
(1988) 06 KL CK 0035
In the High Court Of Kerala

Kuriakose

APPELLANT

Vs

Employees" State Insurance Corporation

RESPONDENT

Date of Decision : 22-06-1988

Acts Referred:

Employees State Insurance Act, 1948 — Section 1, 2

Citation : (1989) 1 ILR (Ker) 521 : (1989) 1 LLJ 1

Hon'ble Judges : K.S. Paripoornan, J;K. Balakrishnan Nair, J

Bench : Division Bench

Judgement

Paripoornan, J.—Is an "advertising concern" a shop? That is the sole question that arises for consideration herein.

The applicant in Insurance Case No. 60/1986, Employees" Insurance Court, Alleppey is the appellant in this appeal. The Opposite Party-Regional Director, ESI. Corporation, Trichur, is the respondent herein. The applicant filed an application praying for a declaration that the applicant-company Will not come under the purview of the E.S.I. Act. The company is doing the work of advertising consultancy at various places in Kerala. It put forward the plea that there was no minimum strength in the establishment requiring coverage under the E.S.I. Scheme. It cannot be termed a "shop". The respondent herein (Opposite Party) relied on the notification, issued u/s 1(5) of the Employees" State Insurance Act, extending the provisions of the Act to "shops and sought to cover the appellant-company under the E.S.I. Act. The notification No. 22877/E2/73/LBR dated 18th September 1974 was relied on to show that the appellant-advertising concern will be covered under item (iii) in the said notification, namely "shops". The company demurred and initiated proceedings before the Insurance Court contending that it is not a "shop" and the provisions of the E.S.I. Act cannot be made applicable to it by virtue of the notification. It pleaded that it is carrying on "professional services" and so will not be a "shop" as specified in the notification dated 18th September 1974. The Insurance Court held that the appellant"s establishment will be covered by the term "shop" and dismissed the

application. The applicant has come up in appeal.

2. We heard counsel for the appellant, Mr. P.R. Raman, as also counsel for the respondent. The sole question that arises for consideration is whether an advertising concern, like the appellant, will be covered by the term "shop" as specified in the notification dated 18th September 1974. We shall extract the notification dated 18th September 1974, in order to understand its import:

GOVERNMENT OF KERALA

NOTIFICATION

S R.O. No.

In exercise of the powers conferred by Sub-section (5) of Section 1 of the Employees' State Insurance Act, 1948 (Central Act 34 of 1948), the Government of Kerala, in consultation with the Employees' State Insurance Corporation and with the approval of the Central Government, hereby gives notice of its intention to extend the provisions of the said Act to the classes of establishments specified in Schedule annexed hereto on or after 29-3-1975.

By order of the Governor, U. MAHABALA RAO Secretary to Government,

3. The Insurance Court held that the appellant is doing consultancy work and for that various workers namely, visualisers, copy writers. Article Directors, Models and Photographers are engaged. They are making advertising materials for their customers for giving to the newspapers for advertising. The Court further held that no sale takes place in the strict sense in the appellant's establishment and with the help of employees the appellant is rendering service to the customers by way of giving advertising materials. In that behalf, skilled workers are employed and for that wages are paid to them. Reference was made to the decision of this Court in *George Mathew v. E.S.I. Corporation* 1978 KLT 686; *Dattaram Advertising Pvt. Ltd. v. Regional Director, E.S.I. Corporation* 1987-I-LLJ-9 Bombay and the decision of the Supreme Court in *M/s. Hindu Jea Band v. Regional Director, E.S.I. Corporation* 1987-I-LLJ-502: It was held that the facts stated in the application filed by the appellant and in the decision of the Supreme Court in *M/s. Hindu Jea Band* case (supra) are identical and in the appellant's establishment a group of professionals are rendering services in the advertising branch and for that they are paid. So, in the view of the Insurance Court, the appellant's establishment will also be taken in by the term "shop" as specified in the notification dated 18th September 1974.

