
(1991) 07 KL CK 0061

High Court Of Kerala

Case No: O.P. No"s. 4944 and 7648 of 1987

Waves Advertising and
Marketing (P) Ltd.

APPELLANT

Vs

Jaison

RESPONDENT

Date of Decision: July 8, 1991

Acts Referred:

- Kerala Shops and Commercial Establishment Act, 1960 - Section 2(15)

Citation: (1992) 1 LLJ 309

Hon'ble Judges: K.A. Nayar, J

Bench: Single Bench

Advocate: B.S. Krishnan, for the Appellant; M. Ramachandran, for the Respondent

Final Decision: Allowed

Judgement

K.A. Nayar, J.

Aggrieved by the decision of the Appellate Authority under the Kerala Shops & Commercial Establishments Act, both the employer and employee filed these original petitions. The writ petition filed by the employer is O.P.4944/1987 and the writ petition filed by the employee is O.P.No.7648/87. The employer is aggrieved against the finding of the Appellate Authority that the Establishment, viz. Waves Advertising & Marketing (P) Ltd., is a shop. It is also aggrieved by the finding that there is no reasonable cause for terminating the employment and the employee will not come under the exempted category viz. persons employed in the position of management.

2. The employee is aggrieved, because the compensation given is an incredible low amount, viz. Rs. 10,000/- as the petitioner was getting a salary of Rs. 2,500/- at the time of termination.

3. The employment of the employee was terminated on September 30, 1984 after serving a notice which says the service will stand terminated on September 30, 1984. When the

employment was thus terminated, the employee filed an appeal u/s 18 of the Kerala Shops & Commercial Establishments Act (for short "the Act") The employee contended in appeal that he comes under the definition employee as defined under the Act and that his employment was terminated without complying with the provision of Section 18 in that there was no reasonable cause for terminating the service of the employee, notice contemplated u/s 18 was not given and no payment has been made in lieu of notice. Since the termination is not for a misconduct, it is contended that the termination was illegal. Therefore, he prayed for setting aside the termination and for reinstating him with back wages. The Management contended that the appeal was not maintainable. The fact that the employee was appointed on November 2, 1980 as an Art Director and continued till September 30, 1984 was admitted. But it was contended that the appeal was not maintainable. The fact that the employee was appointed on November 2, 1980 as an Art Director and continued till September 30, 1984 was admitted. But it was contended that he left the company to take up employment in another company. Further, the Management contended that the employee will not come within the meaning of the Act, and the Company cannot be treated as a shop or establishment within the meaning of the Act. The authority considered whether the employer is running a shop or establishment within the meaning of the Act, whether the employee is entitled to the benefit of the Act, whether the termination is for reasonable cause and also the relief prayed for by both the parties. The Appellate Authority found that the employer's establishment is a shop, that the employee who is drawing an amount of Rs. 2,500/- as an Art Director is not entitled to exemption u/s 3(1)(a) of the Act and the termination is not for reasonable cause, but directed to pay an amount of Rs. 10,000/- in full and final settlement.

4. It is submitted at the bar that the employer has closed the establishment in Kerala and is now functioning in Bangalore and, therefore, I gave time to the parties to find out whether a settlement is possible. Since the petitioner is not operating in Kerala, counsel for the Management pleaded inability to get instruction from the employer. Therefore, I am examining the arguments in detail.

5. Counsel for the employer submitted that the Advertising Agency is not a shop coming within the meaning of the Act so as to attract Section 18 of the Act. Section 18 of the Act says that no employer shall dispense with the services of an employee employed continuously for a period of not less than six months, except for a reasonable cause and without giving such employee atleast one month's notice or wages in lieu of such notice. Such notice shall not be necessary where the services of such employee are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an inquiry held for the purpose. Admittedly, in this case the termination is not for a misconduct and the termination purports to be for a reasonable cause. The employer means a person owning, or having ultimate control over the affairs of an establishment and includes the manager, agent or other person acting in the general management or control of an establishment and the employee means a person wholly or principally employed, in and in connection with, any establishment and includes an apprentice. Establishment means a

