

(1997) 03 MAD CK 0094

In the Madras High Court

Case No : C.M.A. No"s. 161-167 of 1988

Gopikrishnan M.

APPELLANT

Vs

Employees' State Insurance Corporation and Another

RESPONDENT

Date of Decision : 05-03-1997

Acts Referred:

Employees State Insurance Act, 1948 — Section 1(5)

Tamil Nadu Shops and Establishments Act, 1947 — Section 2(3)

Citation : (1999) 3 LLJ 1090 : (1997) 2 LW 336 : (1997) 2 MLJ 205

Hon'ble Judges : Goverdhan, J

Bench : Single Bench

Advocate : S. Vaidyanathan, for Row and Reddy, for the Appellant; G. Desappan, for Murthy and Vasan, for the Respondent

Judgement

Goverdhan, J.—Theses appeals arise out of the orders passed by the Employees" State Insurance Judge, Madras in E.S.I. O.P. Nos. 48 to 54 of 1983.

The case of the petitioners is the same in all the C.M. As. and it is briefly as follows:

The respective petitioners are employees of the second respondent in its office which is doing administrative work for the joint stock companies. It is declared as a commercial establishment under the Tamil Nadu Shops and Establishments" Act. The Employees State Insurance Act was never applicable to the respective petitioners. u/s 1(5) of the Act, the appropriate Government can extend the provisions of the E.S.I Act to establishments other than those covered by the Act. The Labour and Employment Department has made publication of G.O.Ms. No. 287, dated July 21, 1976 in the Tamil Nadu Government Gazette regarding the proposal of Government of the Tamil Nadu to extend the provisions of the Employees" State Insurance Act. The petitioners through their union represented that the said notification did not apply to them The union has also written to the first respondent that they have moved a petition before the Commissioner of Labour u/s 51 of the Tamil Nadu shops and Establishments Act for a decision on

the question whether the office of the second respondent is a shop or a commercial establishment. The Commissioner has given a judgment holding that the office was only a commercial establishment u/s 2(3) of the Tamil Nadu Shops and Establishments Act. This order was communicated to the first respondent as well as to the second respondent. Six years later, the first respondent has once again called the second respondent to cover the respective petitioners and other employees under the E.S.I. Act. If they are covered under the E.S.I. Act, they will lose a number of benefits which they are receiving at the hands of the second respondent. The provisions of the E.S.I. Act cannot be extended to the second respondent and therefore the petitioners have come forward with this application to declare that notification dated July 15, 1976 does not apply to the respective petitioners and for permanent injunction.

The first respondent in the counter contends briefly as follows;

3. The Petitions are barred u/s 77(1-A) of the Act. The allegation that the second respondent is only doing administrative work is not correct. The employees of the second respondent numbering more than 46 are giving various services to the public at large in connection with the sale of the product of the factory, receive and deliver at the stockyard. The decision of the Commissioner of Labour that the second respondent is only a commercial establishment is not binding on the first respondent. The notification applies to the petitioners' establishments. The petitions are therefore liable to be dismissed.

The second respondent in their counter contends as follows:

The Madras office of the second respondent consists of employees in various capacities such as clerks, stenographers, typists, chowkidars and chaprasis. They attend to all the clerical and correspondence work connected with the companies' product. The Government of Tamil Nadu has extended the provisions of the E.S.I. Act by virtue of the notification dated July 15, 1977 to the second respondent. The first respondent dropped further proceedings after the order of the Commissioner dated July 11, 1977 to the effect that the second respondent is a commercial establishment. The application for exemption submitted through the Government of Tamil Nadu has been rejected by the E.S.I. Corporation without any authority. The second respondent is in an unenviable position in that the employees are opposing the applicability of the E.S.I. Act while the E.S.I. authorities are directing to implement the provisions of the E.S.I. Act. According to the second respondent the E.S.I. Act will not apply to their establishment and orders may be passed to that effect.

5. On the above pleadings a common enquiry was held by the E.S.I. Judge and the learned Judge has held that the second respondent establishment is liable to be covered under the provisions of the E.S.I. Act, but the notification dated July 15, 1976 will not be applicable to the respective petitioner and other employees of the second respondent and orders were passed to that effect. Aggrieved over the same the petitioners have come forward with these appeals.

