



CALCUTTA HIGH COURT
Hon'ble Mr. Arindam Mukherjee, J.
WPA 6417/2024, Dt/- 12-4-2024

Santosh Choudhary & Associates
v.
Employees' State Insurance Corporation & Anr

A. EMPLOYEES' STATE INSURANCE ACT, 1948 – Section 1(5) – Firm of Chartered Accountants – Whether covered – The primary issue for consideration before the High Court was whether a firm of Chartered Accountants was covered under the ESI Act and it so, whether the number of the employees in the firm attracts the provisions of the ESI Act of which an ESI Code was required – Held, a notification was issued on 10-02-2011 under section 1(5) of the ESI Act by the Government of West Bengal – Section 1(5) of the Act entitles the appropriate Government to extend the provisions of this Act in accordance with the prescribed procedure to any establishment or classes of establishment, etc. – The notification issued by the Government of West Bengal extended the provisions of the Act to shops – An establishment can be regarded as a 'shop' under section 2(15) if some 'trade' or 'business' is carried on or some services are rendered to 'customers' – Traditionally, lawyers do not carry on a trade or business nor do they render services to 'customers' – The context/phraseology under section 2(15) is inapposite in the case of a Chartered Accountant's office or the office of a firm of Chartered Accountants – A professional activity must be an activity carried on by an individual by his personal skill and intelligence – Chartered Accountant or a Chartered Accountant firm cannot be termed as a trader or businessman and professional firm cannot be equated to business or trade as within the ambit of 'shop' under the ESI Act or the State Shops & Establishments Act – Furthermore, the enquiry followed by ESIC under section 45A of the ESI Act did not decide whether the petitioner fell under 'shop' against which the provisions of the Act are applicable – The petitioner also did not have more than 10 employees which are required to be covered under the ESI Act – Show cause notices, order holding the petitioner liable to pay ESI dues and qualification made including the orders of the authority under section 45A of the ESI Act are set aside. Paras 9 to 12, 14 and 15

B. CONSTITUTION OF INDIA – Article 226 – Writ Petition – The ESIC under section 45A of the ESI Act determined amount to be payable by a firm of Chartered Accountants – It was the contention of the ESIC that the petitioner should have followed the provisions of section 75 of the ESI Act instead of preferring the writ petition – Held, without adjudicating whether the ESI Act is applicable to the petitioner, the authority under section 45A of ESI Act fell in error which is jurisdictional in nature and such an act can be challenged in the writ petition – Alternative remedy is not an absolute bar in filing and maintaining a writ petition – The present writ petition only involved a question of law and did not require adjudication of facts – The writ petitioner is, therefore, maintainable. Para 13

C. EMPLOYEES' STATE INSURANCE ACT, 1948 – “Articles” training under a Chartered Accountant – Whether employees – Held, “Articles” do not qualify as employees under the ESI Act as Articles at the highest can get some money which cannot be equated with wages to attract the provisions of the ESI Act. Para 13

IMPORTANT POINTS

- A firm / office of Chartered Accountants is not covered under the ambit of the ESI Act.
- Lawyers do not carry on a trade or business nor do they render services to 'customers'.
- A professional activity must be an activity carried on by an individual by his personal skill and intelligence.

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- **Chartered Accountant or a Chartered Accountant firm cannot be termed as a trader or businessman and professional firm cannot be equated to business or trade as within the ambit of 'shop' under the ESI Act or the State Shops & Establishments Act.**
- **Enquiries followed by ESIC under section 45A of the ESI Act must decide whether the provisions of the ESI Act are applicable on the establishment.**
- **Without adjudicating whether the ESI Act is applicable to the petitioner, the authority under section 45A of ESI Act fell in error which is jurisdictional in nature and such an act can be challenged in the writ petition.**
- **"Articles" do not qualify as employees under the ESI Act as Articles at the highest can get some money which cannot be equated with wages to attract the provisions of the ESI Act.**

JUDGEMENT

Arindam Mukherjee, J.–1. In this writ petition, the following issues fall for consideration: (1) Whether a firm of Accountant/Accountants establishment covered is under the Employees' State Insurance Act, 1948 (in short, 'ESI Act'). (2) If so, whether the number of employees in the petitioner firm attracts the provisions of ESI Act for which the petitioner was required to have an ESI code.

The petitioner is a Chartered Accountancy Firm under the Chartered Accounts Act, 1949 having its principal office of business at 2A, Ganesh Chandra Avenue, 6th Floor, Room No. 3, Kolkata – 700013.

2. The petitioner says that a Chartered Accountant Firm or a Firm of Chartered Accountants neither falls within the definitions of an establishment considered under the ESI Act nor falls under the provisions of West Bengal Shops and Establishment Act, 1963 (hereinafter referred to as the 1963 Act). In that view of the matter irrespective of number of employees, the petitioner does not come within the ambit of ESI Act. That apart and in any event, the petitioner did not have 10 or more employees at a point of time for which it was required to comply with the requirements under the ESI Act. The petitioner has relied upon the judgments respectively reported in 2015 SCC Online Karn 4465 and ILR 2010 Karn 169 to contend that the petitioner is not covered under the provisions of ESI Act or it fulfills the criteria for attracting the provisions of ESI Act on the basis of the number of employees.

