therefore, the election petitioner could succeed only if he had proved that some irregularities were committed during the course of the counting and on a recount the returned candidate was found having polled lesser number of votes than any other candidate. This has not happened. The votes have not been recounted. Merely because the electoral