Employees'' State Insurance Corporation Vs Dattaram Advertising (Private) Ltd.

Letters Patent Appeal No. 39/86

Court: Bombay High Court

Date of Decision: Oct. 9, 1987

Acts Referred:
Employees State Insurance Act, 1948 â€" Section 1(5)

Citation: (1989) 58 FLR 781 : (1988) 1 LLJ 413

Hon'ble Judges: V.P. Tipnis, J; R.A. Jahagirdar, J

Bench: Division Bench

Judgement

Jahagirdar, J.
The question as to the interpretation of the world ""shop"" occurring in a notification issued by the Government of Maharashtra

under S. 1(5) of the Employees'' State Insurance Act, 1948, is involved in this appeal. The facts will be mentioned in a moment. Before that, one

must notice the legal provision under which the notification is issued. The Employees'' State Insurance Act, 1948 makes a provision that it will

apply, in the first instance, to all factories, including factories belonging to the Government, other than seasonal factories. However, by virtue of the

provisions contained in sub-sec. (5) of Sec. 1, the appropriate Government is empowered, in consultation with the Employees'' State Insurance

Corporation, to extend the provisions of the Act or any of the said provisions, to any other establishment, or class of establishments, industrial,

commercial, agricultural or otherwise. Where, however, the appropriate Government is the State Government, not only the consultation with the

Corporation is necessary but also the approval of the Central Government is necessary.

2. Though the Employee''s State Insurance Act originally applied only to the factories, from time to time, in exercise of the powers conferred by S.

1(5) thereof, the Governments, both the Central and the State, have extended the provisions of the Act to different establishments. By issuing the

notification, which is the subject-matter of interpretation before us, the Government of Maharashtra extended all the provisions of the Act to

various classes of establishments mentioned in column (1) of the schedule to the notification in the areas mentioned in column (2) of the schedule.

We are concerned with item (3) of the said notification, which is as follows :

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 theatres; and

(v) newspaper establishments as defined in S. 2(b) of the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955 (45

of 1965).

The Employees'' State Insurance Corporation, the appellants before us, told the respondent, which is a private limited company, that it was

covered by the said notification and accordingly, it must comply with the provisions of the Employees'' State Insurance Act, including the

contributions to be made under the said Act. The respondent resisted the contention of the appellants. There was some correspondence between

the appellants and the respondent. A notice also seems to have been issued by the appellant-Corporation to the respondent asking the latter to

make certain contributions. Since the Corporation did not accept the contention of the respondent, the latter filed an application, being Application

(ESI) No. 24 of 1981, in the Employees'' State Insurance Court, Bombay. In this application, the respondent contended that it is neither a hotel

nor a restaurant nor a shop nor a cinema and definitely not a newspaper establishment. Hence, the action of the Corporation in treating the

respondent as the one covered by the said notification was wrong and illegal. It sought for a declaration that it was not governed by the notification

issued by the Government of Maharashtra. The Corporation resisted the contention of the respondent by contending that the respondent was a

shop and a shop was covered by the notification issued by the State Government. The Employees'' State Insurance Court held that the

establishment of the respondent was a shop and, therefore, it was covered by the notification issued by the State Government. Accordingly the

Employees'' State Insurance Court dismissed the application by its judgment and order, dated 30 August 1983.

3. The respondent preferred an appeal, being First Appeal No. 2691 of 1983, which was heard and allowed by a Single Judge of this Court

(Vaze, J) by his judgment and order, dated 4 March 1986, reported in Dattaram Advertising Pvt. Ltd. Vs. Regional Director Maharashtra

Employees State Insurance Corpn. Bombay and another, . The learned Single Judge has made an exhaustive survey of the extension of the

provisions of the Employees'' State Insurance Act from time to time. He has held that though the word ""shop"" could no longer confine to the

traditional activities, yet it could not be extended to embrace the activities carried on by the respondent. A proper understanding of the activity

carried on by the respondent is naturally necessary. The learned Single Judge was of the opinion that in the modern world, cycle-hiring shops or

those that lend books of video cassettes have become an integral part of the daily community life and an ordinary citizens has an access to such

shops and makes use of them in a routine manner. Proceeding further, Vaze, J., said in Para. 11, at page 12 :

.... Not so with a firm of advertising consultants like the appellants in the present case. Not so with the atelier of an artist where he paints in oil

which paintings may ultimately be sold. Not so with the study of a novelist or a poet where he writes his novel or composes his poem though

ultimately it would be a commercial proposition for him to sell the intellectual property so created. A visual or a catchy tune in an advertising

agency would be a type of intellectual property for which copyright could be claimed in a like manner but it would be doing violence to the

language to call the situs of such intellectual activity a ""shop"" because the general sense of the community would not accept such a concept.

