

# RAJASTHAN HIGH COURT

Sajjan Raj Surana

Vs.

Jaipur Vidyut Nigam Ltd.

S.B. Civil Second Appeal No. 448 of 1997

(Arun Madan, J.)

18.12.2001

## JUDGMENT

**Arun Madan, J.**

1. Shorn in details the facts giving rise to this second appeal are that Sajjan Raj Surana (plaintiff appellant) instituted a civil suit for permanent injunction with the averments *inter alia* that he has been practicing advocate not only in the subordinate courts but also before this Court; he had taken electric connection from erstwhile Rajasthan State Electricity Board (RSEB) (now substituted as Jaipur Vidyut Vitran Nigam Ltd., Jaipur) bearing Account No. 28A/112-4 Zone III for his rented premises in a residential building known as Rahim Manzil, M.I. Road Jaipur, where his office cum chamber is established. His case in the plaint was that being an advocate by his profession he is not indulged in any commercial activities to the suit premises but the defendant (RSEB) charged for electric connection to his chamber as a commercial establishment whereas at that time, domestic charges was 59P. as against commercial one at Rs. 1.05 per unit.

2. In written statement, the defendant (RSEB) had a case that the suit premises has been situated in a Rahim Manzil which was in a commercial area, inasmuch as according to application dated 26.6.87 the plaintiff applied for electricity supply under a non-domestic service category, therefore, even he on demand also deposited Rs. 156/- on 19.8.1987 for release of such NDS electric connection and accordingly the plaintiff was being charged as a non- domestic service customer of the RSEB, which he continued to pay since first bill November, 1987.

3. In replica the plaintiff averred that the portion of Rahim Manzil where his chamber is situated has been a residential area where many of people have been residing as tenants for their residences and no commercial activities have been performed not only by them but also by him, and that apart, initial bill had been charged as a domestic customer but subsequently changed to commercial one without any prior notice or intimation to him, and that being so, he had been paying the electricity bills under protest.

4. Further in reply to the replica of the plaintiff, the defendant (RSEB) reiterated that right from the inception the electricity connection was applied for by the plaintiff, he did so for his office and not for domestic purpose inasmuch as the Rahim Manzil where the suit premises has been situated did consist of commercial establishments including that of the plaintiffs, for which a list of such commercial establishments had also been appended to the reply by the defendant, and further that without any protest the plaintiff did deposit demand money for electricity connection as a non-domestic service customer. The defendant in reply to the replica denied the plaintiff's averments as to the bills having been deposited under protest right from the first bill.

5. On the basis of the pleadings of the parties, two issues including of relief were framed, namely whether advocate's chamber of the plaintiff situated in residential building Rahim Manzil (suit premises) could be termed as a commercial establishment and what is its effect ? The plaintiff examined himself and produced three more witnesses in support of his case whereas the defendant (RSEB) examined six witnesses. After conclusion of the trial, the learned Additional Civil Judge (JD) No. 2, Jaipur City, Jaipur by his judgment & decree dated 1.11.1995 decreed the plaintiff's suit issuing permanent injunction directing the defendant RSEB to charge the plaintiff as a domestic customer on his electricity connection to the suit premises. Against it, the defendant (RSEB) preferred first appeal which came to be decided by the Additional District Judge No. 2, Jaipur City, Jaipur who by a judgment dated 6.10.1997 dismissed the suit of the plaintiff. Hence this second appeal which was admitted on the following substantial questions of law as proposed by the plaintiff appellant –

1) Whether advocate's chamber or office situated in a residential building which is not being used as commercial office can be termed as a commercial establishment and the commercial charges can be taken ?

- 2) Whether the practising advocate who is doing his profession as an advocate can be treated as carrying on commercial activities ?
- 3) Whether the finding of the first appellate court is perverse by not discussing evidence and the statement of PW4 Usman has been misread by the learned first appellate court ?
- 4) Whether for the purpose of imposing domestic levy by the Electricity Board as regards the consumption of electricity, is it necessary that the advocate's family should also live in the same premises and the chamber in which the Advocate's office is situated in the residential premises since the advocates are permitted to operate their chambers from their residence under the Rules ?
- 5) Whether the residential premises of an advocate in which he is also having his chamber for professional activity can be treated as a commercial establishment for levy of electricity duty by the Electricity Board ?
- 6) What is the effect of non-discussion of the evidence adduced by the plaintiff's witnesses PW1, PW2, PW3 & PW4 in the present case and whether the first appellate court is justified to reverse the finding given by the trial Court ?
- 7) Whether in view of non-discussion of documentary evidence by the first appellate court its finding can be treated as perverse ?