4. The appellant's counsel, Mr. Raman, attacked the reasoning and conclusion of the Insurance Court as patently erroneous in law and totally unsustainable. It was argued that the Insurance Court misunderstood and misapplied the decisions referred to in its judgment and in particular the decision of the Supreme Court reported in *M/s. Hindu Jea Band* case (supra). On the other hand, counsel for the respondent submitted that the Insurance Court correctly applied the law laid down in the decision reported in *M/s. Hindu Jea Band* case (supra) and the

conclusion reached by the Insurance Court is warranted in view of Bench decisions of this Court.

5. On hearing the rival contentions of the parties, we are of the view that the Insurance Court totally misread and misunderstood the decision of the Supreme Court reported in *M/s. Hindu Jea Band* case (supra) and also the Bench decisions of this Court. The following decisions were brought to our notice during the course of arguments: *Beeyems Construction Co. v. Government of Kerala* ILR 1978 (2) Ker 1; *George Mathew v. E.S.I. Corporation* (supra); *Brooke Bond India Ltd. v. E.S.I.* 1980 I-LLJ-352; *Darask Ltd. v. E.S.I. Corporation* 1979 KLT.633; *Dattaram Advertising Pvt. Ltd. v. Regional Director E.S.I. Corporation* supra affirmed in 1988-I-LLJ-413 and *M/s. Hindu Jea Band, Jaipur v. E.S.I. Corporation* supra.

6. The word "shop" has not been defined in the Act. The shop is no doubt an establishment to which the Act has been extended u/s 1(5) of the Act. In its popular sense, it means "any factory, office or business". It is a place where one's trade, profession or business as a subject of pre-occupation takes place. It may even be that no sale of commodities takes place there. The word "shop" may also cover a place where any kind of industry is pursued. It will take within its fold a place of employment or activity or industry where any systematic economic activity is carried-on. It may be a servicing centre where servicing is done for price. It is not necessary that a sale of goods should take place at a particular place to call it a shop (*Beeyems Construction Co. v. Government of Kerala* supra. So also, the sale need not necessarily be of goods. It can be of "resource services" also. - (*George Mathew's* case (supra)). The Supreme Court in *M/s. Hindu Jea Band* case (supra)) referred to the meaning of the word "shop" as stated in Collins English Dictionary, and stated thus:

- (i) a place especially 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. It is obvious from the above meaning that a place where services are sold on retail basis is also a shop. It is not disputed that the petitioner 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.

In *Beeyems Construction Co.* case (supra), the establishment involved was a construction "company. It was engaged in the work of civil contract and for that purpose several workers were employed and in order to co-ordinate the work and supervise the same, an office was established. It was held to be a "shop". In *George Mathew's* case (supra), the appellant was a distributor of cinematograph films on commission basis. Even so, it was held that the office will come within the term "shop". In *Brooke Band India Ltd.* case (supra), a branch office engaged in buying and exporting tea, which was an integral part of sale, was held to be a "shop". In *Darask Ltd.* case (supra), a local marketing organisation acted as agents of manufacturing companies situate outside the State on a

