

K.R. ANITHA AND ORS.

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v.

REGIONAL DIRECTOR, E.S.I. CORPORATION AND ANR.

SEPTEMBER 17, 2003

[SHIVARAJ V. PATIL AND D.M. DHARMADHIKARI, JJ.]

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*Employees' State Insurance Act, 1948—Section 1(4), (5) and (6)—
Toddy shops run by licensee contractors on the basis of yearly auction
conducted by State Government—Applicability of the Act—Held, toddy
shop come under the entry 'shop' in the Schedule to the Act—Is not exempt
under proviso to sub-section (4) of Section 1 since it neither belongs to
nor is under the control of State Government—Hence, the Act is applicable—
Kerala Abkari Act and Rules.*

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**Appellants are licensee-contractors in respect of toddy shops run
on the basis of yearly auction conducted by the Excise Department of
the State Government. The appellants did not make contribution
during the period of their license as required under the Employees'
State Insurance Act, 1948 on the ground that the provisions of the Act
are not applicable to the employees working in toddy shops. Respondent-
Corporation conducted inspection and initiated recovery proceedings
for collection of contribution amount against the appellants under the
Act taking the stand that the toddy shops are covered under the Act.**

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**The appellants filed applications before the Employees Insurance
Court (EI Court) under the Act for a declaration that the toddy shops
run by the appellants during the period 1991-94 could not be brought
under the purview of the Act since the toddy shops are not included
specifically in the notification dated 18.9.1974 issued by the State
Government under section 1(5) of the Act. The appellants further
contended before the EI Court that the appellants are not liable under
the Act even though the previous contractors were complying with the
ESI Scheme. The EI Court allowed the applications of the appellants
by holding that the provisions of the Act are not applicable to the toddy
shops of the appellants. The respondents challenged the validity and
correctness of the orders passed by the EI Court before High Court.
The High Court allowed the appeals of the respondents.**

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- A** In appeal to this Court the appellants contended that the toddy shops established under the State Abkari Act are not covered by the ESI Act since they are not included specifically under the notification dated 18.9.1974 issued by the State Government under section 1(5) of the ESI Act; that the toddy shops are exempted under the proviso to subsection (4) of Section 1 of the Act since they are owned and controlled by the State Government and its employees are enjoying similar or even superior benefits provided under the Act; and that the appellants, being Abkari contractors, are only immediate employers under the State Government, who is the principal employer.
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- C** The respondents contended that the appellants did not raise the plea before the EI Court that the toddy shops were not covered by the Act even previously even though the previous contractors were complying with the ESI Scheme and that the strength of the employees in toddy shops was less and not covered by the Act; that the toddy shops in question were covered by the Act long prior to the appellants became licensees to trade in liquor for the period in question.
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Dismissing the appeals, the Court

- E** HELD : 1. The High Court was right in holding that toddy shop is a premises where the business of buying and selling is going on and that a toddy shop would come under the entry 'shop' in the Schedule. the appellants did not seriously dispute this finding of the High Court. [888-G-H]

- F** *M/s International Ore and Fertilisers (India) Pvt. Ltd. v. Employees' State Insurance Corporation*, [1987] 4 SCC 203; *M/s Cochin Shipping Co. v. E.S.I. Corporation*, [1992] 4 SCC 245 and *Employees' State Insurance Corporation v. R.K. Swamy & Ors.*, [1994] 1 SCC 445, relied on.

- G** 2. In order to take shelter under the proviso to sub-section (4) of Section 1 of the Employees' State Insurance Act, 1948, the appellants have to satisfy that their establishments belonged to or were under the control of the Government; and that the employees in their establishments were otherwise receiving benefits substantially similar or superior to the benefits under the Act. The State has the monopoly
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in liquor trade but it is open to the State to part with that right for a consideration so as to grant privilege of carrying on trade in liquor to the licensees. The provisions contained in the State Abkari Act, Rules and conditions of licence dealing with liquor are merely regulatory. None of these provisions interfere with a right to carry on business by licensee subject to the regulatory measures contained therein. In the matter of carrying on business and trade of liquor under licences granted to the appellants, it is not shown by the appellants as to how the State dominated or controlled the toddy shops financially, functionally and administratively. The proviso to subsection (4) of Section 1 of the Act, hence, did not cover the toddy shops of the appellants and that neither the State nor the Excise Department came in the picture of management of the business of the appellants. On facts, the State Government had no participation in terms of finance and carrying on the business of liquor by the appellants either functionally or administratively. Thus, the High Court rightly took the view that toddy shops of the appellants neither belonged to nor were under the control of the State Government. [889-A-E]

Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and Ors., [2002] 5 SCC 111, relied on.

