

(1993) 02 BOM CK 0070

In the Bombay High Court

Case No : Writ Petition No. 2958 of 1988

Jet Air Private Ltd. and Another

APPELLANT

Vs

Employees' State Insurance Corporation and Another

RESPONDENT

Date of Decision : 18-02-1993

Acts Referred:

Employees State Insurance Act, 1948 — Section 1(4), 1(5), 45A

Citation : (1993) 3 BomCR 42 : (1993) 95 BOMLR 838 : (1999) 3 LLJ 180 :
(1993) 2 MhLj 1720

Hon'ble Judges : B.P. Saraf, J

Bench : Single Bench

Judgement

B.P. Saraf, J.—The first petitioner ("Petitioner" hereafter), is a Company incorporated under the Companies Act, 1956. It acts as the General Sales Agents of various International Airlines. It has offices at several places in (India) including Bombay. At these offices, the petitioner carries on the activities which are similar to those carried on by the Airlines themselves in their own offices. In other words, the petitioner carries on the business of handling passengers and cargo on behalf of the different airlines as their General Sales Agents, which functions, in the absence of the agency of the petition company, such airlines themselves would have performed. The activities of the petitioner company also consist of assisting travel agents to get confirmations of passage and cargo space, co-ordinating marketing strategies of the airlines concerned and rendering requisite services to the passengers coming from abroad. For rendering all these services, the petitioner company gets a commission from the airlines concerned.

2. By this petition, the petitioner has challenged the action of the second respondent Regional Director, employees' State Insurance corporation against the petitioner under the Employees' State Insurance Act, 1948 ("the Act") seeking to apply the provisions of the above Act to the petitioner company by virtue of notification dated 18-9-1978 issued by the Government of Maharashtra u/s 1(5) of the Act, on the basis that the petitioner company falls within the

category of "shops" described in category 3(iii) of the said notification. There is no dispute that though u/s 1(4) of the Act, at the first instance the Act was made applicable to factories only, by the above notification dated 18-9-1978 issued u/s 1(5) of the Act, its operation was extended to various categories of establishments which includes "shops". The only controversy is whether the petitioner falls within that category or not.

3. The case of the petitioner is that the expression "shop" is an expression having a definite connotation. It has been defined in various legal as well as ordinary dictionaries, to mean only those establishments where activities connected with sale of goods or services on retail basis to consumers takes place. It is submitted that the activities carried on by the petitioner do not fall within the nature of activities which can make the place of business or establishment of the petitioner a shop. According to the learned counsel for the petitioner, the place of business of the petitioner is, in fact, "not a shop an office".

4. I have carefully considered the contentions of the petitioner. For the purpose of deciding the controversy relating to applicability of the provisions of the Act to the establishment of the petitioner, it is not necessary to decide whether the establishment is an office or not and to examine the meaning of "office". It will be sufficient to ascertain whether it falls within the category of "shops". If that is so, the provisions of Employees' State Insurance Act, 1948 would be attracted otherwise not. On a careful consideration of the nature of the activities of the petitioner, I am of the clear opinion that the establishment of the petitioner falls within the category of "shops" as described in the notification dated 18-9-1978 issued u/s 1(5) of the Act. The expression "shops" came up for interpretation before the Supreme Court in three cases. *Hindu Jea Band, Jaipur Vs. Regional Director, Employees' State Insurance Corporation, Jaipur*, , *M/s. International Ore and Fertilizers (India) Pvt. Ltd. Vs. Employees' State Insurance Corporation*, and *M/s. Cochin Shipping Co. v. E. S. I. Corpn.* 1992 II CLR 623. While interpreting the expression "shop" as used in notification u/s 1(5) of the Act, the Supreme Court made it absolutely clear at the very outset that while construing a welfare legislation like Employees' State Insurance Act and the notification issued thereunder, a liberal construction should be placed on their provisions so that the purpose of the legislation may be allowed to be achieved rather than frustrated or stultified. The Court did not approve the narrow interpretation put by the Employees' State Insurance Court on the expression "shop" by which it confined it to a place where goods are actually stored and delivered pursuant to sale.

5. In *M/s. Hindu Jea Band v. Regional Director, E. S. I. Corpn., Jaipur*, (supra), the controversy was whether the business premises of the petitioner, who was not selling any goods in its place of business but was only engaged in arranging musical performances on occasions such as marriages etc., can be called a "shop". The first contention urged before the Supreme Court in support of the petition was that since the petitioner was not selling any goods in the place of its

business but was only engaged in arranging for musical performances on occasions such as marriages, etc., its business premises cannot be called a "shop". Repelling this contentions, the Supreme Court observed at page 896 (of LIC).

"... We do not agree with the narrow construction placed by the petitioner on the expression "shop" which appears in the notification issued u/s 1(5) of the Act which is a beneficent legislation".

The Supreme Court referred to the meaning of the word "shop" as given in Collins English Dictionary which describes it as " (A) a place esp, a small building for the retail sale of goods and services and (ii) a place for the performance of a specified type of work; "workshop". Applying the above definition to the petitioner who has been making available on payment of the stipulated price the services of the members of the group of musicians employed by it on wages, it was held that : the place where the petitioner had been carrying on business was "shop" to which the Act was applicable by virtue of the notification referred to above.

