

2023 LiveLaw (SC) 600

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

HIMA KOHLI; J., RAJESH BINDAL; J.

CIVIL APPEAL NO.3368 OF 2012; August 02, 2023

E.S.I. CORPORATION, REP. BY THE REGIONAL DIRECTOR

versus

M/s. ENDOCRINOLOGY AND IMMUNOLOGY LAB

Employees' State Insurance Act, 1948 - Pathological labs in Kerala covered under ESI Act from 2007 and not from 2002, by virtue of a Government Notification issued on 06.09.2007 - If the pathological laboratories were already covered under the Act there was no occasion to issue such a notification - Even as per the understanding of the Corporation, pathological laboratories were not covered under the Act prior to that date – Hence, the Supreme Court dismissed the Appeal filed by the ESI Corporation. (Para 13-15)

For Appellant(s) Mr. Saket Singh, Adv. Mrs. Sangeeta Singh, Adv. Mrs. Niranjana Singh, AOR

For Respondent(s) Ms. Ritika Sinha, Adv. Mr. Siddhartha Jha, AOR

J U D G M E N T

Rajesh Bindal, J.

1. Order dated 21.08.2008 passed by the High Court of Kerala has been challenged by the Corporation¹ by which the appeal² filed by the respondent was allowed. It was held that the provisions of the Act³ will be applicable to the respondent establishment w.e.f. 06.09.2007 and not from 22.11.2002⁴.

2. Briefly stated, as per the facts available on record, the respondent establishment is a pathological laboratory. Inspection of the premises of the respondent was carried out by the Inspector on 01.04.1999. Having found that there were 19 employees working in the establishment, a show cause notice was issued to the respondent. The respondent establishment challenged coverage of the establishment by filing an application under Sections 75 and 77 of the Act before the Employees' Insurance Court. The Court vide order dated 19.04.2007, passed in I.C. No.13/2003 declared that the establishment of the respondent is a 'shop' as per Section 1(5) of the Act and the provisions of the Act would extend to the respondent w.e.f. 22.11.2002. A review application⁵ filed by the respondent before the E.S.I. Court, was dismissed vide order dated 21.12.2007. The orders of the E.S.I. Court were challenged by the respondent by filing an appeal before the High Court which was allowed *vide* impugned order.

3. Learned counsel for the appellant submitted that the order passed by the High Court is not in conformity with the law as the respondent establishment will be covered under the provisions of the Act in terms of the notification dated 27.05.1976 issued by the Government of Kerala in exercise of the powers conferred under the Act. In terms of the aforesaid notification, if 10 or more persons are employed in an establishment on any day

¹ The Employees State Insurance Corporation

² Ins. App. No.4 of 2008(A)

³ The Employees' State Insurance Act, 1948 (hereinafter 'the Act')

⁴ Wrongly typed in the impugned order as 24.11.2002

⁵ M.P. No.159/2007

in the preceding 12 months which included a “shop”, it will be covered under the provisions of the Act. The respondent establishment being a shop, was clearly covered. After inspection, a notice was issued to the respondent for coverage w.e.f. 01.04.1999. However, in view of the Circular dated 22.11.2002, issued by the Corporation for the coverage of pathological laboratories and diagnostic centres, the establishment was covered from 22.11.2002. It is stated that the findings of the High Court that the respondent establishment shall be covered under the Act w.e.f. 06.09.2007, is erroneous.

4. On the other hand, learned counsel for the respondent submitted that there is no error in the order passed by the High Court. Notification dated 27.05.1976, issued by the Government of Kerala, does not cover the establishment of the kind that the respondent has, which is pathological laboratory. By no stretch of imagination can it be termed as a shop, where merely buying and selling activities take place, and not the kind of work executed by experts engaged by the respondent. In fact, medical institutions which included nursing homes, diagnostic centres and pathological laboratories employing 20 or more persons were brought under the ambit of the Act vide notification⁶ issued by the Government of Kerala. The order passed by the High Court is in line with the said notification. Hence, the present appeal deserves to be dismissed.

5. We have heard learned counsel for the parties and perused the material placed on the record.

6. The short question which requires consideration by this Court is, the date from which the respondent establishment, which is undisputedly carrying on the business of a pathological laboratory, will be covered under the Act.

7. (i) Section 1(4) of the Act provides that the Act shall apply to all factories (including factories belonging to the Government) other than seasonal factories. Proviso to the aforesaid section provides that this subsection does not apply to the 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 for under the Act.

(ii) Section 1(5) of the Act provides that the appropriate Government may, in consultation with the Corporation and where the appropriate Government is a State Government, with the approval of the Central Government, can extend the provisions of the Act by issuing a notification in the official gazette, to any other establishment or class of establishments.

(iii) The term “factory” has been defined under Section 2(12) of the Act. The same as existed at the relevant time, included any premises and part thereof in which manufacturing process is being carried on with or without the aid of power. The only difference being that the number of persons required to be working in the establishment with the aid of power was 10 or more whereas in cases without the aid power, the number required was 20 or more. It did not include a mine subject to the operation of the Mines Act, 1952 or a railway running shed.

(iv) The term “manufacturing process” has been defined in Section 14 (AA) of the Act to give it a meaning as assigned to it in the Factories Act, 1948. The same is defined under Section 2(k) of the Factories Act, 1948 which is reproduced herein below:

⁶ Dated 06.09.2007

“2(k) “manufacturing process” means any process for –

- (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or
- (ii) pumping oil, water, sewage or any other substance; or
- (iii) generating, transforming or transmitting power; or
- (iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding; or
- (v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; or
- (vi) preserving or storing any article in cold storage; ”

8. On a perusal of the aforesaid provisions in the Act, it can safely be concluded that the establishment of the respondent will not be covered under the provisions of Section 1(4) of the Act as it will not fall within the definition of a “factory”, since no manufacturing process is carried on therein. It is not even the case of the appellant. The respondent establishment is merely a pathological laboratory.