3. There was no plea or material placed before EI Court or High Court by the appellants as to how many employees were working in the toddy shops in question from the beginning or whether the new licensees could change or reduce the number of employees in exiting toddy shops. In the absence of the pleas, the High Court was right in rejecting the contention urged on behalf of the appellants based on section 1(6) of the Act. The question of law based on section 1(6) of the Act is left open by this Court to be decided in an appropriate case. [890-B-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 6486-6494 of 2001.

From the Judgment and Order dated 18.12.99 of the Kerala High Court in M.F.A. Nos. 1152, 1356, 1434, 1353, 1363, 1433, 1362, 1361 and 1301 of 1998.

Sunil Gupta, Roy Abraham, Ms. Seema Jain and Himinder Lal for

A the Appellants.

C.S. Rajan, V.J. Francis, P.L. Jose and Jenis Francis for the Respondents.

B The Judgment of the Court was delivered by

SHIVARAJ V. PATIL, J. : The appellants were contractors in respect of toddy shops during the given period. Toddy shops were run on the basis of yearly auction conducted by the Excise Department of the Government of Kerala. Various guidelines were issued by the Board of Revenue and the State Government from time to time for running toddy shops. The employees working in the toddy shops during the period in question were not brought under the coverage of the ESI Scheme mainly on the ground that the provisions of ESI Scheme were not applicable to the toddy shops according to the appellants; assuming that the Employees' State Insurance Act, 1948 (for short 'the Act') was applicable to the toddy shops in the previous years, that did not create any continuing liability of the appellants. On the basis of the inspection conducted by the officers of the respondent Corporation, respondents took up the position that the toddy shops were covered under the Act and assessed to the contribution; recovery proceedings also were initiated for collection of contribution amount. At that stage the appellants approached the Employees' Insurance Court (EI Court) seeking declaration that the toddy shops run by the appellants during the period 1991-1994 could not have been brought under the ESI Scheme and, therefore, no liability to pay contribution could be foisted on them.

F According to the respondents the toddy shops were covered by the ESI Scheme from 1983 onwards and only when the inspection was conducted it was noticed that the appellants did not pay the contribution during the period of their licence; in spite of the communication of the coverage and demand for payment of contribution the appellants did not respond and in those circumstances revenue recovery proceedings were initiated. According to the respondents there was no illegality in the action taken by them. The appellants elaborated their case in reply statement contending, even assuming, that the previous contractors were complying with the ESI Scheme, that did not make the appellants liable in any manner to continue the coverage as the very applicability of the Act to the workers

of toddy shops was quite uncertain. It was their further case that the appellants could not be treated as principal employers insofar as the toddy shops were concerned because the responsibility to run the toddy shops through some agent was purely that of the Excise Department under the Act; therefore, Excise Department was the owner and principal employer of the toddy shops; the functioning of the toddy shops was covered by the provisions of the Abkari Act and Rules and not by the provisions of Kerala Shops and Commercial Establishments Act; for the benefit of the workers in toddy shops there is separate enactment and schemes framed thereunder, i.e., Kerala Toddy Workers Welfare Fund Act and Scheme; benefits to the workers under the Kerala Toddy Workers Welfare Fund Act and the Scheme were more beneficial to them; the licence given to a contractor to run a toddy shop is not similar to the licence issued to the owners of the shops and other establishments under the shops and Establishments Act. The toddy shops constitute different class of establishments; if the Government had any intention to include the toddy shops also under the purview of the ESI Scheme, they would have found place in the notification issued under Section 1(5) of the Act. According to the appellants as contractors of toddy shops, at the most, they had only the role of an immediate employer; even assuming the Act is applicable to toddy shops the primary responsibility to pay contribution was that of the Excise Department being the principal employer.

