(2011) 05 DEL CK 0505

Delhi High Court

Case No: FAO 124 of 2002 and CM No. 291 of 2002

Consulting Engineering Services (India) Pvt. Ltd.		APPELLANT
	Vs	
The Chairman, Esi Corporation and Others		RESPONDENT

Date of Decision: May 3, 2011

Acts Referred:

- Consumer Protection Act, 1986 - Section 2(1)
- Employees State Insurance Act, 1948 - Section 39, 40, 75, 82, 87
- Penal Code, 1860 (IPC) - Section 406

Citation: (2011) 179 DLT 583 : (2011) 124 DRJ 63 : (2011) 130 FLR 80 : (2011) 4 ILR Delhi 549 : (2012) 2 LLJ 407 : (2011) LLR 687

Hon'ble Judges: Reva Khetrapal, J

Bench: Single Bench

Advocate: Rakesh Kumar Khanna, Anurag and Neha Garg, for the Appellant; K.P. Mavi, for the Respondent

Final Decision: Dismissed

Judgement

Reva Khetrapal, J.

The present appeal filed u/s 82 of the Employees? State Insurance Act, 1948 is directed against the judgment and order dated 15.02.2002 passed by the learned Senior Civil Judge, ESI Court, Delhi in ESI Petition No. 19/99, whereby it was held that the Appellant is covered by the Employees State Insurance Act, 1948 (hereinafter referred to as "the Act") and is not entitled to the relief claimed by it in the petition filed u/s 75 of the Act.

2. The facts leading to the filing of the petition under the aforesaid Act are that the Appellant-Company is a private limited company incorporated under the provisions of the Companies Act, 1956 with its registered office at 57, Nehru Place, Manjusha

building, 5th Floor, New Delhi-110019. It was established in May, 1969 as a professional Architectural/Engineering Consultancy Organisation having no association with any contractor/manufacturer/supplier and renders comprehensive consultancy services starting from initial fact finding surveys, formulation and concept planning, right upto project management and supervision of various kinds of Engineering and Architectural services. It does not carry out any manufacturing activity nor it produces any goods for marketing and supply to any of its clients and customers nor it produces or supplies any goods to the public in general. It is claimed that the Appellant-Company is neither a "factory" nor an "establishment" nor a "shop" within the meaning of the ESI Act. The dominant feature of the application of the ESI Act for the purpose of definition of such application is relatable only to factories and establishments where either manufacturing process goes on or where the business of selling and purchase takes place as a commercial activity. In the case of the Appellant, the said features are claimed to be conspicuously absent and as such the employees of the Appellant are not employees within the meaning of the said Act. It is further claimed that the Appellant-Company is providing medical facilities to its employees which are far superior to those provided by the Respondents, and as such the provisions of the Act are not attracted to the Appellant-Company. It is asserted that the Appellant-Company being not aware of the existing position of the ESI Act, and the implications thereof, had allowed itself to be registered under the said Act. This was done under mistake, and on account of the said mistake it had also deposited an amount of Rs. 10,51,681/- to the ESI Corporation. The Appellant claims to be entitled to the refund of the said sum of Rs. 10,51,681/- and to be de-registered from the operation of the Act. The Respondents having refused to accede to the said prayer and having claimed a further contribution to the tune of Rs. 15,50,703/- for various periods, the Appellant was compelled to file a writ petition before this Court, being Civil Writ Petition 153/98, which was disposed of on 28.01.2000 by passing the following order:

28.1.2000

Present: Ms. Deepty Chowdhary for the Petitioner.

Mr. Harpreet Singh for the Respondent-4.

CW.153/98 & CM No. 2553/98 & CM 216/98

Rule.

With the consent of parties, the matter is taken up for final disposal at this stage today.

The Petitioner received show cause notice from Respondent No. 1/Employees State Insurance Corporation calling upon it to show cause as to why the Petitioner as one of the principal employers be not prosecuted for offence u/s 406 of Indian Penal