6. M/s. International Ore and Fertilizers (India) Pvt. Ltd. Vs. Employees" State Insurance Corporation, was the case of limited company which had been carrying on the business of fertilisers. It represented some foreign principals for the sale of their products in India, sales were finalised at its Central Office but actual clearing of shipments and delivery of goods. etc., were rendered by the branch officer. More than 20 persons were employed at its central office. The question that arose for consideration was whether the shipment-cum-central office of the petitioner company amounted to "shop". In this case also, on behalf of the petitioner it was urged that since no goods were actually being delivered in the premises in which the petitioner was having its establishment, the said establishment could not be treated as a shop which was referred in Item 3(iii) of the Government notification. In the absence of any definition of shop in the Act of the notification, reliance was placed in this case also on the dictionary meaning of the word "shop" which defines it as "house or building" where goods are made or prepared for sale and sold"; "place of business" or "place where one's ordinary occupation is carried on". Negating the contention of the petitioner and holding that the establishment of the petitioner amounted to shop. It was observed (at p. 81) :

".... It is thus clear that the activities carried on by the petitioner constitute trading activities although the goods imported from abroad are not actually brought to the said premises and delivered to the purchaser there. In our opinion, it is not actually necessary that the delivery of the goods to the purchaser should take place at the premises in which the business of buying or selling is carried on the constitute the said premises into a "shop". The delivery of the goods sold to the purchaser is only one aspect of trading activities. Negotiation of the terms of sale, carrying on of the survey of the goods imported, arranging for the delivery of the goods sold, collection of the price of the goods

sold etc., are all trading activities. The premises where business is carried on by the petitioner is undoubtedly a shop as the activities that are carried on there relate only to the sale of goods which were imported into India. The petitioner acts as the agent of the foreign principals who are to sellers. The petitioner directs and controls all its activities from the premises in question. If orders are received at a place which ultimately fructify into sales and the resulting trading activity is directed from there that place comes to be known as a "shop".

In the light of the aforesaid observation, it was held that there was no doubt that the establishment of the petitioner was a shop where selling activities were carried on. The Supreme Court did not approve the narrow interpretation put by the Employees' Insurance Court on the expression "shop" by confining it to a place where goods are actually stored and delivered pursuant to a sale. On the other hand, it agreed with the decisions of the High Court that while construing a welfare legislation like the Act and the notification issued thereunder, a liberal construction should be placed on the provisions so that the purpose of the legislation may be allowed to be achieved rather than frustrated or stultified.

7. *M/s. Cochin Shipping co. Vs. E.S.I. Corporation*, is the latest decision of the supreme Court on this point. This was a case of a company which was engaged in clearing and forwarding operations at the port of Cochin. It was authorised to transact its business at the Cochin Custom house under the terms of Section 202 of the Sea Customs Act read with the Rules made thereunder. The question was whether on the basis of the above activities, the establishment of the petitioner could be called a "shop". The contention of the petitioner was that it did not render any service to its customers at its office, it was merely carrying on clearing and forwarding business by processing the document at Custom House, no service being rendered at its own office establishment. It was, therefore, urged that it could not be called a shop within the dictionary meaning. The supreme Court considered the definition of "shop" as given in various dictionaries and also its earlier decisions referred to above and held that the establishment of the petitioner was a "shop". The supreme Court again made it clear that the word "shop" should not be given a narrow meaning nor its meaning be diluted in any way, in view of the fact that the object was to envelope as many establishment as possible within its purview. Referring to the specific activities carried on by the petitioner, the Supreme Court held :

"... The appellant is carrying on stevedoring, clearing and forwarding operations. Clearing the documents, even it be in the custom house, is necessary for the export or import of goods. These services form part of the carrier's job. It cannot be gainsaid that the appellant is rendering service to cater the needs of exporters and importers and others who want to carry the goods further. Therefore, it is shop carrying on a systematic economic or a commercial activity".

8. The above decision of the supreme court has thus given a wide meaning to the expression "shop" and it has been interpreted to include a "place where systematic economic or commercial activities are carried on". It is no more

restricted to "a small place kept for retail sale of goods and services" which is the conventional definition of "shop" as given in the dictionaries.

9. In the light of the above decisions of the supreme court, I am of the clear opinion that the establishment of the petitioner company is a "shop" within the meaning of Item 3(iii) of the notification dated 18-9-1978 issued u/s 1(5) of the Act. Having held so, the alternative grievance of the petitioner on the ground of violation of natural justice has also to be dealt with the case of the petitioner is that as it had challenged the very application of the Act to its establishment, it did not furnish the returns, statements etc., required of it, as a result of which the impugned provisional assessment came to be made by the respondent No. 2. The contention of the petitioner is that it should be permitted to file the necessary returns, statements etc., and the respondents should be directed to recompute or recalculate the amount of contribution on the basis thereof after giving proper opportunity of hearing to the petitioner. The petitioner also submits that it has made certain payments on a provisional basis which too have not been adjusted by the respondent No. 2. I think the contention of the petitioner on this count deserves consideration. The petitioner is entitled to file the returns, statements etc., and to an opportunity of hearing and to get the amount of contribution properly computed in accordance with law. I therefore, allow the petitioner to submit the requisite statement etc., within 8 weeks. Thereafter, the respondents shall, after giving proper opportunity to the petitioner, as expeditiously as possible recompute the amount of contributions and intimate the same to the petitioner which the petitioner shall pay. Till such recomputation is made, the demand of payment on ad-hoc basis u/s 45-A shall not be given effect to. In case the petitioner fails to submit the return statement etc., within the time specified above the prohibition on the respondent No. 2 on enforcing payment "on ad-hoc basis" u/s 45-A shall cease to operate.

10. In the result, the petition is allowed to the extent indicated above and the rule is disposed of accordingly. No order as to costs.

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11. Ordered accordingly.