Ramanathan Vs. State of Kerala

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Court : Kerala

Decided On : Nov-22-1990

Reported in : (1995)IIILLJ221Ker

Judge : Thomas, J.

Acts : Kerala Shops and Commercial Establishment Act, 1960 - Sections 2 (4), 2(8) and 2(15); Chartered Accountant Act, 1949

Appeal No. : O.P. Nos. 7136, 7644 of 1983

Appellant : Ramanathan

Respondent : State of Kerala

Advocate for Def. : K. Janarthanam, (GP), M.R. Rajendran Nair,; T.P. Kelu Nambiar and;

Advocate for Pet/Ap. : K.K. Ravindranath,; K.P. Balasubramanian,; V.P. Mohan Ku

Disposition : Petition allowed

Judgement :

Thomas, J.

1. Government of Kerala issued a Notification on 30.7.1981 declaring the Offices of 'Registered Accountants and Auditors' in the State of Kerala to be 'Commercial Establishments' for the purposes of the Kerala Shops and Commercial Establishments Act, 1960 (for short 'the Act'). Petitioners in all these Original Petitions, who are practising Chartered Accountants, challenge the validity of the notification. The officials of the Labour Department, as follow up measure, directed the Chartered Accountants to get their offices registered as establishments under the Act. Some of the petitioners challenged the notification as ultra vires to Articles 19(1)(g) of the Constitution. The main attack is on the ground that Government have no power to declare office of a Chartered Accountant as commercial establishment.

2. If the office of a Chartered Accountant is a commercial establishment, its employer is duty bound to make an application for registration certificate in respect of that establishment. The provisions of the Act impose certain restrictions or limitations on an employer who runs the establishment. No employee in an establishment shall be required or allowed to work for more than eight hours in any day and forty eight hours in any week, except when the employee is required to do overtime work in which case the total number of hours of work shall not exceed ten in any day. The period which an employee in the establishment has to work on each day, shall be so fixed that no period shall exceed four hours. No establishment shall be opened earlier than and closed later than such hours as may be fixed by a general or special order of the Government. The employer has the duty to maintain such registers and records and display on the premises of his establishment such notices as may be prescribed. Such establishment is liable to be inspected by an inspector appointed by the Government. These are, inter alia, the restrictions or limitations which the employer of an establishment is subjected to under the provisions of the Act.

3. The Government have no case that but for the notification the office of a Chartered Accountant would fall within the purview of 'commercial Establishment' as defined in the Act. So, the question is whether Government are empowered to declare the office of a Chartered Accountant as 'Commercial Establishment'.

4. 'Commercial Establishment' is defined in Section 2(4) of the Act which reads thus:-

'Commercial Establishment ' means a commercial or industrial or trading or banking or insurance establishment, an establishment or administrative service in which the persons employed are mainly engaged in office work, hotel, restaurant, boarding or eating house, cafe or any other refreshment house, a theatre or any other place of public amusement or entertainment and includes such other establishment as the Government may, by notification in the Gazette, declare to be a commercial establishment for the purposes of the Act, but does not include a factory to which all or any of the provisions of the Factories Act, 1948 (Central Act 63 of 1948) apply'.

It is clear that Government have the power to declare an establishment as commercial establishment for the purposes of the Act. The corollary is, Government cannot declare any office as commercial establishment unless the office is an establishment. Section 2(8) defines 'establishment' as 'a shop or a commercial establishment'. An establishment is a commercial establishment if it is engaged in a commercial or industrial or trading or banking or insurance work. The idea conveyed by the use of the word 'commercial' is that it should be understood with reference to commercial activity. There is no commercial activity unless there is at least some element of trade, or business. A profession, in ordinary parlance, is not a commercial activity. Unless the transactions made in the establishment bear the character of some commercial activities, it is difficult to call it a commercial establishment. Commercial activity often implies some investment of capital and involves some element of risk.

5. The work of a Chartered Accountant is neither commercial nor industrial nor trading nor banking nor insurance activity. Profession of a Chartered Accountant is regulated by the provisions of the Chartered Accountants Act, 1949. Section 2(1)(b) of the said Act defines 'Chartered Accountant' as 'a person who is a member of the Institute of Chartered Accountants of India'. A member of the Institute can practise accountancy and offer his services involving auditing or verification of financial transactions, books of accounts, or records or preparation,

verification or certification of financial accounting. The Central Government have constituted a Council of the Institute for controlling the profession of Chartered Accountants. Every Chartered Accountant is subject to certain strict rules of discipline and norms of ethical standards. He cannot pay either directly or indirectly any share or commission or brokerage in the fees or profits of his professional business to any person other than a member of the Institute. Nor can he accept any part of the profits of the professional work of a lawyer, auctioneer, broker or other agent who is not a member of the Institute. He cannot enter into a partnership with any person other than a Chartered Accountant in practice. He cannot solicit clients or professional work either directly or indirectly. He cannot issue any circular, advertisement or interview of by other means to canvass business, nor can he advertise his professional attainments or services. He cannot accept a position as auditor previously held by another Chartered Accountant without first communicating with that Chartered Accountant in writing. He cannot charge any fee based on a percentage of profits. These are only some of the strict norms which a Chartered Accountant has to observe. Any failure to observe those norms will invite serious consequences to the delinquent practitioner. The strict rules of profession which every Chartered Accountant is subjected to are very much similar to the rules of conduct applicable to members of the legal profession.