Code for non-payment of contribution u/s 39 and 40 of E.S.I. Act. Petitioner replied stating that it was not the liability of the Petitioner to pay any such contribution. However the contention of the Petitioner was not accepted by E.S.I. authorities and demand notice was issued dated 4.11.1996 demanding a sum of Rs. 7,14,656.25 p for the period from 17.1.1995 to 31.1.1995 and 1.2.1995 to 30.6.1996. Subsequently further a sum of Rs. 3,37,025/- was also demanded. Petitioner made the payment of Rs. 10,51,681/- pursuant to the aforesaid demand notices. Thereafter on 5.9.1997 another sum of Rs. 15,50,703/- was demanded. Petitioner challenged the validity of this demand and requested the Respondent Corporation to exempt its company from the ESI coverage under the provisions of Section 87, 88, 89 and 91A of the ESI Act. Thereafter Petitioner filed CW No. 5374/97 in this Court in which order dated 10.12.1997 was passed directing the Respondent to give hearing to the Petitioner. It is the case of the Petitioner that without giving hearing Deputy Director, the Respondent No. 3 passed an ex-parte order directing the Petitioner to pay a sum of Rs. 15,50,703/-. At this stage, Petitioner filed this writ petition challenging the aforesaid order dated 19.12.1997 as well as coverage of the Petitioner establishment under the provisions of ESI Act.
On 11.5.1999 an order in this writ petition was passed in the following terms:

Learned Counsel for the Respondent No. 1 & 2 submitted that the Petitioner''s plea that he is not covered by the provision of the Employees? State Insurance Corporation Act, 1948, hereinafter referred as ESI Act, can be raised before ESI Court u/s 75 of the ESI Act. Learned Counsel for the Petitioner is, therefore, permitted to raise this plea before the ESI Court within a period of two weeks from today. The ESI Court will decide this issue raised by the Petitioner within a period of six weeks thereafter.

After the aforesaid order, the Petitioner raised the dispute before the ESI Court by filing this petition which is pending before the said Court. Counsel for the Petitioner states the next date is 16.3.2000 for filing of reply by Respondents 5 & 6/Central Government.

In view of the aforesaid position, when the matter is seized of by ESI Court and which is also the efficacious alternative remedy provided to the Petitioner in such cases, no useful purpose would be served in keeping this petition pending. If the Petitioner is aggrieved against the order that would be ultimately passed by the ESI Court, Petitioner has remedy provided under ESI Act which provides for complete machinery for adjudication for such disputes. The counsel for the Petitioner accepts this position and is willing to withdraw this petition. However she contends that in the meantime, the stay order granted by this Court should continue till the matter is decided by the ESI Court. This stay order was passed after hearing both the parties at length and the Respondents agreeing to the same. Mr. Harpreet Singh, learned Counsel for the Respondent however points out that it was on the understanding that ESI Court would decide the matter within a period of six weeks as mentioned in

order dated 11.5.1999 also.

Keeping in view the entirety of circumstances stated above, it would be appropriate to continue the stay order and at the same time it is necessary to issue directions to ESI Court to decide the matter as expeditiously as possible. Accordingly direction is issued to ESI Court to decide the matter by 31.5.2000 and interim order passed in this Court would continue till the decision of the case by ESI Court.

The Writ Petition and CM dismissed as withdrawn.

Dasti to counsel for both the parties.

3. In view of the aforesaid order, the Appellant, as already stated above, filed a petition u/s 75 of the ESI Act, which was dismissed vide the impugned order dated February 15, 2002.

4. Aggrieved by the aforesaid dismissal, the Appellant has preferred the present appeal praying for quashing the impugned order and judgment dated 15.02.2002, on which I have heard Mr. Rakesh Kumar Khanna, the learned senior counsel for the Appellant and Mr. K.P. Mavi, the learned Counsel for the Respondents.

5. Mr. Khanna, the learned senior counsel for the Appellant contended that the provisions of the Act are applicable only to factories and establishments where either the manufacturing process goes on or where business of selling and purchase takes place as a commercial activity. It is the case of the Appellant-Company that it is neither a factory nor an establishment nor a shop and, as such, is not liable to be covered under the Act. It is providing consultancy services only, and an organization providing consultancy services only is not covered under the Act. In this context, Mr. Khanna relied upon the meaning of the words "Shop" and "Establishment" as per the New Lexicon, Webster''s Dictionary of the English language (Deluxe Encyclopedic Edition), and the Oxford Dictionary as given below. In the former, the words "Shop" and "retail" are described as under:

"SHOP" A Store (Building where retail trade is carried on).

A workshop or establishment where machines or goods are made or repaired. "

RETAIL? Selling of goods, which are for sale, in small quantities to the General Public, outlet (i.e. shops) for the retail of leather goods, retail business traders, manufacturers, etc.

The meaning of word "Shop" as per Oxford Dictionary is as under:

Building or room where goods or services are sold to the public.

The meaning of the word "Commercial Establishments" as per Delhi Shops and Establishments Act, 1954 was also adverted to as given below:

"COMMERCIAL ESTABLISHMENTS "Shop" means any premises where goods are sold, either by retail or wholesale or when services are rendered to customers, and includes an office, a store-room, godown, warehouse or workhouses or work place, whether in the same premises or otherwise, used in or in connection with such trade or business but does not include a factory or "Commercial Establishment".