3. Countering this, the ESI Authorities have submitted that the petitioner is an establishment as mentioned in sections 1(5) and 1(6) of the ESI Act. By virtue of a notification dated 1st February, 2011 which was published in the Kolkata Gazette on 10th February, 2011, the respondents say that under the said notification "Shops" have been included. Relying upon a judgment of a Division Bench of this Court reported in (1996) II CHN 159, the respondents say that 'Shop' has been explained in the said judgment as an establishment where any sale or services are provided. The respondents also say that the Chartered Accountant Firm or the Firm of Chartered Accountants render services against money. So, a firm of such nature conforms to the definition of 'shop' and is an establishment within the ambit of ESI Act. The respondents also say that they have conducted an inspection. The preliminary inspection was done for the first time on 30th October, 2014 and then on 5th November, 2014. The Inspecting Officer recorded that only the balance sheet of the petitioner has been produced. One of the annexures to the said preliminary inspection report is a chart showing the details of "articles" engaged under Santosh Kumar Choudhary, a Chartered Accountant and key person of the petitioner firm. The preliminary inspection report dated 5th November, 2014 with such annexure appears at pages 21 and 22 of the writ petition. It will be, according to the respondents found from the said report that on inspection the Inspecting Officer has found 6 employees in the rolls of the petitioner out of which one is again shown as casual. Taking into account the 10 number of



'articles' and the time of inspection, the Inspecting Officer has come to the conclusion that the number of employees on a day in a calendar year had exceeded 10 and as such, the provisions of ESI Act was attracted.

4. The petitioner firm, therefor, is covered under Employees' State Insurance Corporation (ESIC) after the said preliminary inspection as shown in Form C-23 conducted by Insurance Inspector of the Respondent who is also referred to as Social Security Officer.

5. Pursuant to such inspection conducted by S.S.O. ESIC on 05-11-2014, the C-11 form dated 05-11-2015 was issued by the Respondent Corporation to the petitioner firm intimating that the petitioner firm is covered under ESI Act, and accordingly a Code No. was allotted to them and for registration of employees of the Factories & Establishments under section 1(3)/1(5) of the ESI Act, 1948 as amended. The said letter states that pursuant to such inspection, the establishment being the firm falls within the purview of section 1(5) of the Act with effect from 30-01-2014 and accordingly Code number was allotted.

6. Subsequently a show cause notice under C-18 (*Ad hoc*) dated 18-08-2017/07-09-2017 was issued directing the firm to pay contributions as per the Act for the period 30-10-2014 to 12/16 and 01/17 to 07/17. The said letter also contains a notice for hearing directing the petitioner firm to appear on 16-10-2017 at 11:30 am. The letter dated 18-08-2017/07-09-2017 is already annexed to the writ petition at page 23. On 22-11-2017, the order under section 45A of the ESI Act was passed which records that in the absence of any factual records, a sum of Rs. 3,07,679/- was held as statutory due being arrear of contribution payable by the employer in respect of the show cause notice for the period 30-10-2014 to 07/2017. The said order was challenged by the writ petitioner by filing an appeal under section 45AA of the ESI Act which is pending.

7. By an order dated 08-01-2024, the order under section 45A was passed in respect of the said show cause notice dated 10-10-2023/02-11-2023 for the period Oct/2018 to Mar/2023. The said order clearly speaks that the petitioner (employer) did not participate in the hearing on that date though the petitioner represented on the earlier date. Since the petitioner did not produce any record or any documents on the date fixed for hearing, i.e., on 04-01-2024 the Authorized Officer came to the conclusion affirming the amount specified in the said show cause notice for the period Oct/2018 to Mar/2023.

8. It appears from the documents relied upon at the time of hearing that a notification was issued on 10th February, 2011 under section 1(5) of the said Act by the Government of West Bengal. Section 1(5) entitles the appropriate Government, to extend the provisions of the said Act, in consultation with the respondent, the Employees' State Insurance Corporation (in short 'ESIC') and with the approval of the Central Government, after giving 6 months' notice of its intention so to do by a notification in the Official Gazette, to any establishment or classes of establishments, industrial, commercial, agricultural or otherwise. By the said notification the ESI Act was inter alia extended to shops. The relevant portion of the notification read thus:

"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) shops;

(ii) hotels;

(iii) restaurants;

(iv) shops;

(v) cinemas, including preview theatres; and



(vi) newspaper establishments as defined in section 2(d) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (43 of 1965);

(vii) Educational Institutions (including public, private, aided or partially aided) run by individuals, trustees, societies or other organizations;

(viii) medical Institutions (including corporate, joint sector, trusts, charitable and private ownership hospitals, nursing homes, diagnostic centres, pathological labs)”

Section 2(8) defines “establishment” to mean a shop or a commercial establishment. Section 2(15) defines “shop” as follows:

“‘Shop’ means any premises where any trade or business is carried on or where services are rendered to customers, and includes offices, store rooms, godowns or warehouses, whether in the same premises or otherwise, used in connection with such trade or business but does not include a commercial establishment or a shop attached to a factory where the persons employed in the shop are allowed the benefits provided for workers under the Factories Act, 1948 (Central Act 63 of 1948).”