6. It is well nigh settled that the profession of a lawyer does not involve commercial or industrial activity. In an early decision Sakharam v. Nagpur Corporation AIR 1964 Bombay 200, a Division Bench of the Bombay High Court considered the question whether Advocate's Office can be declared as establishment under Bombay Shops and Commercial Establishments Act. Their Lordships examined different facets of the professional functions of a lawyer and observed that the activity of a lawyer is one carried on by his personal skill, intelligence, study, integrity and individual characteristics. It was held that 'unless the trade, business or profession carried on also : partakes of a commercial nature or venture, the premises in which such activities are carried on will not attract the provisions of the Shops Act'. The remuneration earned by a lawyer depends upon his personal reputation and the kind and quality of work done by him personally. His staff performs which may be called ministerial functions by typing his opinion, or the documents prepared by him, or by maintaining accounts of his income and

expenditure. The Division Bench of the Bombay High Court after analysing the salient features of the legal profession concluded that his office is not a commercial establishment. A Division Bench of this Court has held in Sasidharan v. Peter 1978 KLT 613 that 'it ill goes with the well accepted professional usage to regard a lawyer, engaged in doing research into his cases or in arguing them in the courts, as being engaged in the office work'. To a question posed, as to what is the work which the firm of Lawyers is engaged in, the Bench provided the answer thus:

'We do not except the reply that it is engaged in typing, or sweeping the floor, or dusting the tames, although these are also the incidental activities in the firm, constituting drops in the ocean of its reputation. Taking into account such activities of a lawyer-firm which occupy most part of its time and labour, we do not think it can be said that it is an establishment where the persons are mainly engaged in office work'.

The said decision was confirmed by the Supreme Court in Sasidharan v. Peter 1984 KLT 1039:AIR 1984 S.C. 1700. Thus, it is now well settled that an Advocate's office is not a commercial establishment.

7. Is there any perceptible difference between office of an advocate and that of a Chartered Accountant? An endeavour was made to draw some areas of nice distinction; No doubt, legal profession and Chartered Accountant's profession have differences and dissimilarities. But the areas of similarities would out-weigh the dissimilarities between the two and hence the legal position applicable to the profession of law can generally be applied to Chartered Accountants also in this regard.

8. Learned Government Pleader then contended that even if office of a Chartered Accountant does not engage in any commercial activity, it can be regarded as a shop where services are rendered to customers. The said contention is based on the definition of the word 'shop' in Section 2(15) of the Act. It must be remembered that 'establishment' is defined as 'a shop or commercial establishment'. So, if the office of a Chartered Accountant can reasonably be described as a shop, it would be an establishment which the Government can by notification in the Gazette

declare to be a commercial establishment for the purpose of this Act. The definition of the word 'shop' is quoted below:

'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)'.

Learned Government Pleader pointed out one of the limbs in the definition comprising these words: 'Any premises where services are rendered to customers'. According to him, these words are sufficient to embrace the office of a Chartered Accountant. The office of a Chartered Accountant is a place where services are rendered to the clients and therefore it is a 'shop' within the purview of the definition, according to the Government Pleader. It would be inept to understand the words 'where services are rendered' in isolation from the rest of the words in the clause. Those words must be understood as explanation or addition to the preceding words 'any premises where any trade or business is carried on'. This could be reasonably perceived from the succeeding words also. The. premises can include other places 'used in connection with such trade or business'. It is axiomatic that meaning of words and expression used in an Act must take their colour from the context in which they appear (vide) Ram Narain v. The State of U.P., AIR 1957 SC 18 at Page 23. In Darshan Singh v. State of Punjab AIR 1953 SC 83, Mukherjee, J. has observed thus: 'Words and phrases occurring in a statute are to be taken not in an isolated or detached manner disassociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself. It must particularly be noticed that the definition used the word 'customers' to describe the context of rendering services. It is quite inappropriate to say that a client of an advocate or Chartered Accountant is his customer. The word 'customer' is employed to denote a person who buys things or with whom the establishment has business transactions or a patron who visits a restaurant theatre etc. Client is one who gets help or advice from a professional man. Though a customer and a client have some broad common shades, the two are perceptibly different. Support to this view can be gathered from the following observations made by Chandrachud, CJ, in Sasidharan v. Peter 1984 KLT 1039: AIR: 1984 S.C. 1700:

'Whatever may be the popular conception or misconception regarding the role of today's lawyers and the alleged narrow wing of the gap between 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'.