6. Mr. Khanna, the learned senior counsel for the Appellant also relied upon the definition of "Professional Activity" as set out in the Master Plan, the relevant portion of which reads as under:

15.8. PROFESSIONAL ACTIVITY

Subject to the general terms and conditions specified in para 15.4, professional activity is permissible in plotted development and group housing under the following specific conditions:

i. Professional activities shall mean those activities involving services based on professional skills namely Doctor, Lawyer, Architect, and Chartered Accountant, Company secretary, Cost and Works Accountant, Engineer, Town Planner, Media professionals and Documentary Film maker;

ii. .....

iii. .....

iv. .....

7. The learned senior counsel for the Appellant further contended that the expression "Shop" means a premises which is used in connection with trade or business, but does not include an establishment where professional service is rendered or professional activity is carried on. Relying upon the judgment of the Hon''ble Supreme Court in V. Sasidharan Vs. Peter and Karunakar and Others, , he contended that on the analogy that a lawyer''s office where advice is given by a lawyer is not a "Shop" or "Commercial Establishment" for the purposes of the Kerala Shops and Commercial Establishments Act, 1960, as held by the Hon''ble Supreme Court, the Appellant''s place of work cannot be regarded as a shop.

8. Reliance was also placed by him on the decision of the Hon''ble Supreme Court in Dharmarth Trust J and K, Jammu and Others Vs. Dinesh Chander Nanda, The question which arose for consideration before the Supreme Court in the said case was whether the suit filed by the Respondent, who was an Architect, was covered under Article 56 of the Jammu and Kashmir Limitation Act, 1995 or whether the said suit was covered under Article 119 of the said Act. For the aforesaid purpose, the Supreme Court interpreted the expressions "price" and "work done" as appearing in Article 56 and held that the term "price" does not cover the services provided by professionals such as an architect, lawyer, doctor, etc. as professionals charge a "fee". Also, the term "work done" in Article 56 will not be applicable to professionals

such as architect, lawyer, doctor, etc. as these professionals render "services" to their clients. The remuneration of a professional is in the form of a "fee" and, therefore, it cannot be said that the professional earns a "price". In common usage, the term "price" refers to goods sold. In paragraph 18, the Court observed as follows:

18. As rightly pointed out by Mr. Giri, learned Senior Counsel for the Respondent that the specific treatment of attorneys/vakils who provide professional services is a reflection of the intention of the legislature to treat the services provided by professionals differently from work done by others. The word "price" was never intended to be used synonymously with the word "fee" and, therefore, the fee charged by an architect for services rendered by him would not be covered under Article 56 of the Act. In the case on hand, the trial court as well as the High Court have made a clear distinction between the terms "work done" and "services". The "work done" would refer to work done by masons such as landfilling or engineering projects, etc.

9. The learned senior counsel for the Appellant also placed reliance upon a three-Judge Bench decision of the Supreme Court rendered in the case of Indian Medical Association Vs. V.P. Shantha and Others, to contend that while a person engaged in an occupation renders service which falls within the scope and ambit of Section 2(1)(o) of the Consumer Protection Act, 1986, the service rendered by a person belonging to a profession does not fall within the ambit of the said Section. He contended that whereas hitherto, the word "profession" used to be confined to three learned professions, viz. the Church, Medicine and Law, by and large professional status has now been conferred on seven specific occupations, namely, (i) architects, engineers and quantity surveyors, (ii) surveyors, (iii) accountants, (iv) solicitors, (v) barristers, (vi) medical practitioners, and (vii) insurance brokers (See: Jackson & Powell on Professional Negligence, 3rd Edition). It has now a wider connotation. As enunciated by Scrutton L.J., the profession in the present use of language involves "the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting or sculpture, or surgery, by intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangement for the production or sale of commodities". [See: IRC v. Maxse (1919) 1 KB 647.

10. Rebutting the aforesaid contentions of the learned senior counsel for the Appellant, Mr. K.P. Mavi, the learned Counsel for the Respondents contended that the present appeal was not maintainable in view of the fact that it raised no substantial question of law as envisaged by the provisions of Section 82 of the Act. Relying upon the Notification No. F.28(2)/88/IMP/LC/Lab/2625-32 dated 30th September, 1988, Mr. Mavi, on merits, contended that the provisions of the Act had been extended to classes of establishments specified in Column I of the Schedule given in the Notification with effect from the 2nd day of October, 1988. The said

Schedule reads as under:

SCHEDULE

By order and in the name of the

Lt. Governor of the Union

Territory of Delhi.

