

(1981) 11 P&H CK 0045
In the Punjab And Haryana At Chandigarh
Case No : F.A.O. No. 139 of 1980

M/s Raison Tailors

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 02-11-1981

Acts Referred:

Employees State Insurance Act, 1948 — Section 75

Citation : (1981) 11 P&H CK 0045

Hon'ble Judges : G.C. Mital, J

Bench : Single Bench

Advocate : R.L. Chopra, for the Appellant; K.L. Kapur, for the Respondent

Final Decision : Allowed

Judgement

Gokal Chand Mital, J.—Messrs, Raisons Tailors is a partnership concern carrying on the business of tailoring. The Employees State Insurance Corporation got a report through its Inspector about the working of the partnership concern and it was reported that they were employing more than 10 persons and electric power was fitted and on that basis the Regional Director issued a notice demanding a contribution of Rs. 2,8 4-25 The firm did not accept the notice and filed an application u/s 75 of the Employees State Insurance Act, 1948 (hereinafter called the Act) before the Employees State Insurance Judge The stand of the firm was that they had not employed 10 or more persons in their establishment and that their establishment does not fall within the definition of "factory" contained in section 2(12) of the Act and hence were not covered under the provisions of the Act. The stand of the firm was denied by the Corporation and on the contest of the parties, certain issues were framed and the crucial issue which now falls for consideration is as follows:--

Whether the petitioner's establishment is not covered under the Employees State Insurance Act as alleged? OPP.

The application was rejected by the court below by order dated 30th October

1979 after recording a finding that 11 employees were working and, therefore, the firm was covered by the Act Detailed written arguments were filed before the Court below and the points to show that even if there were 11 employees yet the establishment of the firm would not come within the ambit of the Act were not considered and decided on the ground that those points were not mentioned in the application filed u/s 75 of the Act. Against the aforesaid order the present appeal was filed by the firm in which notice of motion was issued. In the presence of the counsel for both the parties, the Motion Bench passed the following order:--

The substantial question of law involved in this appeal is, whether the premises in question is a shop or a factory. Admitted. Stay declined.

Now the case has been put up before me for final disposal

2. After hearing the counsel for the parties at length I am of the view that the substantial question of law posed by the Motion Bench deserves to be decided in favour of the appellant firm by returning a finding that the premises in which the tailoring-business is carried on would be a shop and not a factory and, therefore, on this basis it will have to be seen whether the business run by the firm would come within the ambit of the Act.

3. I do not find any merit in the contention of the appellant-firm that the number of employees in the firm was below 10 and, therefore, I shall proceed to decide this case on the finding recorded by the court below on the stand of the Corporation that the number of employees was 11. The Act is sought to be extended by the Corporation to the appellant-firm on the basis of Notification No. 10102-SA-III-76/10308, dated the 30th August, 1976, published in the Chandigarh Administration Gazette (Extraordinary). The Relevant Schedule is as under--

1. Any premises including the precincts thereof whereon ten or more persons but in any case less than twenty persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, but excluding a mine subject to the operation of Mines Act, 1952 (35 of 1952), or a railway running shed or any establishment which is exclusively engaged in any of the manufacturing processes specified in clause 12 of section 2 of the Employees State Insurance Act, 1948 (34 of 1948)

2. x x x x x

3. The following establishments whereon twenty or more persons are employed, or were employed, for wages on any day of the preceding twelve months, namely:--

(i) Hotels;

(ii) Restaurants;

- (iii) Shops;
- (iv) Road Motor Transport establishment;
- (v) Cinemas, including preview theatres; and
- (vi) Newspaper establishments as defined in section 2(d) of the Working Journalist; (Conditions of Services) and Miscellaneous Provisions Act, 1955 (45 of 1955).

While the case of the Corporation is that a tailor-masters" business would be covered by item No. 1 of the aforesaid notification where as the case of the appellant-firm is that it would fall under clause (iii) of item No. 3. The worth of the rival contentions may now be noticed.

