

Employee'S State Insurance Corpn vs R.K.Swamy on 28 October, 1993

Equivalent citations: 1994 AIR 1154, 1994 SCC (1) 445, AIR 1994 SUPREME COURT 1154, 1994 (1) SCC 445, 1994 AIR SCW 428, (1994) 1 COM LJ 255, 1994 (1) LAB LR 51, (1993) 6 JT 176 (SC), 1993 (6) JT 176, 1994 SCC (L&S) 586, (1994) 84 FJR 67, (1993) 2 CUR LR 1068, (1993) 67 FAC LR 1145, (1994) 1 LAB LJ 636, (1994) 1 SCT 399, (1993) 2 LAB LN 639

Author: S.P Bharucha

Bench: S.P Bharucha, Kuldip Singh

PETITIONER:

EMPLOYEE'S STATE INSURANCE CORPN.

Vs.

RESPONDENT:

R.K.SWAMY

DATE OF JUDGMENT 28/10/1993

BENCH:

BHARUCHA S.P. (J)

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BHARUCHA S.P. (J)

KULDIP SINGH (J)

CITATION:

1994 AIR 1154

1994 SCC (1) 445

JT 1993 (6) 176

1993 SCALE (4) 284

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by BHARUCHA, J.- Leave granted in the special leave petitions.

2. These are appeals by special leave filed by the Employees State Insurance Corporation against the judgments and orders of the High Courts of Bombay, Madras and Kerala holding that advertising agencies are not shops for the purposes of the application thereto of the Employees' State Insurance Act, 1948 (hereinafter referred to as "the said Act".) All the appeals can, therefore, be disposed of by a common judgment.

3. It is convenient to take note in the judgment, as illustrative, of the facts of the case arising in Bombay.

4. A notification was issued under Section 1(5) of the said Act by the Government of Maharashtra. Section 1(5) entitles the appropriate Government, (in these appeals, admittedly, the Governments of Maharashtra, Tamil Nadu and Kerala) to extend the provisions of the said Act, in consultation with the appellants (the Employees' State Insurance Corporation) and with the approval of the Central Government, after giving 6 months' notice of its intention so to do by a notification in the Official Gazette, to any establishment or classes of establishments, industrial, commercial, agricultural or otherwise. By the said notification the said Act was applied to, inter alia, shops. The relevant portion of the notification read thus:

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

(i) hotels;

(ii) restaurants;

(iii) shops;

(iv) cinemas, including preview theaters; and

(v) newspaper establishments as defined in Section 2(d) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (43 of 1965)."

5. The appellants informed M/s Dattaram Advertising (P) Ltd., the respondent in the appeal, that it was covered by the notification and required it to comply with the provisions of the said Act and make contributions thereunder. The respondent resisted and, ultimately, filed an application before the Employees' State Insurance Court contending that it was not a hotel, a restaurant, a shop, a cinema or a newspaper establishment and, therefore, the said Act had not been extended to it by the said notification. The appellants submitted that the respondent was a shop and, accordingly, covered by the said notification and, therefore, by the said Act. The Employees' State Insurance Court upheld the submission and dismissed the respondent's application. An appeal was filed by the respondent under the provisions of the said Act before the High Court at Bombay and the learned Single Judge who heard it reversed the order of the Employees' State Insurance Court, holding that the respondent was not a shop. The appellants filed a Letters Patent Appeal, upon which the impugned judgment and order was made.

6. The impugned judgment noted the evidence on behalf of the respondent as to the activities carried on in its advertising agency, thus:

"The witness on behalf of the respondent has stated that sometimes the clients visit the office of the respondent, while sometimes the officers of the respondent visit its clients. The proposals for the promotion of the products in different media are given by the officers of the respondent in its office. Advice are given by the respondent's officers as to the expenses that could be incurred if the products are advertised through the different media, such as newspapers, All India Radio, television, etc. Basically, says the witness, the respondent renders advice to its clients as to how their products are to be advertised. Though at one stage he made himself bold to say that the income of the respondent was only by way of commission which the respondent earns by giving advertisements to the media, he was naturally compelled to admit later that the clients also pay the respondent for the various services rendered by the respondent's Organization.

8. Proceeding further, it may be noted that the respondent's Organisation has an art department, a media department and an accounts department. The different categories of the employees are office peons, assistants, accountants, artists, art directors, etc. The witness has described the manner in which a proposal for the advertisement takes shape and how it is ultimately executed.

The description given by him, happily brought out in the cross-examination on behalf of the Corporation, gives a fairly accurate picture of the work done by the respondent. The idea for advertising is suggested, in the first place, by the respondent to its clients. After the idea is accepted in one form or another, the execution of the same is taken up. The photograph work is given to outside agencies. However, the drawing of the sketches and doing the painting work are done by the art department of the respondent. After the work is over, a bill is prepared in respect of a particular client and the payment is naturally made by the client in accordance with the bill."