Sd/-

(MRS. M. BASSI)

DEPUTY SECRETARY (LABOUR)

DELHI ADMINISTRATION: DELHI

11. Mr. Mavi also referred to and relied upon the decision of the Supreme Court rendered in the case of AIR 1994 1154 (SC) , wherein the question which had arisen was whether advertising agencies are shops for the purposes of the application of the Act? Answering the aforesaid question in the affirmative, the Supreme Court, taking into account the expanded meaning now given to the word "shop" in various cases before it, held that the advertising agencies were "shops" "where systematic economic or commercial activity was carried on". In arriving at the aforesaid conclusion, the Supreme Court referred to and relied upon the following judgments already rendered by it:

(i M/s. Cochin Shipping co. Vs. E.S.I. Corporation, . In this case, the Supreme Court noted that the Appellant was carrying on stevedoring, clearing and forwarding operations and held that 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.

(ii) M/s. International Ore and Fertilizers (India) Pvt. Ltd. Vs. Employees'' State Insurance Corporation, In this case, 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 Trading 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 never actually brought to the Petitioner''s premises, the premises were nevertheless held by the Supreme Court to be a "shop", because the trading activities "related to the sale of goods".

(iii) Hindu Jea Band, Jaipur Vs. Regional Director, Employees'' State Insurance Corporation, Jaipur, The Supreme Court in this case 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".

(iv) Regional Provident Fund Commissioner Vs. Shibu Metal Works, . It was held that in construing the provisions of the Employees Provident Fund Act, which had a beneficent purpose, if two views were reasonably possible, the Court should prefer the view which helped the achievement of the object. 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 and thus, a broad construction of the Act was to be preferred.

12. Mr. Mavi next sought support from the judgment of the Supreme Court rendered in Kirloskar Consultants Ltd. v. Employees? State Insurance Corpn. reported in (2001) 1 SCC 57. In the said case, the Appellant before the Supreme Court provided under a roof, the services of several different professionals like Engineers, Architects, Financial Consultants and Management Consultants, guidance and advice to other companies, corporations, boards and even local authorities on how best to manage their business for optimum utilization of plant, machinery and other infrastructure. It was the contention of the Respondent that the Appellant was engaged in the consultancy services in technical and marketing fields for a price and it was a "shop". Applying the analogy of R.K. Swamy''s case (supra), the Supreme Court in the Kirloskar case held as follows:

9. What we are concerned in the present case is what this Court was concerned in R.K. Swamy case. An advertising agency organises campaigns by conducting the same in different media and would give advice in this behalf and also in regard to possible expenses. It is also engaged in preparing and presenting alternate campaigns and for such a purpose it prepares artwork and appropriate slogans to go with it. By engaging the service of experts in different fields the advertising agency would prepare the campaign for customers and sell the campaign by receiving the price thereof. As the advertising agency sells its expert services to a client to enable him to launch an advertising campaign to advertise his product, the same being offered for at a price, the premises of an advertising agency could reasonably be said to be a shop. Adopting the same logic, we may say that the business carried on by the Appellant is of consultancy services to its customers in respect of industrial, technical, marketing and management activities and preparation of project reports by engaging the services of architects, engineers and other experts. In substance, the nature of activities carried on by the Appellant is commercial or economical and would amount to parting with the same at a price. Hence reliance on Sasidharan case is misplaced. Thus, we do not find any good reason to differ from the view expressed by the High Court.

13. Placing strong reliance on the aforesaid observations, the learned Counsel for the Respondents contended that the judgments of the Supreme Court relied upon by the learned senior counsel for the Appellant, rendered in the cases of V. Sasidharan, Dharmarth Trust and Indian Medical Association (supra), were clearly

distinguishable on facts. The first case related to the question as to whether a firm of lawyers is a "commercial establishment" within the meaning of the Kerala Shops and Commercial Establishments Act, 1960. In the second case, viz., Dharmarth Trust, the question which arose for consideration was that whether the term "price" used in Articles 52 to 55 of the Jammu and Kashmir Limitation Act, 1995 in co-relation to goods sold and delivered would take a similar meaning when used in Article 56 of the said Act, and it was in this context that the Court held that the term "price of work done" in Article 56 of the Limitation Act cannot be made applicable to professions where the professional merely provides services for a "fee", and the Supreme Court accordingly accepted the claim of the Respondent that the profession of an Architect is one such service, hence Article 56 is not applicable thereto. In Indian Medical Association, the point in controversy related to the Consumer Protection Act, 1986 and the common question raised in all the appeals, special leave petitions and writ petition was whether and, if so, in what circumstances, a medical practitioner can be regarded as rendering "service" u/s 2(1)(o) of the said Act.