6. Though the defendant (respondent) upon service of the notice of this second appeal, submitted cross objection but this Court by its order dated 13.11.1998 holding the cross objections as time barred and not maintainable according to statutory provisions under Order 41 Rule 22 Civil Procedure Code.

7. A general notice was also published in the daily cause list notifying to the Members of the Bar interested to assist the court on the significant questions of law having public importance as to whether the respondent (RSEB) is entitled to impose commercial tariff as regards the electricity consumed by the Members of the Bar in their premises where they have been carrying on activities of legal profession either at their own residential premises or separately in any other premises than residential.

8. During the pendency of suit as well as this second appeal, two notifications dated 2.7.85 and 19.7.2000 were issued. By notification dated 19.7.2000 the RSEB (defendant) stood splitted into five limited companies viz. Vidyut Vitran Nigam Ltd. of Jaipur, Jodhpur, & Ajmer, so also (4) Rajasthan Rajya Vidyut Prasaran Nigam Ltd.

Therefore, since the consumership of the plaintiff came into the jurisdiction of Jaipur Vidyut Vitran Nigam Ltd., in this appeal, the RSEB was substituted by Jaipur Vidyut Vitran Nigam Ltd. (henceforth for brevity, referred to as JVVNL or Nigam). Whereas by former notification dated 2.7.85 the members of the Bar carrying on professional activities either in their residential premises or chambers situated outside their residences in commercial complex, were imposed with higher tariff even under the non-domestic service.

9. As has been pointed out by the learned Members of the Bar who appeared pursuant to the General Notice in the daily cause list, this notification was challenged in D.B. Civ. Writ Petition No. 359/87 as according to this notification, "non-domestic establishments include offices of the Advocates." The Division Bench of this Court under an interim order directed as under:

"After having heard learned counsel for the petitioner, it is hereby directed that respondents shall not charge non-domestic electricity charges for the electricity consumed by the advocates who have their office in residential accommodation. Offices in the residential accommodation shall be treated as part of the residential accommodation shall be treated as part of the residence. Respondents shall charge domestic charges and no further action shall be taken against members of the legal profession."

10. Here let me first have a resume of relevant provisions. The RSEB (defendant) had been constituted u/Section 5 of the Electricity (Supply) Act, 1948 and thereby was a body corporate, having perpetual succession and common seal with power to acquire and hold property both movable and immovable and, therefore, was entitled to sue and to be sued by its name.

11. Section 49 of the Electricity (Supply) Act, 1948 provides for sale of electricity by the Board to persons other than licensees upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs. When the plaintiff appellant applied for electricity supply to the RSEB, Tariffs for supply of electricity 1985 published by Notification dated 02.07.1985 was in force. Its sub-clause (10) of Clause 5 provides that for the purposes of application of these tariffs, "consumers" have been categorised with respect to various categories of service provided in the Tariff structure, irrespective of the purpose for which or the system of

supply or the voltage or connected load in which the energy is consumed. Thus a consumer having fallen in any one of the categories as per the service provided in the Tariff structure shall not be entitled to be charged at the rates mentioned in any other category of service, whatever may be the purpose of his consuming energy or the system of service or the voltage or the connected load of his consumption. Under Part I of the Tariff structure, the consumers have been categorised as (i) for Domestic services, (ii) for Non- Domestic Services, (iii) for public street lighting, (iv) for agriculture service, (v) for small industrial service, (vi) for medium industrial service, (vii) for bulk supply mixed load, (viii) for large industrial load, and (ix) for temporary supply.

12. Tariff of 1981 provides that non-domestic supply include all categories which are not covered by other tariff schedule of part I and included supply of energy for light, fans, heating and power, appliances in commercial and non-domestic establishments such shops, business houses, places of public worship, hostels, stations, garages, auditoriums, cinemas and also such portions of residential premises used for the conduct of business or other activity of these commercial and non-domestic establishments.

