

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.07.2018

CORAM

THE HON'BLE MR. JUSTICE M.M.SUNDRESH
and
THE HON'BLE MR. JUSTICE N.ANAND VENKATESH

W.A.Nos.2150 & 2656 of 2010

The Deputy Regional Director,
Regional Office(Tamilnadu),
Employees' State Insurance Corporation,
143, Sterling Road, Chennai-600 034..... Appellant/Respondent in
both appeals

Vs.

Pithavadian & Partners,
33 (Old No.14) College Road,
Chennai-600 006.
Rep., by its Partner Mr Parthasarathy.

... Respondent/Petitioner
in both appeals

Writ Appeals preferred under Clause 15 of the Letters
Patent against the orders dated 07.04.2010 made in
W.P.Nos.23452 and 23453 of 2003.

Petition filed Under Article 226 of the Constitution of
India, praying to issue a Writ of Certiorari call for the
records of the respondent in proceedings No.TN/INS-V/51-75324-
101/737/02 and quash its order dated 11.08.2003 (WP.23452/2003).

Petition filed Under Article 226 of the Constitution of
India, praying to issue a Writ of Prohibition prohibiting the
respondent from invoking the provisions of the ESI Act to the
Petitioner's establishment. (WP.23453/2003).

For Appellant
in both appeals

: Mr.C.K.Chandrasekar
For Mr.G.Bharadwaj for
ESI Corporation

For Respondents
in both appeals

: Mr.Anand Gopalan for
M/s T.S.Gopalan & Co.,

COMMON JUDGMENT

(Judgment of the Court was made by M.M.SUNDRESH,J.)

Since both the writ appeals have been preferred against the orders passed by the learned single Judge involving very same parties and W.A.No.2150 of 2010 has been filed challenging the order passed under Section 45-A of the Employees' State Insurance Act, 1948 (hereinafter called as 'ESI Act'), they have been taken up together and disposed of by way of common judgment.

2. The respondent/writ petitioner is an Architecture Firm. An order was passed by the appellant under Section 45-A of the ESI Act inter alia holding that it would come under the purview of the ESI Act and therefore, the consequence will have to be followed. The following are the findings of the appellant, which are not in dispute.

"A scrutiny of the above agreement also reveal that the maximum, amount of fees to be paid to the architecture as remuneration for the professional service to be rendered to them in relation the respective projects ranges from 2.5% to 4% of the actual cost of the work for the purpose of preparing sketch designs, work drawings, architectural and structural designs including detailed estimate, contractor documents and preparation and checking of bills, periodical supervision at sites and all other related works until handing over the premises to employer to his full satisfaction and the same also stipulates the terms and payment at different phases and finally on successful completion and also making employer's firm responsible for appropriate insurance coverage and also including soil testing, providing technical specification of cost estimated works.

..... On a thorough examination of the above records it is revealed that the employer firm is a firm of architecture rendering professional architectural service to the clients which are governed by the appropriate agreement entered with the respective client and charging fees for the service rendered as prescribed in the said agreement in exchange for their above service. The firm also employs various engineers, supervisors and

other technical staff and also clerical and administrative staff in the process of rendering the above service to the clients, including the supervision of the various construction process in different stage as prescribed in the agreement.

From this it is quite clear that the employer firm is carrying on a systematic economic activity leading to the sale of their services to the various clients either through the consultancy works rendered by the architects concerned or through the execution of various projects including effective supervision of these projects through their engineers and supervising staff.

..... Accordingly, the above firm is a firm of architects in whose premises the economic activity of rendering professional/consultancy service is rendered through various clients as described in the aforesaid paras for a consideration and the fees paid to the firm by the respective clients which amounts to sale of professional/consultancy services rendered in the premises as stated above and hence the employer firm squarely fits in well within the definition of 'shop'."

3. Thus the appellant was pleased to hold that the reference available would certainly show the existence of the systematic, economic activity. Incidentally, it was further held that such an activity facilitates the impugned transaction, which is construction.

4. The learned single Judge, by placing reliance upon the decisions of the High Court of Karnataka and Apex Court, was pleased to allow the writ petitions by setting aside the order impugned holding that the respondent is doing the professional work as an Architect, the provisions of ESI Act will not have an application as it does not come within the rigor of the word "shop".

5. It appears that the respondent has, in fact, paid the requisite contribution imposed in pursuant to the impugned order.

6. The learned counsel appearing for the appellant would contend that as per the judgment of the Kerala High Court in DESIGN COMBINES G.209, PANAMPILLY AVENUE, COCHIN VS. EMPLOYEES

STATE INSURANCE CORPORATION AND OTHERS ((2013) III LLJ 463) an Architect would come within the purview of the ESI Act. In any case, the issue involved is no longer res integra as held by the Apex Court in BANGALORE TURF CLUB LIMITED VS. REGIONAL DIRECTOR, EMPLOYEES' STATE INSURANCE CORPORATION ((2014) 9 Supreme Court Cases 657). Placing reliance upon the judgment of the Apex Court in EMPLOYEES' STATE INSURANCE CORPORATION VS. F.FIBRE BANGALORE (P) LTD., ((1997) 1 Supreme Court Cases 625), it is submitted that even this legal issue sought to be raised can very well be contested before the Appellate Authority constituted under the Act.