4. According to Mr. K.L. Kapur, counsel for the Corporation since there is a electric connection fitted in the premises where tailoring business is carried on, therefore, electric press can be used there and the use of electric press would mean carrying on "manufacturing process" with the aid of power and, therefore, item No. 1 of the said notification would apply whereunder if 10 or more persons are employed, the firm would come within the ambit of the Act to pay contributions. The report submitted by the Inspector of the Corporation was read. It merely states that there were 11 employees working in the tailoring premises and that there was power connection in existence. The report does not say nor is there any evidence on record as to what is done with the power connection and what process is being carried on with the aid of power. On that matter, the report of the Inspector as also the present record is wholly silent. Since tailoring business is being carried on, therefore, Mr. Kapur, (Learned Counsel for the Corporation) wanted to infer that after the clothes are stitched, the pressing must be done with electric press and, therefore, the entire process would become "manufacturing process" covered by item No. 1 of the said notification. I am wholly unable to subscribe to this view. Section 2(12) of the Act defines "factory" which contains the expression "manufacturing process" and that expression has been assigned the same meaning as given in the Factories Act, 1948. A reading of the definition of "manufacturing process" as contained in section 2(k) of the Factories Act would show that whenever any process is used for making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleanings, breaking up, demolishing or otherwise treating or adepting any article or substance with a view to its use, sale, transport, delivery or disposal then it would be called a manufacturing process. The admitted case of the parties is that the appellant-firm merely stitches clothes of its customers according to the size of each customers out of the cloth delivered by the customer to the firm. The preparation of clothes for each individual customer according to his fitting would be a matter of rendering service and would not be called a "manufacturing process" within the meaning of the definition and, therefore, would not be a factory premises. Since in item No 3 of the said notification, the words "establishment" and "shops" have been used, therefore, their meaning will also

have to be found out to finally decide the matter. Neither "establishment" nor "shop" has been defined in the Act. However, I find that they have been defined in the Punjab Shops and Establishments Act 1958, as follows:--

Section 2(B) "establishment" means a shop or a commercial establishment.

Section 2 (30) "shop" means any premises where any trade or business is carried on or where services are rendered to customers and includes offices, store-rooms, godowns, sale-depots or ware houses, whether in the same premises or otherwise, used in connection with such trade or business but does not include a commercial establishment or a shop attached to a factory where the persons employed in the shop are allowed the benefits provided for workers under the Factories Act, 1948 (LXIII of 1948).

A reading of the above definitions would clearly show that an establishment includes a shop and a shop means any premises where trade or business is carried on or where services are rendered to the customers. The definitions of "shop" and "commercial establishment" came up for consideration before a Full Bench of this Court in *Ram Chander v. The State* (1963) 65 P.L.R. 1 the relevant part of which is as follows--

In order to determine this question it is necessary to closely analyse the definition of "shop" and "commercial establishment". One element is common to both, namely, that there have to be premises wherein, in the case of a commercial establishment any business, trade or profession is carried on for profit and in the case of a shop where any trade or business is carried on or where services are rendered to customers. The carrying on of trade or business or profession necessarily has to have a close and intimate connection with the premises. It cannot be disputed and indeed it was not that a trade, profession, or business can be carried on without there being premises, but the definition requires the existence of premises and in the case of a shop it includes offices, store rooms, godowns or warehouses whether in the same premises or otherwise used in connection with such trade or business. In other words, these offices, etc., must have a necessary connection with the premises which is a shop. The other requirement is that what should be carried on in these premises is trade or business or rendering of services to customers in the case of a shop, and, in the case of a commercial establishment a trade or business or profession has to be carried on for profit..... Hence the question arises what then is a shop? This phrase as understood by a common man denotes nothing more and nothing less than a premises where goods are brought or sold where their price is paid or is to be paid, that is, the purchase or sale is either on cash or credit basis, it cannot be said that when goods are being sold to customers no service is being rendered. Most likely, this additional element has been specifically introduced into the definition of the shop for the reason that there are certain places known as shops, for instance, tin smith's shop or a mechanic's shop, where services are sold instead of goods, or, may be partly goods are sold and partly services are rendered. It is primarily for this reason that in the definition of shop, in addition

to the carrying on of trade or business another alternative requirement is envisaged, namely, the rendering of services to the customers.

A reading of the above shows that where these services are rendered, the premises is known as shop.

5. Whether factory would be included in the word "establishment" or "commercial establishment", the matter came up for consideration before Supreme Court in *Shri B.P. Hira, Works Manager, Central Railway, Parel, Bombay etc. Vs. Shri C.M. Pradhan etc.*, In para 19 of the report it was observed as follows:--

We have already noticed that in defining "commercial establishment" and "shop" respectively, the Act has expressly excluded "factories" from the said expressions. It is true that the definition of "establishment" does not expressly exclude factory, but it is plain that factory is treated by the Act as separate and distinct and there can be no doubt that the provisions in the Act which apply to establishment are not intended to, and do not apply to factories. In other words, though the definition of "establishment" is wide enough, it does not include factory for the purposes of the Act. It is conceivable that a kitchen attached to an establishment like a residential hotel may satisfy the definition of factory, but it seems to us that such an adjunct of an establishment is *prima facie* not intended by the Act to be treated a part and separately from the main establishment itself, and so it would be taken as a part of the establishment and be governed by the provisions of the Act in relation thereto. The factory where the respondents are employed is not connected with, much less an inseparable adjunct of, any establishment and so this academic aspect of the matter which was incidentally posed before us by the learned Attorney-General need not be pursued any further in the present appeal.