13. Similarly, Tariff of 1985 relevant for the present appeal prescribed as under :

I. Domestic Service (Schedule DS/LT-1)

(a) *Applicability* - Available to residential consumers for *bona fide* domestic uses i.e. lights, fans, radios, televisions, heaters, cookers, refrigerators, including pumps, grinders and other supply in whole or part for commercial or non-domestic purposes or any other purposes by such consumers, the Tariff schedule NDS/LT-2 as hereinafter mentioned, shall be made applicable on entire consumption from the months in which such use is noticed by the Board, till a separate service connection is taken for non-domestic purpose or under the relevant tariff as per use of supply of the loads other than covered under domestic service. Re-sale or submetering to tenants and to other persons is strictly prohibited.

(b) *System of supply* : A.C. 50 cycles, single phase 220/250 volts or three phase 400/440 volts .....

II. Non-domestic service (schedule NDS/LT-2)

(a) *Applicability* : Non-domestic supply shall include all categories, which are not covered by other tariff schedules of Part-I as mentioned below : DS/LT-

1, PSL/LT-3, AG/LT-4, SP/LT-5, MP/LT-6 and MD/LT-7 and includes supply of energy for light, fans heating and power appliances in commercial and non- domestic establishments such as shops, business house, places of public worship, hostels, hotels, restaurants, petrol pumps, services stations, garages and auditoriums, cinemas, hospitals, nursing house, dispensaries and doctor's clinics, which are used for private gains, unrecognised educational institutions and telephone exchanges, etc. and also such portions of residential premises used for the conduct of business of any other activity of these commercial and non-domestic establishments including the offices of advocates."

14. As rightly contended at the bar, the defendant (RSEB) did not include the offices of other professionals namely Chartered Accountants, Tax consultants, Architects/Chartered Engineers & Interior Decorators whereas the defendant made specific inclusion of offices of the Advocates prescribing it as non- domestic establishments so as to cover it under non-domestic service.

15. Even upon conversion of the RSEB into JVVNL, new Tariff for supply of electricity-2001 has been enforced w.e.f. 1.4.2001, according to which under clause (III) relating to General conditions of application, these tariff shall apply to and subject to provisions of the "General Conditions of Supply and Scale of Miscellaneous Charges relating to the supply of Electricity" issued by the erstwhile Rajasthan State Electricity Board or any modifications thereof as are enforced from time to time and the rules and regulations made or any orders issued thereunder or any subsequent amendments or modifications thereof so far as the same are applicable. Under sub-clause (6) to clause (III) thereof, for the purpose of application of these tariff, consumers have been categorised with respect to the various categories of service provided in the "Tariff Structure".

16. Part I of Tariff Structure deals with various services including relevant domestic service and Non-domestic Service. For Domestic Service (Schedule DS/LT-1) under its clause of applicability it has been prescribed for being available to residential consumers for *bona fide* domestic uses i.e. lights, fans, radios, televisions, heaters, cookers, refrigerators including pumps, grinders and other domestic appliances. As per its sub-clause (b) character of service means A.C. 50 cycles at supply voltage and under which also even for designed load or load requirement above 1500 KVA with 33

KV & above, consumer is prescribed as domestic service customer. Whereas for applicability of Non- domestic service (Schedule NDS/LT-2), it includes all categories which are not covered by other tariff schedules of Part I viz. DS/LT-4, PSL-3, AG/LT-4, SP/LT-5, MP/LT-6 & ML/LT-7 and includes supply of energy for light, fans, heating and power appliances in Commercial and non-domestic establishments as prescribed in erstwhile tariffs either of 1981 or 1985 or modified from time to time, including offices of the Advocates not situated at his residence. However, Under Tariff 2001, it has further been provided that offices of the Advocates situated at his residence, without employing any person, shall be covered under Domestic Category. There has been no difference as regards character of service as contemplated for Domestic service consumer.

17. Upon careful and conjoint reading of aforesaid Tariffs of 1981 or 1985 or even 2001 it is crystal clear that there have been no difference as to the character of service or supply of energy as both the clauses of tariff prescribed for domestic or non-domestic service include supply of energy for light, fans, heating and power appliances in these twin services and only distinction made is to the premises where the supply of energy is provided, if it is residential with *bona fide* domestic uses then domestic service under the Tariffs will apply and in case it is used in Commercial & Non-domestic establishments which as per clause (II) of Non-domestic service include such as shops, business houses, places of public worship, hostels, hotels, restaurants, petrol pumps, service stations, garages, auditoriums, cinemas, hospitals, nursing homes, dispensaries and doctor's clinic and emphasis has been laid to the use for private gains, and advocates' offices have been included if not situated at their residence.