9. It is on the basis of these definitions that it is to be decided whether the office of a chartered accountant or of a firm of chartered accountants is a commercial establishment within the meaning of the Act.

10. The expression ‘establishment’ is defined by section 2(8) to mean a shop or a commercial establishment. Since by the definition contained in the first clause of section 2(4), a commercial establishment means an establishment, a place of work cannot be regarded as a commercial establishment unless the activity is conducted in a ‘shop’ or in a commercial establishment which is really tautological. The definition of ‘shop’ which is contained in section 2(15) shows that in order that an establishment can be regarded as a shop, it is necessary that some ‘trade’ or ‘business’ must be carried on there or some service must be rendered to ‘customers’. The expression ‘shop’ also includes offices, warehouses, storerooms or godowns which are used in connection with the trade or business. It does not require any strong argument to justify the conclusion that the office of a chartered accountant’s office or the office of a firm of chartered accountants is not a ‘shop’ within the meaning of section 2(15). Whatever may be the popular conception or misconception regarding the role of today’s lawyers and the alleged narrowing of the gap between a profession on one hand and a trade or business on the other, it is trite that, traditionally, lawyers do not carry on a trade or business nor do they render services to ‘customers’. The context as well as the phraseology of the definition in section 2(15) is inapposite in the case of a chartered accountant’s office or the office of a firm of chartered accountants.

11. A professional activity must be an activity carried on by an individual by his personal skill and intelligence. There is a fundamental distinction, therefore, between a professional activity and an activity of a commercial character. Considering a similar question in the background of section 2(4) of the Bombay Shops and Establishments Act, 1948 (79 of 1948), it was held by the said High Court in *Devendra M. Surti (Dr.) v. State of Gujarat*, (1969) 1 SCR 235: AIR 1969 SC 63: 1969 Cri LJ 285, that a doctor’s establishment is not covered by the expression “commercial establishment”.

12. Upon considering the arguments and materials of both the parties, the Court holds that a chartered accountant or a chartered accountant firm cannot be termed as a trader or businessman and professional firm cannot be equated to business or trade as within the ambit of “Shop” as contemplated under the ESI act or the State Act as held in numerous judgments:

1. *M/s. B.V.C. & Co. (CA firm) v. The Employees State Insurance Corporation, Sub-Regional office, Bangalore North* on 24th November, 2014.



2. *B.K. Ramadhyani and Co. v. The Employees State Insurance Corporation* , 17th September, 2013.

3. *V. Sashidharan and M/s. Peter and Karunakar & others* , (1984) 2 LLJ 385 (SC).

4. *Pithavadian & Partners v. D.D. Regional Office (T.N.), ESIC*, delivered on 7th April, 2010.

13. Furthermore, the enquiry followed by ESIC does not decide the issue whether the provisions of the ESI Act is applicable to the petitioner. The Authority under provisions of section 45A of ESI Act also does not actually determine whether the petitioner falls under “shop” against which the provisions of the Act is applicable. An appeal preferred by the petitioner will only decide the correctness of the order passed under section 45AA of ESIC Act. The argument of ESIC that instead of filing this writ petition the petitioner should have followed the provisions of section 75 of the ESI Act and for that reason the writ petition is not maintainable and cannot also be accepted. Without adjudicating whether the ESI Act is applicable to the petitioner the Authority under section 45A of ESIC Act fell in error which is jurisdictional in nature and such an act can be challenged in the writ petition. It is also settled provision that alternative remedy is not an absolute bar in filing and maintaining a writ petition. That apart only a legal issue is involved and adjudication of the issues in the writ petition does not require adjudication of facts. The writ petition is, therefore, maintainable. The petitioner also does not have more than 10 employees as an establishment is covered under the ESI Act only if it has over 10 employees. The ESIC has considered the “Articles” who has come for training under a Chartered Accountant as employees. “Articles” do not qualify as employees under the ESIC Act as Articles at the highest can get some money which cannot be equated with wages to attract the provision of ESIC Act. Hence, the petitioner does not qualify the conditions to fall as a “shop” to be governed under the provisions of ESI Act.

14. The writ petition is accordingly allowed holding that the petitioner is not a ‘shop’ to come within the ambit of ESI Act, 1948 and liable to pay contribution. As a consequence, the show-cause notices, the order holding the petition liable to pay ESI dues and the qualification made including the orders of the Authority under section 45A of the ESI Act, 1948 are set aside and/or questioned.

15. Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.

Ref: LLR

If you have any questions, feel free to reach out to us on WhatsApp at Jay Shah - +91 9167121333