shop or a commercial establishment. It is in that way the word "shop" comes for interpretation and "shop" means commercial or industrial or trading or insurance establishment, an establishment or administrative service in which the persons employed are mainly engaged in office work. (Other portion of the definition can be ignored). Thus the shop means any premises where services are rendered to customers. On a casual reading of the definition it can be stated that a premise where services are rendered may come within the definition of shop, and therefore, the establishment is a shop. But a careful examination of the definition in the light of the decisions compels me to come to a different conclusion. The word "service" has different meaning and takes colour from the context. Service in Tennis and Shuttle Badminton may have a different meaning from the meaning attributable to it in service jurisprudence. The term "service" has to be explained in the context of Section 18 of the Act. In the decision reported in [Phillipos and Co. Vs. State](#), the Karnataka High Court held that the office of a Chartered Accountant is not a shop or commercial establishment. The service rendered by Chartered Accountants is predominantly mental or intellectual rather than physical or manual. Therefore, it was held that the office of the Chartered Accountant is not a shop. The Supreme Court held in the decision reported in [V. Sasidharan Vs. Peter and Karunakar and Others](#), that the lawyers' office is not shop or commercial establishment as they do not render service to customers. In the decision reported in *Hindu Jea Band v. ESI Corporation* 987 I LLJ 502, the Supreme Court held that shop includes a place where services are sold, and in order to make a premise a shop, services are to be sold on rental basis. In [Employees' State Insurance Corporation Vs. Dattaram Advertising \(Private\) Ltd.](#), the Bombay High Court held that Advertising Agency is not shop. They are not selling any unit of work, service rendered is not tangible and are mostly in the nature of supply of an idea, the payment is for quality and not for quantity and, therefore, it is held in that case the premises of advertising agency is not a shop. Hence, it is to be held that wherever services are rendered, the premises are not shop. Service must be sold on retail basis for a stipulated price for coming under the definition of shop. Even though the places where services are rendered will be a shop by definition it is to be confined by decisions to situation when the services are sold to any person who wants to avail the same and made available on payment of stipulated price with no variation according to volume, nature and quantity or complexity of work involved in the matter. In that way service has been characterised as the ordinarily understood services like repairs of and servicing of an Automobile, Barbershop, drycleaners, laundries, lending libraries of books and video cassettes, bicycle shops where ordinary people have access to such shops in a routine manner and not so in the case of Atelier or an Artist where he paints or does sculpturing. The Bombay High Court also noted that a visual or a catchy tune in an advertising agency would be a type of intellectual property for which copy right can be claimed but it would be doing violence to language to call the sites of such intellectual activity a shop. Therefore, it is stated that the general sense of the country would not accept the concept. Thus the shop though liberally interpreted would take in any place where the services are rendered, but 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. The services of advertising agents are more in the nature of supply of an idea rather than the supply of any particular tangible service and predominant part of which is played by the mind. It is a creative tool in the hands of men and what is supplied is the product of such an idea for the effective campaign for sale. The activity will not involve sale or purchase. The Supreme Court emphasised that in a shop service would be available on a retail basis and would be sold at a stipulated price and the service must be in a tangible form. A Division Bench of this Court which examined the question whether an advertising concern is a shop for the purpose of coverage of ESI Act, came to the conclusion that K.P.B. Advertising Pvt. Ltd. is not a shop. This Court held that:

"We do not understand the decision of the Supreme Court in [Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others](#), 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 Hindu Jea Band's 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 [Employees' State Insurance Corporation Vs. Dattaram Advertising \(Private\) Ltd.](#), 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".

These decisions, though rendered under the ESI Act, explained the meaning of "shop" and held that any premise where services are rendered will not be considered as shop within the meaning of the Act. The service is which can be rendered on a retail basis involving the sale or purchase in tangible form. After the Supreme Court decision declaring that lawyers firm is not a shop or commercial establishment, certain State legislatures amended the Shops Act viz. Bombay and Calcutta, including law firms as shops and Commercial establishment, but they have been struck down by the respective High

Courts holding that inclusion of legal practitioners firm in the definition of "shop" will violate constitutional safeguards. (See [Dipti Kumar Basu and Others Vs. Chief Inspector \(Shops and Establishments\) and Another](#), and [Narendra Keshrichand Fuladi and another Vs. State of Maharashtra](#)). Therefore, the definition of the shops will not cover all places where services are rendered as it will then violate the constitutional safeguards. In that view of the matter the finding in Ext.P3 that the employee's establishment is a shop is illegal. Therefore, the original petition, viz. O.P.No. 4944/87 filed by the employer will have to be allowed.

6. The employee has a case that even if the establishment of the employer is not a shop, it will be a commercial establishment for it is an establishment or administrative service in which persons employed are mainly engaged in office work. I refer to the decision in *Karunakaran Nair v. Authority under Payment of Wages Act 1972* 1 LLJ 350 wherein the word commercial establishment has been explained. The definition of commercial establishment has two parts. The first part refers to a commercial or industrial establishment and the second part refers to an establishment or administrative service in which persons employed are mainly engaged in office work. This Court held (p.351):

"We are therefore of opinion that the word "establishment" in the second part of the definition is used in the meaning the word has a common parlance, viz. "An organised staff of employees or servants, including, or occasionally limited to, building in which they are located", (vide Shorter Oxford English Dictionary) with the result that a "commercial establishment" will mean an establishment or administrative service in which the persons employed are mainly engaged in office work, etc."

This aspect is not considered by the appellate authority and this has to be considered by the appellate authority in the light of the evidence. Parties are free to adduce fresh evidence before the appellate authority if so required. Since I am remanding the case to the appellate authority, it is not necessary to consider the other contentions of the management and also the contention of the employee for enhanced compensation. Since the employer as well as the employee are aggrieved by the appellate order, I need not limit the remand to any particular issue.

7. In the circumstances, I allow both the original petitions and remand the matter for fresh disposal to the appellate authority in the light of the observations contained in this judgment.