Consistent with this view, the learned Single Judge allowed the appeal and set aside the order passed by the Employees'' State Insurance Court.

4. The Corporation has challenged the judgment and order of the learned Single Judge by means of this Letters Patent Appeal.

5. Sri Nain, the learned advocate appearing for the appellant-Corporation, has contended that the learned Single Judge was in error in giving a

restricted meaning to the word ""shop"" mentioned in the State Government''s notification. In the earlier part of his judgment, the learned Single

Judge has observed the gradual extension of the provisions of the Employees'' State Insurance Act to various establishments which were otherwise

not governed earlier. It is, says Sri Nain, for the State Government to decide as to whether considering various facts and circumstances and the

existence of infrastructure facilities, the provisions of the Act should be extended. Once the State Government, after being satisfied about the need

to extend the facilities to shops and after such satisfaction, issues a notification in exercise of the powers conferred upon it by S. 1(5) of the

Employees'' State Insurance Act, it is not for the Court to decide as to whether the provisions ought to have been extended to a particular

establishment or a class of establishments.

6. While we agree with the contention of Sri Nain that it is not for the Court to decide as to whether the provisions of the Act ought to be or ought

not to be extended to any establishment or a class of establishments, it is certainly within the proper province of the Court to decide whether by a

particular notification the provisions have been in fact extended to any class of establishments. The learned Single Judge has, while exercising this

function, examined the meaning of the word ""shop"" and has come to the conclusion that the word ""shop"" howsoever liberally interpreted could not

include 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. We are, however, examining the question as to whether the view of the learned Single Judge is correct. Sri Nain has relied upon several

judgments of different High Courts in order to seek support to his contention that a shop in modern times must be interpreted to mean any place

where sale and purchase of not only goods but also services take place. One should not be handicapped by the traditional meaning of the word

shop"" when it means a place where goods are sold and purchased. With advance of civilisation and the complexity of modern economics, the

concept of ""shop"" must be given its contemporary connotation which is that a shop must mean a place where not only goods but also services are

bought and sold. We will proceed on the assumption that this is the correct meaning of the word ""shop"" in modern context. Still the question

remains whether the activities, such as those of the respondent, are such that could be said to be the subject-matter of scale and purchase in a

particular place.

7. The evidence in the case consists only of the evidence which has been brought on record on behalf of the respondent. The Secretary and Chief

Accountant of the respondent has been examined as a witness on its behalf. He has given a description of the activities carried on by the

respondent''s organisation. It must be noted that the respondent is an advertising firm. 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. Advices 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 organisation.

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, artist, 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.

9. From what has been mentioned above, it is clear that the respondent in the course of its business or commercial activity does not sell any unit of

work, let alone unit of commodity, to any particular person, not even to its client. The bill that is prepared will naturally depend upon the extent of

the work involved, the quality of the work that is executed and naturally also the volume of the publicity that is undertaken. In an activity of the type

that is carried on by the respondent, one can safely proceed on the basis that the payment is not so much for the quantity but for the quality. It is

true that the respondent renders services for which it gets paid, but the services that are rendered by the respondent are more in the nature of

supply of an idea rather than of the service of any particular tangible type. If, in the work that is executed by the respondent on behalf of its client,

predominant part is played by the mind, a creative tool in the hands of men, and what is supplied is the product such as an idea for the effective

campaign for sale, one cannot conceive this activity as one which involves the sale and purchase of services. Sri Nain quarrels with this

interpretation of the respondent''s activities made by us and suggests that our view is contrary to what is mentioned by the Supreme Court in Hindu

Jea Band, Jaipur Vs. Regional Director, Employees'' State Insurance Corporation, Jaipur, . Sri Nain suggests that the judgment of the Supreme

Court is an authority for the proposition that even if what is sold is not material goods but services, it would amount to a sale. In Hindu Jea Band

case (supra), the petitioner-firm was carrying on the business of playing music on occasions, such as marriages and other social functions. The

petitioner-firm refused to concede that its place of business was covered by the word ""shop"" mentioned in the notification issued, similar to the one

which is before us, by the Rajasthan Government under S. 1(5) of the Employees'' State Insurance Act. The contention urged on behalf of the

petitioner before the Supreme Court that the petitioner was not selling any goods in the place of its business but was only engaged in arranging for

musical performances and therefore, not shop, was rejected by the Supreme Court by holding that the narrow construction placed by the petitioner

on the expression ""shop"" was not acceptable. The word ""shop"" though not defined either in the Act or in the notification, meant, according to the

Supreme Court, a place where services were sold on retail basis. It was taken as undisputed before the Supreme Court that the petitioner before it

had been making available on payment of the stipulated price the service of the members of the group of musicians employed by it on wages.