commission basis and medical representatives were appointed to canvass orders and promote sales. Delivery of goods to third parties was effected by the local marketing organisation. They were so done on behalf of their principal for commission. The said activity in the premises was held to be sufficient to rope it within the term "shop". In *M/s. Hindu Jea Band*'s case (supra), the petitioner was only engaged in arranging for musical performances on occasions such as marriage etc., and the question was whether its business premises can be called a "shop". The Court held that the place where the petitioner was carrying on business is a shop to which the Act is applicable by virtue of the notification. In *ESIC v. Dattaram Advertising Pvt. Ltd.* case 1988-I-LLJ-413 the Bombay High Court considered some of the decisions of this Court, referred to hereinabove, as also the above latest decision of the Supreme Court and held that the advertising agency, like the appellant, is not a shop. The Court took the view that the place wherein the advertising agency was conducting its business was not one where goods in tangible form was sold. The Court was further of the view that the word "shop" cannot include the premises wherein an advertising firm conducts its business, because basically and mainly the activity that is taking place in such premises is only "intellectual" and "things are not sold or purchased in that place". It was held that the concern is not engaged in selling any unit of work, and the services rendered by an advertising firm is not tangible, and if at all, the consultancy service is in the nature of supply of an idea" and the payment is not for the quantity but for the quality. In such cases, the premises wherein the business activity is carried on cannot be called a "shop". We do not understand the decision of the Supreme Court in *M/s. Hindu Jea Band*'s case (supra) to say that wherever services are rendered, the premises will be covered by the term "shop". The decision of the Supreme Court should be understood in the background of the particular facts disclosed in that case. Their Lordships held that the place where the business was carried on by the petitioner is a shop and the provisions of the Act are applicable by virtue of the notification. The Supreme Court stressed the fact that it was a case where services were sold on retail basis and the petitioner was making available on payment of the stipulated price, the services of the members of the group of musicians employed by it on wages; and these would go to show that the place where the petitioner was carrying on business, is a shop. It is clear, that in the case dealt with by the Supreme Court, "any person can go and obtain the services" and the services were sold at a "stipulated price". There was no variation in the price according to the volume, nature, quality or complexity of work. We are of the view that the decision of the Supreme Court in *M/s. Hindu Jea Band* case (supra), to the effect, that "even a place where services are rendered or performed will be a shop", should be confined to a situation, where the services are sold for any person who wants to avail of the same and were made available on payment of a stipulated price, with no variation according to volume, nature, quality or complexity of work involved in the matter. Indeed, the Bombay High Court in the decision reported in *ESIC. v. Dattaram Advertising Put. Ltd.* case (supra), stated that though the word "shop" liberally interpreted would take in any place where services are rendered, it will

not go to the extent of including the premises where basically and mainly "intellectual activity is taking place" and "things are not sold or purchased", a concept which is peculiar to a shop. In para 9 of the judgment, the Court held as follows 1988-I-LLJ-413:

...it is clear that the respondent in the course of its business or commercial activity does not sell any unit of work, let alone unit of commodity, to any particular person, not even to its client. The bill that is prepared will naturally depend upon the extent of the work involved, the quality of the work that is executed and naturally also the volume of the publicity that is undertaken. In an activity of the type that is carried on by the respondent, one can safely proceed on the basis that the payment is not so much for the quantity but for the quality. It is true that the respondent renders services for which it gets paid, but the services that are rendered by the respondent are more in the nature of supply of an idea rather than of the service of any particular tangible type. If, in the work that is executed by the respondent on behalf of its client, predominant part is played by the mind, a creative tool in the hands of men, and what is supplied is the product such as an idea for the effective campaign for sale one cannot conceive this activity as one which involves the sale and purchase of services.

The decision of the Supreme Court in *M/s. Hindu Jea Band* case (supra) was distinguished in para 10 of the judgment, in the following words:

In the first place, the services of the respondent are not available on retail basis in the sense that any person can go to the respondent and obtain the same. Secondly, the services of the respondent are not sold at a stipulated price. The price must necessarily vary according to the volume, nature and the complexity of the work which is assigned to the respondent by its client. One must also not forget that the shop even in its expanded meaning must be a place where the goods and the services in a tangible form are sold, such as an entertainment programme which appeals to the senses, or reservation of accommodation in certain transport. The first mentioned is suggested by the facts in *Hindu Jea Band* case (supra), and the second is suggested by the facts in the case of *New India Maritime Agencies (Private) Ltd. v. Government of Tamil Nadu and Anr.* (1983) LLN.(3) 934 by Padmanabhan, J. of Madras High Court.

The above observations of the Bombay High Court have our concurrence.

7. In the light of the above discussion, we are of the view that a company like the appellant, which is rendering services to its customers by way of giving advertising materials by employing several categories of skilled workers, and whose services are in the form of consultation and advice, will not be taken in by the word "shop", occurring in the notification. The Insurance Court committed a serious error of law in holding that the decision of the Supreme Court in *M/s. Hindu Jea Band* case (supra) applied to the instant case and so the appellant's establishment will also come under the comprehension of the term "shop" which appears in the notification dated 18th September 1974.

8. We set aside the judgment of the Insurance Court dated 9th September, 1987 in I.C. No. 60 of 1986 and declare that the appellant's establishment will not come under the purview of the E.S.I. Act. This appeal is allowed. There shall be no order as to costs.