6. The learned counsel appearing for the respective appellants would argue that the Commissioner of Labour who is the competent authority has held an enquiry with regard to the nature of the establishment of the second respondent and has held that it is a commercial establishment and not a shop and it has been communicated to the E.S.I. authorities as well as the second respondent and all of a sudden six years later the first respondent has chosen to issue a notice to the second respondent to extend the provisions of the E.S.I. Act to its employees and it is not proper since the matter has been set at rest by the Commissioner of Labour who is the competent Court to decide whether a particular establishment is a shop or a commercial establishment. There is no dispute over this proposition that the Commissioner of Labour is the proper person to decide whether a particular institution comes under the definition of shop or a commercial establishment. There is also no dispute that insofar as the second respondent establishment is concerned the finding of the Commissioner is to the effect that it is a commercial establishment. The learned counsel appearing for the respective appellants would argue that the notification dated July 15, 1977 is applicable only to shop as defined under Tamil Nadu Shops and Establishments Act and it is held that the second respondent is a commercial establishment the notification does not apply and if the notification does not apply there is no question of extending the provisions of the E.S.I. Act to the second respondent. The question that has to be decided is whether the notification issued under the E.S.I. Act can be extended to the second respondent institution also which has been classified as a commercial establishment by the Commissioner of Labour. The word commercial establishment has been defined u/s 2(3) of the Tamil Nadu Shops and Establishments Act which is a State Act. As per the above definition commercial establishment means an establishment which is not a shop but which carries on the business of advertising, commission, forwarding or commercial agency, or which is a clerical department of a factory or industrial undertaking or which is an insurance company Joint stock company, bank, broker's office or exchange and includes such other establishments as the State Government may by notification declare to be a commercial establishment for the purpose of the Tamil Nadu Shops and Establishments Act. In the case on hand no oral evidence has been let in by either side. But it is not in dispute that the products manufactured in the head office are sent to the branch office, Madras where they are dealt with by the various staff members of whom the petitioners who are in the category of Chowkidars and Chaprasis. The manufactured products are dealt with in the branch office at Madras by the employees of the second respondent is not disputed. It is no doubt true that the Commissioner of Labour has held that the second respondent institution is a commercial establishment and not as a shop on account of the fact that no direct sales of the manufactured products are effected in the second respondent. The learned counsel appearing for the appellants therefore would argue that extending the notification under the E.S.I. Act is only for shops and not for commercial establishments and therefore the second respondent institution cannot be considered to be a one to which the notification has been extended. The learned counsel appearing for the

respondent has argued that the question whether the provisions of the E.S.I Act are applicable to the commercial establishments has been set at rest by the Supreme Court in the decision reported AIR 1994 1154 (SC) and the appeals are without merits. In the above decision the Supreme Court has considered the meaning of the word "shop" and has held that the E.S.I. Act is a beneficial legislation and if therefore it is reasonable to construe the word "shop" as to include the activity of an advertising agency within it that construction must be preferred. The Supreme Court has further observed that any one who has products to sell may approach an advertising agency who will prepare an advertisement for him utilising services of the experts it employs in this behalf and it sells the products to the clients and receives the price thereof and advertising agency sells its expert service to enable the client to launch an effective campaign for his products, can therefore reasonably be said to be a shop as now understood. The ruling of the Supreme Court in the above decision makes it abundantly clear that where the services are utilised for commercialising the product which the manufacturer has manufactured and anyone who is in an establishment in a way responsible for the sale of the same is also the person responsible for such a sale has also to be considered as a "shop". It was on account of the services rendered by the second respondent the products of the manufacturer are to be routed and the second respondent is paying to his employees for the services rendered by them and when we consider all these aspects the finding of the lower Court that the notification issued to confer benefits to the employees of the second respondent establishment cannot be deprived to them by technical objection raised by the petitioners by contending that their establishment is a commercial establishment not covered under the Employees' State Insurance Act and that the E.S.I. Act will cover only shops and not the other establishments. In that view, I am of the opinion that the arguments of the learned counsel appearing for the appellants that in view of the finding of the Commissioner of Labour that the second respondent is only a commercial establishment and not a shop as defined under the Tamil Nadu Shops and Establishments Act is not tenable one. Further the Tamil Nadu Shop and Establishments Act being state Act, the E.S.I. Act can override the same and in that view also the arguments of the learned counsel appearing for the appellants cannot be said to be a tenable one. Considering all these aspects, I am of the opinion that the appeals are without merits.

In the result C.M.A. Nos. 161 to 167 of 1988 are dismissed.