**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Reserved on : 04.10.2024
Pronounced on : 10.12.2024**

1. FAO-1294-2001

Employees State Insurance Corporation and another ..... Appellants

versus

Northern India Motion Pictures Association and ors.... Respondents

2. FAO-1657-2015

Employees State Insurance Corporation ..... Appellant

versus

Northern India Motion Pictures Association and ors.... Respondents

CORAM : HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. H.S. Bhatia, Advocate
for the appellants in FAO-1294-2001.

Mr. Adarsh Malik, Advocate
for the appellants in FAO-1657-2015.

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PANKAJ JAIN, J.

1. These two appeals involve same parties and same question of law. FAO No.1657 of 2015 is taken as a lead case.

2. Appellants are aggrieved of the order dated 31.05.2014 passed by ESI Court, Jalandhar whereby suit filed by the assessee seeking declaration to the effect that the assessee is not covered under the provisions of ESI Act and has been wrongly held liable to pay contribution has been allowed setting aside the impugned recovery.

3. Counsel for the appellants has drawn attention of this Court to the impugned judgment passed by ESI Court to submit that the case

filed by the plaintiffs was tested only on the touchstone of the plaintiff being a factory or not, as contemplated under Section 2(12) of the ESI Act. He submits that the judgment passed by the ESI Court cannot be sustained in view of dictum of law laid down by Supreme Court in the case of ***M/s. Kirloskar Consultants Ltd. vs. Employees' State Insurance Corporation, 2001 (1) SCC 57.***

4. Notice of motion was issued. Plaintiff-respondent has opted not to appear and was ordered to be proceeded against *ex-parte*. The relevant finding recorded by the ESI Court reads as under:-

> "xx xx xx
> Further, the petitioners are not into any process of manufacturing with or without the aid of power so that they could be covered under the term factory as defined in Section 2 (12) of ESI Act. Accordingly, even if the petitioners had employed more than 20 persons as per Ex.R16, so long as they are not into the process of manufacturing, they would not be covered by the application and scope of ESI Act. Accordingly, the notices issued by the respondents by invoking the provisions of ESI Act are without authority and are not enforceable against the petitioner."

5. The plaintiffs filed petitions seeking declaration that they are not covered under ESI Act, claiming that they are a society registered under Companies Act with no profit motives and they are only into the business of regulating the trade amongst its members. The funds collected are applied for the welfare of the members. ESI Court found that there being no manufacturing activity, plaintiffs are not covered under the definition of 'Factory' as enumerated under Section 2(12).

6. ESI Act, 1948 was enacted to provide for benefits to employees in case of sickness, maternity and employment injury and to

make provisions for other matters in relation thereto. Section 1 of the Act deals with short title, extent, commencement and application reads as under:-

> "(1) This Act may be called the Employees' State Insurance Act, 1948.
>
> (2) It extends to the whole of India.
>
> (3) It shall come into force on such date or dates as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and for different States or for different parts thereof.
>
> (4) It shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories:
>
> [4][Provided that nothing contained in this sub-section 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.]"

7. Comparative reading of Section 1(4) and Section 1(5) shall lead to the inference that factory and establishments have been used by the legislature in different context and the same connote different meanings. Factories are the one defined under Section 2(12) of the Act and the establishments shall connote a class other than factory notified by an appropriate Government in the official gazette to be covered by the provisions of 1948 Act. Plaintiff has its operations in Ludhiana. Punjab Government vide gazette notification 29.03.1975, extended the provisions of 1948 Act to the following:-

> "1 Any premises including the preoinots thereof whereon ten or more persons but in any case less than twenty persons, are employed or were employed for wages on any day of the preceeding twelve months and in any part of which a manufacturing process is being carried on with the aid of

power or is ordinarily so carried on, but excluding a mine subject to the operation of the Mines Act 1952 (35 of 1952) or a railway running shed or an establishment which is exclusively engaged in any of the manufacturing process specified in Clause (12) of section 2 of the Employees' State Insurance Act, 1948 (34 of 1948).

2 Any premises including the preoinots thereof whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on but excluding a mine subject to the operation of the mines Act 1952 (35 of 1952) or a railway running shed or an establishment which is exclusively engaged in any of the manufacturing process specified in Clause (12) of section 2 of the Employees' State Insurance Act, 1948 (34 of 1948).

3 The following establishments whereon twenty or more persons are employed, or were employed for wages on any day of the preceding twelve months namely :-

(i) Hotek, (ii) Restaurants, (iii) 'Shops, (iv) Road Motor Trans- port establishments, (v) Cinemas including preview theatres, (vi) Newspaper establishments as defined in section 2(d) of the working Journalists (conditions of service) and Miscellaneous Provisions Act, 1955 (45 of 1955)."

8. The issue as to whether the premises in which consultancy services are carried out, is a shop and hence covered by provisions of 1948 Act was dealt by Supreme Court in ***M/s. Kirloskar Consultants Ltd.*** (supra) observing as under:-

"xx xx xx

7. This court in **Sasidharan's case** was concerned with the interpretation of Kerala Shops & Commercial Establishments Act, 1960, wherein Section 2(4) defines 'commercial establishment' and Section 2(15) defines 'shop'. In that case, therefore, this court had to find out whether the activities carried on in a lawyers office fall within the definitions in Section 2(4) and 2(15) of the said Act. Thus, this court was not concerned with the meaning attributed to a shop arising in ESI Act. It was

held that lawyers do not carry on trade or business nor render service to customers but carry on a profession and therefore cannot fall within the scope of that Act.

8. Reference may be made to a decision of this court in **Hindu Jea Band v. Regoingal Director, ESIC**, [JT 1987 (1) SC 518 = (1987) 2 SCC 101], and in that case the premises in which services for rendering music is given is held to be a 'shop'; so was the decision in **Cochin Shipping Co. v. ESI Corpn**. [JT 1992 (4) SC 602 = (1992) 4 SCC 245], wherein it was held that regardless of the fact that the steamship company is not carrying on stevedoring operations, it is a shop. Further, in the case of **International Ore and Fertilizers (India) Pvt. Ltd. vs. ESI Corporation**, [JT 1987(3) SC 354 = (1987) 4 SCC 203], the premises was held to be a shop even where activities relating to sale of goods do not take place but negotiations for the terms of sale, carrying on of the survey of the goods imported, is done.

9. What we are concerned in the present case is what this court was concerned in **R.K.Swamy's 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 sells 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's case** is misplaced. Thus, we do not find any good reason to differ from the view expressed by the High Court."

9. In view of above, the findings recorded by the ESI Court cannot be sustained and are hereby set aside. The appeals are allowed. The matter is remanded back to the ESI Court to decide afresh in light of law down by Supreme Court in the case of ***M/s. Kirloskar Consultants Ltd.*** (supra).

10. A photocopy of this order be placed on the file of other connected case.

(PANKAJ JAIN)
JUDGE

10.12.2024
Dinesh

Whether speaking/reasoned : Yes

Whether Reportable : No