

(1996) 06 CAL CK 0040

In the Calcutta High Court

Case No : A. No. 1001 of 1993 and M. No. 1670 of 1990

The Regional Director, Employees' State Insurance
Corporation and Others

APPELLANT

Vs

The Peerless General Finance and Investment Company Ltd.
and Others

RESPONDENT

Date of Decision : 13-06-1996

Acts Referred:

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

Citation : (1996) 74 FLR 2253 : (1997) 1 LLJ 82

Hon'ble Judges : Visheshwarnath Khare, C.J.; Altamas Kabir, J

Bench : Division Bench

Advocate : S.C. Moitra, M.S. and Jyanti Mukherjee, for the Appellant; Bhaskar Gupta and Ajoy Nath Chunder, for the Respondent

Final Decision : Allowed

Judgement

Kabir, J.—The respondent No. 1 in this appeal is an existing company within the meaning of the Companies Act, 1956 and claims to be carrying on business of promoting schemes for savings by small investors. The petitioner No. 2 claims to be a shareholder and also the Chairman and Managing Director of the Company.

2. On January 20, 1983 the State Government issued a Notification in exercise of the powers conferred u/s 1(5) of the Employees State Insurance Act, 1948, hereinafter referred to in short as the "E.S.I. Act" extending the applicability of the said Act to "shops" in the areas specified in the Schedule to the notification wherein twenty or more persons are employed or were employed for wages on any day of the preceding twelve months.

3. The said Notification was challenged by the respondents Nos. 1 and 2 in this appeal by way of a writ petition which was allowed by the learned Single Judge by his judgment and order dated February 15, 1991 upon holding that the impugned Notification did not apply to the respondent No. 1 Company and the appellants were directed not to take any further steps pursuant to the said

Notification as far as the respondent No. 1 Company was concerned.

4. This appeal is directed against the said judgment and order of the learned Single Judge.

5. In order to appreciate the submissions made on behalf of the appellants it would be necessary to set out in brief the case made out in the writ petition.

6. In December 1985, the respondent No. 1 Company, hereinafter referred to as the "Company", received a letter dated November 1, 1985 from the Regional Director of the Employees' State Insurance Corporation, hereinafter referred to in short as the "E.S.I. Corporation", requiring the Company for the first time to make its contribution under the E.S.I Act from the month following in a Bank to be selected by the Company. The Company was also assigned a Code number for the said purpose.

7. According to the writ petitioners/respondents the said letter had been wrongly sent to them since the Company did not come within the purview of the E.S.I Act. Various correspondence followed wherein the Company reiterated its stand that the E.S.I. Act was not applicable to it.

8. It was the further case of the writ petitioners that since a "shop" is a place where activities connected with the buying and selling of goods are carried on, the Company's offices where no such trading activities involving buying and selling of goods or selling of services on a retail basis are carried on, could not be brought within the scope of the impugned Notification, nor could they be said to be "factories," as erroneously assumed by the E.S.I. authorities.

9. Appearing for the appellants, Mr. S.C. Moitra submitted that the trading activities being carried on by the Company involved selling of services, and the learned Single Judge, therefore, error in holding that the said Notification was not applicable to it.

10. Mr. Moitra urged that the business of the Company involved investing of the customers' money and sharing profits. Such sharing of profits amounted to retention by the Company of its charges for selling its services to the depositors and was in the nature of customer service and thus constituted commercial activity, which brought the Company within the scope of the impugned Notification.

11. In support of his said submissions, Mr. Moitra firstly referred to the decision of the Supreme Court in the case of *Hindu Jea Band, Jaipur Vs. Regional Director, Employees' State Insurance Corporation, Jaipur*, wherein while interpreting the concept of "Shop" the Supreme Court was of the view that it is not only a place where goods are sold which is a shop but it includes a place where services are sold on a retail basis, such as making available on payment services of musicians to play at social occasions.

12. In this connection, MR. Moitra also referred to another decision of the

Supreme Court in *M/s. Cochin Shipping co. Vs. E.S.I. Corporation*, wherein while considering a similar Notification issued under Sub-section (5) of Section 1 of the E.S.I Act the Honb'le Supreme Court held that merely because other establishments which can fall within the definition of shop have been enumerated in the Notification, it does not make it obligatory for the Court to give a narrow meaning to the word "shop", in as much as, the object of the E.S.I Act is to envelope as many establishments as possible without leaving any room for doubt, which the Notification intends to do. In the said case it was held that since the appellant was carrying on stevedoring, clearing and forwarding operations which involved clearing documents in the Customs House, which was necessary for import or export of goods, it was rendering service to cater to the needs of exporters and importers and Ors. who wanted to carry the goods further, it was a shop carrying on a systematic economic or a commercial activity, which was sufficient to bring the appellants within the pale of the Notification.