The EI Court after considering facts, respective contentions and referring to the provisions of the Act and the Abkari Act and Rules concluded that toddy shops were the establishments belonged to or were under the control of the Department of the Government and the employees working in those shops were enjoying the benefits substantially similar to the benefits provided in the cases covered by the ESI Scheme. In this view the EI Court held that the provisions of ESI Scheme were not applicable to the employees working in toddy shops of the appellants during the relevant period. The Court also made it clear that since the proviso to Section 1(4) of the Act was added to the statute book only with effect from 20.10.1989, any demand for contribution for the prior period had to be viewed differently. In this view the EI Court allowed the applications filed by the appellants and granted relief to them. The respondents challenged the validity and correctness of the orders passed by the EI Court by filing miscellaneous first appeals before the High Court. The High Court, after

A hearing the learned counsel for the parties and considering the respective contentions raised by them, allowed the appeals and set aside the judgment of the EI Court. Hence these appeals are filed by the appellants questioning the validity and correctness of the impugned common judgment.

B This Court, on 9.5.2000, issued notice limited to the question whether the provisions of the Act are applicable to the employees of toddy shops in the State of Kerala under the notification in question. Subsequently leave was granted on 13.9.2001.

Section 1 of the Act reads : -

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“1. *Short title, extent, commencement and application.* - (1) This Act may be called the Employees’ State Insurance Act, 1948.

(2) It extends to the whole of India.

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(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.

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(4) It shall apply, in the first instance, to all factories including factories belonging to the Government other than seasonal factories :

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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.

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(5) 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, after giving six months’ notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Act or any of them, to any other establishment or class of establishments,

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industrial, commercial, agricultural or otherwise :

Provided that where the provisions of this Act have been brought into force in any part of a State, the said provisions shall stand extended to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of establishments in another part of that State.

(6) A factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid or power."

State of Kerala issued a notification dated 18.9.1974 in exercise of power conferred under sub-Section (5) of Section 1 of the Act extending the provisions of the Act to classes of establishments specified in the schedule to the notification.

The learned senior counsel for the appellants urged that (1) the toddy shops established under the Kerala Abkari Act are not covered by the Act since in a notification issued under Section 1(5) of the Act they are not specifically included; though Government specifically included hotels and restaurants, intentionally excluded toddy shops while issuing notification in 1974; this exclusion was because the employees attached to a toddy shop are enjoying substantially similar or even superior benefits under the Abkari Welfare Fund Act; hence the High Court was wrong in holding that toddy shops are covered by the Act. (2) Toddy shops were owned and controlled by the State Government and employees of these shops were otherwise receiving benefits substantially similar or superior to the benefits provided under the Act; because of the same the toddy shops were exempted from the purview of the Act by virtue of proviso to Section 1(4) of the Act; the State is the sole authority to do the business of any intoxicating substance and no citizen has any right to do such business; the appellants being only licensees (known as Abkari contractors) to run abkari business of the Government, were only immediate employers under the State Government or its Excise Department, who is the principal employer; from various provisions of Abkari Act, Rules and the licence conditions it is clear that the authority to run the business is only limited and the main

A powers are vested with the Government itself. (3) The finding of the High Court that the establishments of the appellants, i.e., toddy shops having been covered by the Act, they shall continue to be governed by virtue of Section 1(6) of the Act even though sub-Section (6) of Section 1 of the Act came into force with effect from 20.10.1989 by an amendment is not correct; even assuming that the Act was made applicable as on 20.10.1989 to the then contractors, that itself will not automatically make the Act applicable to the appellants since they contracted to run toddy shops in question for the first time in the year 1991-92.

C In opposition, learned senior counsel for the respondents made submissions supporting the reasons recorded by the High Court to arrive at the conclusions in accepting the plea of the respondents negating the contentions raised on behalf of the appellants. He specifically pointed out that before the EI Court, as observed by the High Court in the impugned judgment, the appellants did not specifically contend that the toddy shops were not covered by the Act previously; the appellants only contended that the toddy shops functioning in the State are not covered by the Act; it was also not their case that strength of the employees in toddy shops was less for being covered by the Act.