18. Even under Tariff 2001 further distinction has been made by envisaging that if advocates use their residence for office also without employing any person, he will be covered under Domestic service, otherwise he will be non- domestic service consumer. Such a distinction is again uncalled for and not sustainable in the eye of law and I find much substance in the contentions urged at the bar that if an advocate is having paucity of residential accommodation at the place of his residence either rented or owned then he will have certainly to take his office either on rent or owned at some other place than of his residence, but in that eventuality, as per Tariffs (supra) he will be covered for domestic service, and that apart, if his office is away from his residence, that would not be treated a commercial establishment merely because of its

being away from his residence. Moreover, advocate by his activity at the place of his chamber/office either at his residence or being not situated there but elsewhere cannot be regarded as commercial rather legal profession of an advocate at all times have been considered to be a profession and not like a trade or a business.

19. Profession as distinguished with 'commercial' means a person who enters into a profession involving certain amount of skill as against commercial activity where it is more of a matter of things or business & trade activity. In profession it is purely use of skill activity. Two are distinct concepts in commercial activity-one works for gain or profit whereas in profession one works for his livelihood. (See *L.M. Chitale v. Commissioner of Labour*.)

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20. Now let me lend support from dictum of law laid down in some of citations at the bar. I must express thankfulness to each of the learned members of Bar especially Sarva Shri P.C. Jain (president of High Court Bar Association Jaipur Bench as he then was), Virendra Dangi, R.K. Mathur (for Bar Council of Rajasthan), Amod Kasliwal, R.P. Singh, R.A. Katta, Jai Kumar Yadav, & Ms Manjit Kaur for their assistance rendered during the course of hearing.

21. In *M/s. L.M. Chitale v. Labour Commissioner* (supra) it was held as under –

"Office of a charter architect is not a "shop" within the meaning of Section 2(16) of the Madras Shops and Establishments Act. It is not a premises where any trade or business is carried on or where any services are rendered to customers. The fact that the office of a chartered architect has not been exempted while advocates' chambers and doctor's consulting rooms have been exempted cannot be construed to mean that the office of a chartered architect is covered by the provision.

"Section 2(16) defining a shop is restricted in its own scope. It clearly envisages an activity which as commonly understood is associated with the carrying on of trade or commerce and cannot take in establishments where professional services are rendered. The expression "services are rendered to customers" in the definition has to be construed as services rendered to customers in the carrying on of trade or business. A chartered architect carried on a learned profession and it is his special qualifications that are placed at the disposal of his clients. The code of professional conduct prescribed by the Royal Institute

of British Architects indicates that he is as much constrained in the performance of his functions as a lawyer or a solicitor is. The office of a chartered architect does not therefore fall within the purview of shop."

22. In *Dr. D.M. Surti v. State of Gujarat*,<sup>2</sup> the Apex Court held that private dispensary of a doctor is not a 'commercial establishment' within the meaning of the Bombay Shops and Establishments Act and the provisions of the Act do not apply to his dispensary. According to the Apex Court, the correct test of finding whether a professional activity falls within Section 2(4) of the Act is whether the activity is systematically and habitually undertaken for production or distribution of goods or for rendering material services to the community or any part of the community with the help of employees in the manner of a trade or business in such an undertaking. The Apex Court further held that a professional activity must be an activity carried on by an individual by his personal skill and intelligence; and there is a fundamental distinction between a professional activity and commercial activity and unless the profession carried on by a person also partakes of the character of a commercial nature, he cannot fall within the ambit of "commercial establishment" as defined in Section 2(4) of the aforesaid Act. Ultimately the Apex Court held that the professional establishment of a doctor cannot come within the definition of commercial establishment under the said Act.

23. In *V. Sasidharan v. M/s. Peter & Karunakar*,<sup>3</sup> the question was whether the office of a lawyer is a commercial establishment or not and the Apex Court answered it by holding that the office of a lawyer or of a firm of lawyers is not a "commercial establishment" within the meaning of Section 2(4) Kerala Shops and Commercial Establishments Act. The Apex Court then observed that 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 the 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; and the context as well as the phraseology of the definition in Section 2(15) is inapposite in the case of a lawyer's office or the office of a firm of lawyers.