13. Reference was then made to the decision of the Supreme Court in AIR 1994 1154 (SC) and *M/s. International Ore and Fertilizers (India) Pvt. Ltd. Vs. Employees" State Insurance Corporation*, wherein the context of an advertising agency and a company carrying on business of importing fertilizers, the same principles were reiterated.

14. Reference was also made to several other decisions of the Supreme Court in the same line and a Bench decision of the Madras High Court in the Case of *Sundaram Finance Limited v. State of Tamil Nadu and Ors.* to which we shall advert if required.

15. Mr. Moitra lastly referred to Section 75 of the E.S.I. Act and submitted that under Sub-section (3) thereof the jurisdiction of the Civil Court, and by necessary implication that of the Writ court had been ousted in relation to any question or dispute indicated in Sub-sections (1) and (2) or any liability which under Act was required to be decided by a Medical Board or by a Medical Appeal Tribunal or by the Employees" Insurance Court.

16. Mr. Moitra urged that the learned Single Judge had erred in holding that the impugned Notification had no application to the petitioner Company and that the judgment and order dated February 15, 1991, passed by the learned Single Judge on such finding, was liable to be set aside.

17. Appearing for the writ petitioners/ respondents Mr. Bhaskar Gupta submitted that for the first time on November 1, 1985 the Regional Director of the Corporation wrote to the Company requesting it to deposit its contributions under the E.S.I. Act for the next month onwards in a Bank to be selected by it, Mr. Gupta submitted that a series of correspondence followed with the Company denying its liability to make such payment since its establishment was neither registered as a factory or a shop and the E.S.I Act was not applicable to it.

18. Mr. Gupta next submitted that in view of the continued insistence of the E.S.I authorities regarding the applicability of the E.S.I Act and the impugned

Notification to the Company, it was compelled to move the writ application on June 22, 1990, and an interim order was passed thereupon, which was ultimately confirmed by the judgment and order dated February 15 1991 by which the writ petition was disposed of.

19. Mr. Gupta urged that the expression "Shop" has not been defined in the E.S.I Act and is not also mentioned in Sub-section (5) of Section 1 thereof, but, in his usual fairness, Mr. Gupta added that in view of the several decisions of the Supreme Court where the expression "shop" had been considered in the context of the E.S.I Act, such ground was not immediately available to the writ petitioners/ respondents.

20. Mr. Gupta then urged that, in any event, the expression "Shop" could not be extended to the Company's business premises in view of the nature of the business carried on therein. Referring to the decision in Hindu Jea Band case (Supra) cited on behalf of the appellants, Mr. Gupta submitted that in the said case the services of musicians were being made available at a price which amounted to providing customer service.

21. Mr Gupta urged that the nature of business being carried on by the writ petitioners/respondents had fallen for consideration in an earlier writ petition filed by the writ petitioner/respondents questioning the applicability of the provisions of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978, to the Endowment Scheme of the writ petitioner Company. The matter ultimately went up to the Supreme Court, Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others, wherein it was observed that for over a quarter of a century the business of the Company has been that of finance and investment. It was further observed that the Company offered three schemes the principal of which is the Endowment Certificate Scheme which is neither a gambling scheme nor a lottery scheme. There are no prizes, no gifts, no elements of chance. It is just a plain Recurring Deposit Scheme such as the money scheme floated by Commercial Banks and National Savings Organizations which fact is admitted in the Inspection Report of the Reserve Bank of India.

22. Mr. Gupta urged that from the aforesaid observations it would be obvious that the writ petitioners/respondents were not engaged in any commercial activity involving the sale of any commodity or services, but that of finance and investment only which is ordinarily carried on by Banking Organizations. Mr. Gupta submitted that since Banks did not come within the purview of the E.S.I. Act or the impugned Notification having regard to the nature of their activity, by the same yardstick, the provisions of the E.S.I. Act or the said Notification could not be made applicable to the writ petitioners/respondents, as had quite rightly been held by the learned Single Judge.

23. Continuing in the same vein Mr. Gupta then submitted that despite the wide nature of activities indicated in its Memorandum of Association, the Company's business was confined to only finance and investment and if in future it wanted

to expand its present activities, it would first have to comply with the Provisions of Section 149(2A)(2B) and (3) of the Companies Act, 1951 before it could do so. Furthermore, from the guidelines given by the Reserve Bank as to how the depositors' moneys were to be invested it would appear that there was no element of chance involved.

24. Referring to the other decisions cited by Mr. Moitra, Mr. Gupta submitted that in all the said cases the concerned parties were carrying on trading activities unlike the writ petitioners/respondents who were only concerned with financial investments which did not involve sale of any kind.