7. The Division Bench held that it was clear that the respondent, in the course of its business or commercial activity, did not sell any unit of work or unit of commodity to any particular person, not even to its client. The bill that was prepared depended upon the extent of the work involved, the quality of the work and the volume of publicity undertaken. The payment was not so much for the quantity but for the quality. It was true that the advertising agency got paid for the services which it rendered but the services were more in the nature of supply of ideas rather than services of any particular tangible type. If in the work that was done by the advertising agency on behalf of its client, a predominant part was played by the mind and what was supplied was the product, such as an idea for an effective sale campaign, one could not conceive this activity as being one which involved the sale and purchase of services. The Division Bench distinguished the judgment of this Court in the case of *Hindu Jea Band v. Regional Director, Employees' State Insurance Corpn., Jaipur* stating that the services of an advertising agency were not available on retail basis in the sense that any person could go and obtain the same. Secondly, the services of the advertising agency were not sold

at a stipulated price, the price necessarily varied according to the volume, nature and complexity of the work assigned to it by its client. The Division Bench emphasised that a shop, even in its expanded meaning, must be a place where goods and services in a tangible form were sold, such as an entertainment programme which appealed to the senses, or the reservation of accommodation in transport. Even if it were accepted that a shop meant a place where goods and services were sold, it could not legitimately be held that the premises in which an advertising agency conducted its business was 1 (1987) 2 SCC 101 : 1987 SCC (L&S) 88: AIR 1987 SC 1166 a place where services were sold. The concept of sale necessarily involved a unit of work or of service, a definite price for the same and its availability on retail basis to anyone who asked for it. The Division Bench, therefore, upheld the contentions of the respondent and dismissed the appeal.

8. Shri M.L. Verma, learned counsel for the appellants, submitted that a shop was a place where services were rendered for consideration and that an advertising agency being a place where services were rendered for consideration, it was a shop. He submitted that the said Act was a piece of beneficial legislation and the court ought so to interpret it as to bring employees into its fold rather than the other way around. He relied upon the aforementioned judgment of this Court in the case of Hindu Jea Band as also on the decisions of this Court in Cochin Shipping Co. v. E.S.I. Corpn.² and International Ore and Fertilizers (India) Pvt. Ltd. v. Employees' State Insurance Corpn.³

9. Mr Pai, learned counsel for the advertising agencies involved in the Madras cases, drew our attention to the correspondence which had taken place between the Government of Tamil Nadu and the appellants in the course of the consultation required by Section 1(5). The correspondence showed, in his submission, that the larger area of commercial activity was not intended to be covered by the word "shop". It was used to bring into the coverage of the said Act small retail establishments. Mr Pai and other learned counsel for the respondent advertising agencies submitted that it was the retail activity of the establishment that had been emphasised in the Hindu Jea Band case] and an advertising agency was not a retail establishment. Counsel cited the judgment of this Court in Regional Provident Fund Commissioner v. Shibu Metal Works⁴ which sets out, broadly, the principles on which an entry in a statute such as the said Act must be construed.

10. In the case of Hindu Jea Band' the petitioner arranged for musical performances on occasions such as marriages. The question was whether its business premises could be called a shop. The Collins English Dictionary defined the word 'shop' thus:

"(i) 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."

The Court said: (SCC p. 103, para 3) "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. We, therefore, hold that the place where the petitioner has been 2 (1992) 4 SCC 245 1993 SCC (L&S) 85 3 (1987) 4 SCC 203 1987 SCC (L&S) 391 4 (1965) 2 SCR 72 : AIR 1965 SC 1076 :(1965) 1 LLJ 473 carrying on business is a shop to which the Act is applicable by virtue of

the notification referred to above."

11. In the case of International Ore and Fertilizers (India) Pvt. Ltd. ³ the Court said: (SCC pp. 206-07, para 4) "The word 'shop' is not defined in the Act or in the notification issued by the State Government. According to the Shorter Oxford English Dictionary the expression 'shop' means 'a house or building where goods are made or prepared for sale and sold'. It also means a 'place of business' or 'place where one's ordinary occupation is carried on'. In ordinary parlance a 'shop' is a place where the activities connected with the buying and selling of goods are carried on. The evidence produced in the case shows that the petitioner is carrying on its business at its business premises in Secunderabad. At that place the petitioner carries on the commercial activity facilitating the emergence of contracts of sale of goods between its foreign principals and the State Trading Corporation/Minerals and Metals Trading Corporation of India. It arranges for the unloading of the goods under its supervision and for the survey of the goods despatched by its foreign principals at the ports on behalf of its foreign principals and on the goods being delivered to the Central Government it collects the price payable by the Government and remits it to its foreign principals. All these activities are directed and controlled from its premises at Secunderabad. 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 to 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 are imported into India. The petitioner acts as the agent of its foreign principals who are the sellers. The petitioner directs and controls all the 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 our view the Employees' Insurance Court placed a very narrow interpretation on the expression 'shop' while upholding the contention of the petitioner by confining 'shop' to a place where goods are actually stored and delivered pursuant to a sale. We agree with the decision 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 their provisions so that the purpose of the legislation may be allowed to be achieved rather than frustrated or stultified."