9. The stand taken by the appellant is that the respondent establishment will be covered in view of the notification dated 27.05.1976 issued by the Government of Kerala, the relevant part whereof is extracted below:

“GOVERNMENT OF KERALA
LABOUR (E) DEPARTMENT
NOTIFICATION

16141/E2/75/LBR Dated, Trivandaram 27th May 1976

S R O No.559/76 – In exercise of the powers conferred 1948 (Central Act 34 of 1948), the Government of Kerala having already given six months’ notice as required thereunder. The government of Kerala Notification No.16141/E2/75/LBR dated 5.11.1975 published as SRO BNO.1070/75 in the State Gazette dated 18.11.1975 hereby appoints the midnight of 29th shall extend to the classes of establishment and in areas as specified in the schedule annexed hereto:-

SCHEDULE

Description of establishment	Area in which the establishments are situated
1	2
xxx	xxx
The following establishments 10 or more persons are employed or where employed for any day of preceding 12 months namely: Hotels Restaurants Shops Road Motor Transport Establishment Cinema including preview Theaters Newspaper establishment as defined in Section 2(d) of the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act, 1955 (45 of 1955)	Whole of the State of Kerala where the benefit provisions of Chapter IV, V and VI of the Act have already been brought into force by the Central Government under Section(3) of the Employees State Insurance Act, 1948 (Central Act 34 of 1948) except the areas where the scheme has already been extended with effect from the midnight of 29th March 1975 vide notification No.22877/E2/73LBR dated 22.03.1975 published in the Kerala Gazette dated 25th March 1975 as SRO No.288/75

10. The argument raised by the appellant is that the respondent establishment would fall within the term “shop” and the same is sought to be covered in terms of the aforesaid notification.

11. A notice was issued to the respondent establishment on 27.04.2001, directing production of certain records. The same was replied to. Though it is claimed that the respondent establishment would be covered under the provisions of the Act in terms of the Notification dated 27.05.1976, however, before the E.S.I. Court, reliance was placed on a letter issued by the Corporation on 22.11.2002 through which an earlier Memo dated 06.01.1989, was modified. In terms of the aforesaid Memo letter, pathological laboratories and diagnostics centres were not covered under the definition of “shop”. It was not disputed that a “shop” as such is not defined under the Act. At the time of hearing, reliance was also placed on the Notification dated 06.09.2007, issued by the Government of Kerala bringing certain establishments under the ambit of the Act.

12. It is not a matter of dispute that such a notification is issued in terms of the power conferred under Section 1(5) of the Act in consultation with the Corporation and with the approval of the Central Government. In terms of the aforesaid notification, medical institutions including diagnostic and pathological laboratories, where 20 or more persons were employed, were covered. The relevant part of the said notification is extracted below:

“GOVERNMENT OF KERALA

LABOUR & REHABILITATION (F) DEPARTMENT

NOTIFICATION G.O. (P) NO/116/2007/LBR Dated, Thiruvanthapuram

6TH September 2007

S R O No.749/2007 – In exercise of the power conferred by sub-section (5) of Section 1 of the Employees’ State Insurance Act 1948 (Central Act 34 of 1948), the Government of Kerala in consultation with the Employees’ State Insurance Corporation and with the approval of the Central Government and after having given six months’ notice of its intention to do hereby extend the provisions of the said Act to the classes of establishments specified in Column (1) of the Schedule annexed hereto and situated in the areas specified in column (2) thereof with immediate effect

SCHEDULE

Description of establishment	Areas in which the establishments are situated
Medical institution (including corporate, joint sector, trust, charitable, and private ownership hospitals, nursing homes, diagnostic centre, pathological laboratories wherein 20 or more persons are employed or were employed on any day of the preceding twelve months	Areas where the scheme has already been brought into force under sub-section (2) and (5) of Section 1 of the Act

13. A perusal of the aforesaid notification shows that pathological laboratories were specifically covered under the provisions of the Act in terms of the aforesaid notification. In the case at hand, the respondent is running pathological laboratory and would be covered under the Act in terms of the Notification dated 06.09.2007, issued by the Government of Kerala. The order passed by the High Court is in terms of the aforesaid notification directing coverage of the respondent establishment from that date onwards, as undisputedly, 20 or more persons were found to be employed in the establishment.

14. The argument raised by the appellant that the respondent establishment should be deemed to be covered in terms of the Notification issued on 27.05.1976 read with the Circular dated 22.11.2002 issued by the Corporation, is merely to be noticed and rejected. It is admittedly the case of the Corporation itself that the term “shop” as such has not been defined under the Act. It was sought to be assigned a meaning as per the understanding of the “Corporation”. Clause 23 of the aforesaid letter shows that even as per the earlier Memo dated 06.01.1989, pathological laboratories were not covered as shops under Section 1(5) of the Act. The aforesaid Memo letter was subsequently modified vide Memo letter dated 22.11.2002.

15. Further, fact remains that there is a Notification issued on 06.09.2007 by the Government of Kerala covering medical institutions including pathological laboratories from that date. The aforesaid Notification was issued in consultation with the Corporation and with the approval of the Central Government. If the pathological laboratories were already covered under the Act, as is sought to be urged by the Corporation, there was no occasion to issue such a notification. This fact clearly establishes that even as per the understanding of the Corporation, pathological laboratories were not covered under the Act prior to that date.

16. For the aforesaid reasons, we do not find any merit in this appeal. The same is hereby dismissed. There shall be no orders as to costs.

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