7. The learned counsel appearing for the respondent/writ petitioner would contend that even the notification issued under the Employees' State Insurance Act, 1948, does not include the professionals. The definition of "shops" as mentioned in the notification cannot be extended to include a case of the professional like an Architect. Section 1(5) of the ESI Act though provides for inclusion, inasmuch as such there is no such inclusion, it has to be held that the order impugned cannot be sustained in law as against an Architect. Since there is no dispute that the respondent is an Architect and rendering professional service, there is no jurisdiction to pass the impugned order.

8. After considering the submissions made, we are of the view that the interpretation will have to be given keeping in view the nature of legislation. Admittedly, the Employees' State Insurance Act, 1948, is a social welfare legislation. Therefore, a purposive, creative and reasonable interpretation based upon fair construction principle will have to be made. This is exactly what has been done by the Apex Court in the judgment referred supra. In BANGALORE TURF CLUB LIMITED VS. REGIONAL DIRECTOR, EMPLOYEES' STATE INSURANCE CORPORATION ((2014) 9 Supreme Court Cases 657), the following paragraphs would be apposite.

"The term 'establishment' would mean the place for transacting any business, trade or profession or work connected with or incidental or ancillary thereto. It is true that the definition in dictionaries is the conventional definition attributed to trade or commerce, but it cannot be wholly valid for the purpose of constructing social welfare legislation in a modern welfare State. The test of finding out whether professional activity falls within the meaning of the expression 'establishment' is whether the activity is systematically and habitually undertaken for production or

distribution of the goods or services to the community with the help of employees in the manner of a trade or business in such an undertaking. If a systematic economic or commercial activity is carried on in the premises, it would follow that the establishment at which such an activity is carried on is a 'shop'.

.....40. Therefore, certain basic features of a 'shop' may be culled out from the above. It can be said that a 'shop' is a business establishment where a systematic or organised commercial activity takes place with regard to the sale or purchase of goods or services, and includes an establishment that facilitates the above transaction as well.

41. The word 'shop' is not defined either in the ESI Act or in the notification. The ESI Act being a Social Welfare Legislation intended to benefit as far as possible workers belonging to all categories, one has to be liberal in interpreting the words in such a welfare legislation. The definition of a shop which meant a house or building where goods are sold or purchased has now undergone a great change. The word 'shop' occurring in the notification is used in the larger sense than its ordinary meaning. What is now required is a systematic economic or commercial activity and that is sufficient to bring that place within the sphere of a 'shop'.

9. The aforesaid judgment would clearly carve out an exception. The exception is with respect to the systematic, economic or commercial activity and therefore, includes a "shop" which facilitate such an activity. Now the findings as recorded by the appellant would clearly show that the respondent facilitates the commercial and economic activity, which is also systematic in nature. Therefore, there is no difficulty in holding that even a professional would come within the purview of the Act, provided the activity is systematic, economic or commercial in nature though it involves a facilitation of a pure commercial or economic activity. This is one of the facts to be considered on a given case. Therefore, we are of the view that though a professional per se cannot come within the purview, the jurisdiction of an authority under the ESI Act has to be seen on the facts and circumstances of each case by appreciating the materials available on record.

10. At this juncture, the learned counsel appearing for the respondent would submit that decision of the Division Bench of Kerala High Court requires explanation. We have perused the abovesaid judgment. We are of the view that in the light of our discussion, which was made in tune with the decision of the Apex Court in BANGALORE TURF CLUB LIMITED VS. REGIONAL DIRECTOR, EMPLOYEES' STATE INSURANCE CORPORATION referred supra, the judgment of the Division Bench of Kerala High Court cannot be accepted as we cannot bring within the rigour of the Act 34 of 1948 the "professionals" notwithstanding the activity involved.

11. Therefore, we once again make the position clear that the "professional" would come within the purview of the ESI Act only when he or it comes within the purview of commercial or economic activity either involved themselves in a direct/systematic, economic, commercial activity or in order to facilitate such an activity.

12. With the abovesaid clarification, the appeals stand allowed. No costs.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

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To

The Deputy Regional Director,
Regional Office (Tamilnadu),
Employees' State Insurance Corporation,
143, Sterling Road, Chennai-600 034.

+1cc to Mr.G.BHARADWAJ, Advocate, S.R.No.43692

+2cc to Mr.T.S.GOPALAN AND CO. Advocate, S.R.No.43070

W.A.Nos.2150 & 2656 of 2010

SR(CO)
TR(24/07/2018)

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