10. Two basic factors which weighed with the Supreme Court in holding that what can be regarded as a band company was a shop must be

noted. The first was that the services of the players in the band were available on retail basis. The second was that they were so available on

payment of the stipulated price. The services, therefore, by the petitioner in Hindu Jea Band case (supra), were held to be sold and, therefore, the

establishment was held to be a shop. It is not possible to accept the contention of Sri Nain that the facts before us in this case are analogous to

those in the case of Hindu Jea Band (supra). In the first place, the services of the respondent are not available on retail basis in the sense that any

person can go to the respondent and obtain the same. Secondly, the services of the respondent are not sold at a stipulated of price. The price must

necessarily vary according to the volume, nature and the complexity of the work which is assigned to the respondent by its client. One must also

not forget that the shop even in its expanded meaning must be a place where the goods and the services in a tangible form are sold, such as an

entertainment programme which appeals to the senses, or reservation of accommodation in certain transport. The first mentioned is suggested by

the facts in Hindu Jea Band case (supra), and the second is suggested by the facts in the case of New India Maritime Agencies (Private), Ltd. v.

Government of Tamil Nadu and another (1983) ii L.L.j 934 by Padmanabhan, J., of Madras High Court.

11. What has been stated by the Supreme Court in Hindu Jea Band case (supra), therefore, in our opinion, does not support the view which is

canvassed for our acceptance that a firm like the respondent, whose services are in the form of consultation and advice and rendering of certain

services as an advertising agency, is embraced by the word shop. Even if one accepts a shop to mean a place where goods and services are sold,

one cannot legitimately hold that the premises in which the respondent conducts its business are a place where the services are sold. The concept

of sale necessarily involves a unit of work or of service, a definite price for the same and its availability, as pointed out by the Supreme Court, on

retail basis to any one who asks for it. The activity of the respondent does not amount to sale as understood above. We are, therefore, of the

opinion that the view taken by Vaze, J., is perfectly correct not only for the reasons which he has given but also for the reasons which we have

taken the liberty of giving in this judgment.

12. Sri Nain, as already mentioned earlier in the judgment, has relied upon several judgments. None of them is a judgment which is binding upon

us. We have, therefore, felt free to decide the question without being trammeled by any of those judgments. Nevertheless, a brief reference to the

same is warranted in fairness to Sri Nain. In Beeyems Construction Company v. State of Kerala (Original Petition No. 1329 of 1975, dated 1

February 1978), Khalid, J., (as he then was), held that a construction company engaged in the business of undertaking civil contract works, for

which purpose workers were engaged from time to time at the site, was a shop. The learned Judge referred to Shorter Oxford English Dictionary

and Traders Digest Great Encyclopedia Dictionary in order to hold that the word ""shop"" had several shades of meanings and the type of activity

carried on by the petitioner before the Kerala High Court was within the penumbra of the word ""shop.

13. A Division Bench, consisting of Justice Sri Subramanian Poti (as he then was) and Justice Miss Janaki Amma, of Kerala High Court by its

judgment in Darsak Ltd. v. Employees'' State Insurance Corporation (1979) II L.L.J. 288 held that he petitioner before the Court, who was

carrying on the business as dealers and agents of certain manufacturing companies situated outside the State and working for a commission on the

sales turnover and effecting sales promotion, was carrying on the activity of a shop.

14. In Kerala State Financial Enterprises Ltd. v. Regional Director, Employees'' State Insurance Corporation, a Division Bench of the Kerala High

Court, consisting of Justice Sri P. Narayana Pillai and Justice Sri K. Kodor, held that a firm conducting the business of chitties and of advancing

monies to its customers to purchase articles on hire purchase agreements was a shop. (M.F.A. No. 434 of 1978).

15. Justice Sri Padmanabhan of the Madras High Court decided New India Maritime Agencies v. Government of Tamil Nadu (supra), and in that

judgment, the learned Judge held that a company, which was doing the business of steamship agents which involved acting as shipping agent for

booking cargo on behalf of foreign steamship companies, was a shop. This judgment has been subsequently confirmed by the Division Bench of

the Madras High Court, consisting of Sr. M. N. Chandurkar, Chief Justice, and Justice Sri Srinivasan in a judgment which disposed of several writ

petitions dealing with the same question, namely, the interpretation of the word ""shop"". It may incidentally be noted that this Division Bench

judgment in New India Maritime Agencies (Private) Ltd. (supra) has also approved the view taken by Vaze, J., in the judgment which is impugned

before us.

16. In the result, this appeal must be dismissed and is hereby dismissed. In view of the fact that the question involved in this appeal has arisen for

the first time and has not been decided authoritatively by the Court, we direct that the parties shall bear their respective costs throughout. The bank

guarantees given by the respondent stand discharged with effect from 1 December 1987.