9. Though in a different context, M.S Menon, CJ. speaking for himself and P. Govindan Nair, J. (as he then was) observed in Sethurama Menoh v. Meenakshi Amma, 1966 KLT 655 that the expression 'trade or business' connotes a commercial activity, whereas the expression 'profession' does not, and is virtually at the other end of the scale. The expression 'profession' used to be confined to the practice of theology, law and medicine. With the extension of the applications of science and learning, however, the expression has come to coyer other vocations as well. But the dividing line between what is a profession and what is a trade or business stilt subsists and is of material consequence. Nobody uses the word 'customer' with reference to a professional man. Similarly, the word 'client' is not ordinarily used with reference to a business place. Hence the particular limb in the definition 'shop' referring to 'prem-ises.....where services are rendered to customers' cannot obviously be expanded to embrace the office of a professional man.

10. Another Division Bench of the Bombay High Court in N.E. Merchant v. State, AIR 1968 Bombay 283 had occasion to consider the very question whether office of the Chartered Accountant is a commercial establishment falling under the Bombay Shops and Commercial Establishments Act (Act 79 of 1948). Palekar, J. (as he then was) who spoke for the Bench surveyed through the salient features of the profession of Chartered Accountant vis-a-vis the definitions of 'commercial establishment' as well as 'shop' in the said Act (The definitions of these two words in the Bombay Act are similar to those words as defined in the Kerala Act). After referring to the general features of the three conventional professions (theology,

medicine and law) the Bench found that in each of these three, the individual activity is characterised by personal skill and intelligence and is dependent on personal study, character and integrity. Then Their Lordships observed that 'the same element of trust and confidence must be a test in more or less degree in modern professions. A Chartered Accountant is approached by his client for advice and guidance in this problem with regard to trade, business or industry, and it is expected that the Chartered Accountant, to the best of his ability, would be in a position to help him in his difficulties and not betray the confidence that is placed in him. This, in our opinion, is one of the elements which should be sought when considering whether a particular person is practising a profession or is merely doing a business'. After referring to the various duties and functions of a Chartered Accountant, the Bench held that no commercial element is involved in the profession of Chartered Accountants. Support was found from the Supreme Court decision in National Union of Commercial Employees v. M.R.Meher 1962 (1) LLJ 241. In that case it was sought to apply the provisions of Industrial Disputes Act to solicitors and their establishments. The Supreme Court observed that the solicitors were practising a profession and were not carrying on an industry. A solicitor, in order to carry on the work efficiently, has to keep accounts and do correspondence work. The said work would need employment of clerks and accountants. The question posed in the said decision was this: Has the work of the clerk who types correspondence or that of the accountant who keeps accounts any direct or essential nexus or connection with the advice which it is the duty of the solicitor to give to his client? The question was answered in the negative and rejected the plea that a solicitor's firm is an industry. The Division Bench observed that the work done by the assistants merely eliminates drudgery part of the profession. 'The priest has his acolyte, the doctor his nurse and the lawyer his devil. These respective pairs undoubtedly co-operate in the work they do for their clients or customers. But in the essential part of the professional business, the individual judgment or advice of the priest, the doctor and the lawyer alone are supreme, and in the formation of that judgment their assistants hardly play a recognizable part. That applies, equally to the Chartered Accountant who has under him for training articled clerks. In the formation of the judgment and advice, the articled clerks have no place. Therefore, their co-operation with the Chartered

Accountant in checking receipts and payments is not the sort of co-operation which will reduce what is essentially a profession to a commercial venture'

11. A learned single Judge of the Karnataka High Court considered the identical question in Philipose & Co. v. State 1989 (Vol 80) Current Tax Reporter - page 1). For failure of a Chartered Accountant to apply for registration of his office under the provisions of the Karnataka Shops and Commercial Establishments Act, 1961 prosecution steps were initiated against him. He challenged the charge-sheet filed against him under Section 482 of the Code of Criminal Procedure. Quashing the charge-sheet, learned single Judge found that the office of a Chartered Accountant is neither a commercial establishment nor a shop. In that case also, the counsel for the State tried to highlight that part of the definition of a 'shop' which comprise of 'any premises where services are rendered to customers'. Learned single Judge was of the view that 'the context as well as the phraseology in which this part of the definition appears associated as it is with the expression 'trade or business' on the one hand and with 'office, store rooms, godowns or warehouse' on the other, if the ordinary principles or construction are applied, it appears to me that this part of the definition will have to be construed as services rendered to customers in the carrying on of trade or business'. Learned Judge further found that the nature of the work of a Chartered Accountant in practice, the character of the work he can do as a Chartered Accountant with the restrictions and the obligations to conform to the norms of professional conduct would show that the performance of his functions and duties is analogous to the functions and duties of a lawyer or a solicitor. The requirements of learning, skill and integrity -for the carrying on of a profession would make it clear that the office of a chartered Accountant or of a firm of Chartered Accountant cannot be regarded as premises where services are rendered to customers.-

12. The above decisions also support the stand taken by me that the office of a Chartered Accountant is hot a 'shop'. It follows that his office is not an establishment falling within the purview of the definition in the Act. The conclusion is inevitable that Government cannot, through a notification, bring the office of a Chartered Accountant within the purview of the Act. The notification is, therefore, liable to be struck down.

In the result, I allow the Original Petitions by striking down the notification dated 30-7-1981 (No. G.O. (MS) 64/81/LBR-SRO. 960/81 published in the Kerala Gazette No. 33 dated 18.8.1981).

Original Petitions are disposed of in the above terms.