14. Rebutting the aforesaid contentions of the learned Counsel for the Respondents, Mr. R.K. Khanna, the learned senior counsel for the Appellant, pointed out that the question of law, as formulated in the Rejoinder-Affidavit filed by the Appellant, is whether the ESI Act was applicable to the Appellant-Company as it does not fall within the scope and definition of shop/factory/establishment as defined in the said Act? Reference was also made by Mr. Khanna to the Regulations framed by the Council of Architecture, and in particular to the Preamble thereof, to reinforce his submission that the work being carried on by the Appellant-Company was professional activity, and to highlight the distinction drawn by him between trading activities for which "price" is paid and professional activity for which "fee" is received.

15. After hearing the learned Counsel for the parties and going through the precedents cited by them at the Bar, I am of the view that the present case stands squarely covered by the decision of the Supreme Court rendered in the case of Kirloskar Consultants Ltd. (supra). In the said case, as in this case, the business carried on by the Appellant was of consultancy services to its customers in respect of industrial, technical, marketing and management activities and preparation of project reports by engaging the services of architects, engineers and other experts. The Supreme Court in the said case after reviewing the entire gamut of case law held that the nature of activities carried on by the Appellant was commercial or economical and would amount to parting with the same at a "price". Reliance in such circumstances on Sasidharan''s case (supra) was held to be misplaced as in the said case the Court was not concerned with the meaning attributed to the word "shop" arising under the ESI Act, and was concerned only with the interpretation thereof for the purposes of the Kerala Shops and Commercial Establishments Act, 1960, wherein Section 2(4) defines "commercial establishment" and Section 2(15)

defines "shop". In the cases Hindu Jea Band, M/s. Cochin Shipping Co. and International Ore & Fertilizers (India) Pvt. Ltd.(supra), the premises were held to be "shop" even though activities relating to sale of goods were not taking place and in the first case the premises were being used for rendering service of musicians, in the second case the steamship Company was not carrying on any stevedoring operations at its office, and in the third case the survey of goods imported was being done.

16. The irresistible conclusion, in my view, therefore, is that whenever an establishment carries on activities in the nature of trade or commerce, it must be held that the premises being used therefore is a "shop" by giving an expanded meaning to the word "shop". The giving of the expanded meaning is entirely justified in view of the fact that the Preamble to the Act explicitly states:

An Act to provide for certain benefits to employees in case of sickness, maternity and "employment injury" and to make provision for certain other matters in relation thereto.

The aforesaid object, being a beneficent one, it stands to reason that a narrow or restricted meaning assigned to the coverage of the Act would defeat the very purpose of the enactment itself.

17. The Senior Civil Judge, in my view, has, therefore, rightly held that it is not necessarily only a place where "goods" are sold which comes within the meaning of the word "shop". A place where "services" are sold has also been legally interpreted to be a "shop". The Appellant-Company, by its own admission, is carrying on consultancy services, for which it charges its clients. The services are not being rendered as gratuitous or for charity, but admittedly for remuneration. As such, the interpretation required to be given to the provisions of Section 1(4) read with Section 2(12)(b) of the Act read with the Notification No. F.28(2)/88/IMP/LC/Lab/2625-32 dated 30th September, 1988 (effective from the 2nd day of October, 1988) must, in my opinion, necessarily encompass services of the nature being rendered by the Appellant.

18. I am fortified in coming to the aforesaid conclusion from the fact that the Appellant-Company of its own accord obtained its registration under the Act, but on second thoughts and presumably on advice subsequently received by it, is trying to have itself de-registered without any valid justification for the same. The last ditch attempt of the Appellant to bring itself within the proviso to Section 1(4) of the Act, which provides that nothing contained therein shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act, also cannot be countenanced. The reason is not far to seek, for the Appellant is neither a Government company nor it claims to be exempted from the provisions of the Act on the ground that it is providing

superior medical services than provided by the Respondent, unless it has been specifically so exempted under the provisions of the Act.

19. In view of the aforesaid discussion, the judgment of the learned Senior Civil Judge is affirmed and it is held that the Appellant- Company, which is a Company covered under the Act, is not entitled to the relief claimed by it in its petition u/s 75 of the Act.

20. The appeal is without merit and is dismissed. CM No. 291/2002 also stands disposed of accordingly.