A reading of the above clearly shows that "factory" is not included in the definition of establishment.

6. Whether a mixture of medicines prepared by a doctor for his patients could be called a "manufacturing process amenable to sales-tax law came up for consideration before Supreme Court in *Commissioner of Sales Tax, U.P. Vs. Dr. Sukh Deo*, wherein it was held that the process could not come within the expression "manufacture" because the medical practitioner supplied to his patients medicines and pharmaceutical preparations separately When they were mixed up by his employees under his directions for the special use of a patient under his treatment to achieve a special purpose, that was not a mixture of general marketable commodity as is the case of wholesale manufacturing by pharmaceutical companies. A Division Bench of the Kerala High Court in *Darsak Ltd. v. E.S.I. Corporation* 1980 Lab. I.C. 1287 had an occasion to deal with "shop premises" in connection with the Act and came to the following conclusion:--

"Shop" is not a term defined either in the Notification or in the Act So, it must have the meaning as understood in common parlance. That the popular meaning

is to be given to the term is indicated by the decision in Commissioner of Income Tax, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad, The dictionary meaning of the term "shop" is mentioned in the order of the Insurance Court as "shop" is a place where any kind of industry is pursued; a place of employment or activity industry means systematic economic activity or any branch thereof." Generally a shop is a place where commercial activities such as buying and selling take place. But there need not necessarily be such activity to make a place a shop. It may be a servicing centre where servicing is done for price. Radio repairing shop, shoe repairing shop, cycle repairing shop are examples Where there is no commercial activity at all the fact that employees are engaged may not be sufficient to make it a shop Normally one associates the term shop with customer. Where there is no commercial activity at all and the place is not intended for commercial activity there will be no occasion for a customer to deal with that office It may be necessary for the purpose of this case to go further into the term shop, for, it appears to us that on the facts evidenced in this case the Canon Shed Office of the appellant company is nothing but a shop. It is not a case where there may be any difficulty in finding so.

7. The matter of printing of saris came up for consideration before the Gujrat High Court in Shantilal Popatlal Kotak v. Ramniklal Mohanlal Ashra 1971 Lab. I.C. 1287 wherein ten or more persons were employed. The facts of that case were that the customers used to bring their cloth to their premises for printing and used to get printing done according to their specification. The printing concern only rendered the service of doing the skilled work of printing and the premises in which this work was being carried on was held to come within the definition of "shop". The operative part of the judgment is as follows:--

But the premises of the petitioner is the place where the business of rendering services to customers is conducted. It is there that the orders and instructions of the customers are received and it is there that the goods are delivered back to the customers after the work as required by them is executed. Moreover, the works place of the petitioner which he calls the factory or laboratory for carrying out the electroplating process, which is solely used in connection with the business, which is conducted on the premises, is also a shop within the inclusive part of the definition of a "shop" u/s 2(27) of the Bombay Shops and Establishments Act.

8. I also had an occasion to deal with the case of a dry-cleaning business under the Act in F. A. O No 405/1978 (E.S.I. Corporation v. M/s Triplex Dry-cleaners) (1982) 84 P.L.R. 600 decided on 24th October, 1981, wherein it was held that dry-cleaning business was not a "manufacturing process" and the main reason for coming to this conclusion was that no process was involved by which any new or independent marketable commodity came into being after the process of dry-cleaning.

9. For all the aforesaid reasons I am of the view that the tailor-master business which the appellant is carrying on in the present case would not come within the

definition of "manufacturing process" and would come within the definition of "shop" where service is rendered to the customers and, therefore, the present case will fall) under item No. 3 (iii) of the said notification and not under item No. 1 thereof. Since under item No 3 a shop would come within the ambit of the Act only if twenty or more persons are employed and since the appellant firm has employed only eleven persons, his case would not come within the ambit of the Act and the Regional Director had no authority to issue notice demanding contributions from the appellant.

10. However, I would like to make it clear that the aforesaid reasoning would not extend to a concern which may be manufacturing cloths for being sold in the market and whenever a case on those factes would come up for consideration would be decided on its own facts.

11. For the reasons recorded above, I allow this appeal, set aside the order of court below and by allowing the application of the appellant filed u/s 75 of the Act I hold that the notice issued by the Regional Director demanding contributions from the appellant was clearly illegal and without jurisdiction and is hereby set aside. Since a difficult question of law was involved in this case leave the parties to bear their own costs.