25. Mr. Gupta urged that "sale" had been defined in Black's "Law Dictionary" and in Halsbury's "Laws of England" to be a transfer by mutual consent of the ownership of a thing from one person to another for a money price and though it is not the same as barter, in certain circumstances it may be treated as one of sale.

26 Mr. Gupta also urged that Section 75 of the E.S.I. Act had no application to this case, since the Act itself did not apply to the Company and the question raised in the writ petition was not a matter to be decided by the Employees' Insurance Court under the said Act. Mr. Gupta submitted that the provisions of Section 75 of the aforesaid Act were not an alternate remedy available to the writ petitioners/ respondents, as had been contended on behalf of the appellants, and, in any event, having regard to the decision of the Hon'ble Supreme Court in the case of L. Hirday Narain Vs. Income Tax Officer, Bareilly, , once this Court had entertained the writ petition, the same could not, thereafter, be rejected on the ground that the statutory remedy had not been availed of.

27. Mr Gupta submitted that the direction given by the learned Single Judge to the appellants herein not to apply the impugned notification of January 20, 1983, to the Petitioner Company, was unassailable and did not warrant any interference.

28. Replying to Mr. Gupta's submissions, Mr. Moitra reiterated that the Company's business amounted to selling of services to the depositors and its retention of a part of the profits on the customers' deposits, was really its charges for investing" such deposits and the learned Single Judge was wrong in holding otherwise.

29. Although, lengthy submissions have been made on behalf of the respective parties, the issue involved in the writ petition and this appeal is really confined to the question whether the business activities of the writ petitioner company are such as to bring it within the ambit of the impugned Notification published under Sub-section (5) of Section 1 of the E.S.I. Act.

30 From the Memorandum of Association of the Writ petitioner Company it will be noticed that provision has been made for various kinds of commercial activity, but as indicated by Mr. Gupta, the Company is at present engaged in the business of finance and investment only. The question is whether it can be said

that the said business cannot be equated with buying or selling of goods.

31. Having regard to the views expressed by the Hon"ble Supreme Court in the Hindu Jea Band case (Supra) and in the case of International Ore and Fertilizers (India) Pvt. Ltd (Supra) it is quite clear that the concept of "Sale" need not be confined to buying and selling of, goods and commodities only but includes selling of services for a remuneration. In the instant case, the Schemes offered by the writ petitioner Company involve deposit of money by the Customer, which money is then invested by the Company and the profits therefrom are paid to the depositor, but after the Company retains a part thereof.

32. Such retention of a part of the profits on the part of the Company is nothing but its remuneration for investing the depositor's money to give him a return thereupon. We have no doubt in our minds that the same amounts to sale of services by the Company for a remuneration and the learned Single Judge erred in arriving at a finding that the business of the Company did not involve any article of commerce being bought and sold. The findings of the learned Single Judge on this point also run contrary to the views expressed by the Hon"ble Supreme Court in the two above mentioned cases and cannot be sustained.

33. Apart from the above, there is another aspect of the matter. Though the expression "Shop" has not been defined in the E.S.I. Act, the usage thereof has been extended thereto in the two above mentioned cases, thereby bringing the impugned Notification within the pale of Sub-section (5) of Section 1 of the said Act. In any event, the appropriate Government is empowered to extend the provisions of the E.S.I. Act to any establishment or class of establishments, Industrial, Commercial, agricultural, or otherwise.

34. We are of the view that the business activity carried on by the writ petitioner Company is of a commercial nature as it involves selling of services and that the company is an establishment which comes within the scope of the impugned Notification notwithstanding the fact that the provisions of the E.S.I Act have not been extended to Banking Institutions carrying on the same kind of business as that of the writ petitioner Company. It is up to the appropriate Government to take a decision as to whether the provisions of the said Act should be extended to Banking Institutions as well. In the E.S.I Act there is nothing to indicate that a shop is not an establishment. On the other hand, the expression "establishment" has a wide connotation, and, in our view includes the expression "Shop" in its embrace, thus bringing the said Notification squarely within the confines of Sub-section (5) of Section 1 of the said Act and extending its provisions to the writ petitioner Company also.

35. In our view, this appeal must succeed on our aforesaid findings and it is not necessary for us to go into the other submissions made on behalf of the respective parties, though we do not accept Mr. Moitra's contention that the jurisdiction of the writ Court stands excluded by virtue of the provisions of Section 75 of the ESI Act.

36 The appeal is, accordingly, allowed. The judgment and order of the learned Single Judge dated February 15, 1991, is hereby set aside and the writ petition is dismissed.

37. There will, however, be no order as to costs.

Visheshwar Nath Khare, C.J.

38. I agree.