E After careful consideration of the submissions made on either side and looking to the discussion made and reasons recorded by the High Court in the impugned judgment in the light of the facts and circumstances found in these cases we are unable to find fault with the impugned judgment. The High Court, dealing with the contention that the toddy shops are not covered by the notification issued under Section 1(5) of the Act, referred to and followed the judgments of this Court in *M/s International Ore and Fertilizers (India) Pvt. Ltd. v. Employee's State Insurance Corporation*, [1987] 4 SCC 203, *M/s. Cochin Shipping Co. v. E.S.I. Corporation*, [1992] 4 SCC 245 and *Employees State Insurance Corporation v. R.K. Swamy and Ors.*, [1994] 1 SCC 445. Keeping in view the position, as made clear in G aforementioned decisions of this Court, the High Court was right in holding, "Toddy Shop is a premises where the business of buying and selling is going on. Therefore, according to us, a toddy shop would come under the entry 'shop' in the schedule." We may add here that the appellants were not in a position to seriously dispute this finding of the H High Court.

In order to take shelter under the proviso to sub-Section (4) of Section 1 of the Act the appellants have to satisfy that (1) their establishments belonged to or were under the control of the Government; and (2) the employees in their establishments were otherwise receiving benefits substantially similar or superior to the benefits provided under the Act. The High Court rightly took the view that the toddy shops of the appellants neither belonged to the government nor they were under the control of the Government. If the first requirement of the proviso itself is not satisfied, it becomes unnecessary to examine as to the satisfaction of second requirement of the proviso. No doubt, the State has the monopoly in liquor trade but it is open to the State to part with that right for a consideration so as to grant privilege of carrying on trade in liquor to the licensees. Under Abkari Act right to run toddy shops is auctioned annually and licences are granted to carry on business in liquor subject to the provisions of Abkari Act, Rules and conditions of licence. The provisions contained in the Abkari Act and Rules and conditions of licence having regard to the nature of business, namely, dealing with liquor, are regulatory. None of these provisions of the Act, Rules and conditions of licence interfere with a right to carry on business by licensee subject to the regulatory measures contained therein. In the matter of carrying on business and trade of liquor under licences granted to the appellants it is not shown to us as to how financially, functionally and administratively the State either dominated or controlled. Looking to the facts of the case, keeping in view the provisions of Abkari Act and Rules and conditions of licence, the control of the State Government in regard to the trade in liquor by the licensees was merely regulatory. Judged by the tests laid down in recent judgment of the Constitution Bench of this Court in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and others*, [2002] 5 SCC 111 in the context of establishment of belonging to or under the control of the Government found in the proviso to sub-Section (4) of Section 1 of the Act, the High Court was right in its conclusion that the said proviso did not cover the toddy shops of the appellants and that neither the State Government nor the Excise Department came in the picture of management of the business of the appellants. It is clear from the facts that the State had no participation in terms of finance and there was no Government participation in carrying on the business of liquor by the appellants either functionally or administratively. Hence we do not see any merit in the second contention urged on behalf of the appellants.

- A** The High Court rightly pointed out in the impugned judgment that the appellants did not raise plea before the EI Court that the toddy shops were not covered under the Act previously. According to the respondents the toddy shops in question were covered by the Act long prior to the appellants became licensees to trade in liquor for the period in question.
- B** The appellants only contended that the toddy shops functioning in the State were not covered by the Act. As already noticed above, this plea was rejected by the High Court with which we are in agreement. Neither there was a plea nor material placed before EI Court or High Court as to how many employees were working in the toddy shops in question from the beginning or whether the same employees continued/required to work in those shops even though the licensees changed or whether the new licensees could change or reduce the number of employees in existing toddy shops. In the absence of necessary pleas the High Court was right in rejecting the contention urged on behalf of the appellants based on Section 1(6) of the Act. The question of law based on Section 1(6) of the
- D** Act is left open to be decided in an appropriate case.

Thus, we do not find any merit in any one of the contentions urged on behalf of the appellants. In our view, the impugned judgment does not call for any interference. Hence the appeals are dismissed with no order as to costs.

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B.S.

Appeals dismissed.