12. In the case of Cochin Shipping Co.² this Court took note of the decisions in the cases of Hindu Jea Band' and International Ore and Fertilizers (India) Pvt. Ltd.³ and it noted that the appellant was carrying on stevedoring, clearing and forwarding operations. Clearing documents, even if it be in the Custom House, was necessary for the export or import of goods. These services formed part of the carriers' job. It could not be gainsaid that the appellant was rendering a service to cater to the needs of exporters and importers and others who wanted to carry goods. Therefore, the appellant's premises were held to be a shop carrying on a systematic economic or commercial activity.

13. In the case of Regional Provident Fund Commissioner v. Shibu Metal Works⁴ this Court noted that the Employees Provident Fund Act was intended to serve a beneficent purpose. The object which the Act purported to achieve was to require that appropriate provision should be made for employees employed in establishments to which the Act applied. That meant that in construing the material provisions of such an Act if two views were reasonably possible, the courts should prefer the view which helped the achievement of the object. When the words used in an entry were capable of a narrow or a broad construction, each construction being reasonably possible, and it appeared that the broad construction would help the furtherance of the object, then it was necessary to prefer that construction. This rule postulated that there was a competition between two constructions, each one of which was reasonably possible. The rule did not justify straining words or putting an unnatural or unreasonable meaning on them just for the purpose of introducing a broader construction.

14. There is no doubt at all that the said Act is beneficent legislation. If, therefore, it is reasonably possible so to construe the word "shop" as to include the activity of an advertising agency within it, that construction must be preferred.

15. The decision in the case of Hindu Jea Band' held a shop to be "a place where services are sold on retail basis". It was, therefore, held that making available on payment of a stipulated price the service of musicians employed by the petitioner on wages made the petitioner's establishment a shop. In the case of International Ore and Fertilizers (India) Pvt. Ltd.³ the petitioner carried on commercial activities facilitating the sale of goods by its foreign principals to the State Trading Corporation or the Minerals and Metals Corporation. It arranged for the unloading of such goods and, their survey. Upon delivery it collected the price payable and remitted it to its foreign principals. These were trading activities and although the goods imported were not actually brought to the petitioner's premises and delivered to the purchasers there, the premises were held to be a shop because the trading activities aforementioned related to the sale of goods. These judgments were followed in the case of Cochin Shipping Co.² which catered to the needs of exporters and importers and others who wanted to carry goods. The appellant's premises were, therefore, held to be a shop where systematic economic or commercial activity was carried on.

16. In the light of these judgments and the expanded meaning now given to the word "shop", the evidence which we have reproduced above setting out the different activities of an advertising agency needs to be considered. Clients call on an advertising agency to initiate campaigns for promotion of their products. Advertising campaigns can be conducted in the different media and otherwise. The advertising agency gives advice in this behalf and as to possible expenses. The advertising agency prepares and presents alternative campaigns for the client to choose from. For such purpose it must prepare the necessary art work and the appropriate words to go with it. It employs specialists in these fields. The advertising agency is paid for the service it renders as aforesaid by the client. It also receives commission from the media through whom advertising is done.

17. Anyone who has products to sell may approach an advertising agency. The advertising agency will prepare an advertising campaign for him utilising the services of the experts it employs in this

behalf. It sells the campaign to the client and receives the price thereof. Indubitably, the price will depend upon the nature of the campaign, but that does not, in our view, make any great difference. Essentially, the advertising agency sells its expert services to a client to enable the client to launch an effective advertising campaign of his products. Without straining language, the premises of an advertising agency can, therefore, reasonably be said to be a 'shop', as now understood.

18. The correspondence between the Government of Tamil Nadu and the appellants in the course of consultation under Section 1(5) of the said Act does not assist, in our view, even the advertising agencies in the cases from Madras for, whatever the view of the appellants was before the notification was issued, it is for the courts to interpret the notification once it is issued. The doctrine of contemporaneous exposition does not apply here. The appellants have not, in implementing the notification, proceeded on the basis that advertising agencies are not shops.

19. Accordingly, all the appeals [except the appeal arising from SLP (C) No. 12696 of 1987] are allowed and the judgments and orders under appeal are set aside. The respondents therein are directed to register themselves and make contribution under the said Act as on the date from which they were first called upon so to do.

20. The appeal arising from SLP (C) No. 12696 of 1987 relates to a steamship company. The activities of a shipping company were considered in the case of Cochin Shipping Co.2 aforementioned. Regardless of the fact that the steamship company in this appeal does not carry on stevedoring operations, it is covered by the aforementioned case. The appeal arising out of SLP (C) No. 12696 of 1987 is, therefore, dismissed.

21. There shall be no orders as to costs in these appeals.