24. While placing reliance upon the aforesaid decisions including *V. Sasidharan v. M/s. Peter & Karunakar* (supra), the Division Bench of the M.P. High Court in *Shiv Narayan v. M.P. Electricity Board*,<sup>4</sup> observed as under :

"Their Lordships of Apex Court have categorically held that the office of a lawyer is not a commercial establishment. This observation was with regard to Kerala Shops and Commercial Establishments Act; nonetheless, the fact remains that it has been held categorically without any manner of doubt that the profession of a lawyer is not a commercial activity and it is absolutely erroneous to cover it by a tariff which is essentially meant for commercial purposes. The heading of the 'tariff' as pointed out above, is for the supply of the energy for the commercial purposes. Since the lawyer's profession is not a commercial activity, therefore tariff imposed by the MPEB to cover the office of a lawyer as commercial establishment is not a correct categorisation of the lawyer's profession."

25. Having benefited by enlightenments derived from afore quoted citations it is trite that an individual for a professional has to apply his such skill as against commercial or business activity where the transaction is done with active co-operation of employer and his employees for sale of certain goods or with the profit motive. However for a profession, one works for livelihood and not for a profit motive only. Thus categorisation and inclusion of profession of a lawyer as a commercial establishment or non-domestic service by the defendant (RSEB) or the respondent (JVNL) for the purposes of payment of electricity consumption at commercial rate or non-domestic service charges under its any of the Tariffs of 1981 or 1985 or 2001 is absolutely illegal, irrational and arbitrary and, therefore, it is *ultra vires* of Article 14 of the Constitution of India. Section 49 of the Electricity (Supply) Act clearly provides that there should be simplification and standardisation of methods and rates of charges for such supplies, and that in fixing the uniform tariff the Board shall have regard to the nature of supply and the purpose for which it is required. Even as per Section 49(4) in fixing the tariff and terms & conditions for the supply of electricity the Board shall not show undue preference to any person.

26. Once even other professionals like Chartered Accountants, Tax consultants, Architects, Chartered Engineers and Interior Decorators by their skilled art having acquired by dint of skill & study, are not included as commercial & non-domestic establishments for being covered under non-domestic service clause of any other tariffs of 1981 or 1985 or 2001 then, in my considered opinion, specific inclusion only of the Advocates' offices in the Tariffs for non-domestic service clearly and legally

smacks of unguarded, unbridled power of the defendant and is a glaring example of colourable exercise of power, inasmuch as there is no reasonable ground to include advocates officers by treating as commercial and non-domestic establishments because non-domestic service is basically meant for commercial and not for professionals.

27. Thus viewed, in my considered opinion the practicing advocate or lawyer by his legal profession cannot be treated as carrying on commercial activity, irrespective of the chamber or office either established or situated in his own residence or in any residential building rented or owned by him either in commercial area or residential colony or any commercial complex, and thus, his such chamber or office cannot be termed as a commercial establishment, since the lawyers profession is not a commercial activity, and, therefore, tariff imposed by the defendant RSEB (or 'JVVNL') under its any of tariffs of 1981 or 1985 or 2001 to cover the lawyer/advocate's office/chamber as commercial establishment is not a correct categorisation and it is absolutely erroneous to cover it by a tariff essentially meant for commercial purposes. Further for the purposes of imposing domestic tariff of electric supply it is not necessary that advocates/lawyer's family should also live in the premises where his professional office/chamber is situated in any of residential house/area of commercial complex/campus/area of the local self Government body like JDA/UIT/Municipality.

28. Applying aforesaid dictum of law to the facts of the instant case, and having given careful look at the impugned findings arrived at by the First Appellate Court reversing decree of the trial court I find that the first appellate court failed discuss the evidence on record while dealing with issue No. 1. The plaintiff's evidence including of Mohd. Usman (PW4) in whose residential building Rahim Manzil, has been not only discussed but also properly appreciated by the trial court but not by the first appellate court. The trial court rightly concluded, as I find from plaintiff's evidence, that Rahim Manzil building where plaintiff's professional office is situated being established by having taken on rent by him, is totally residential campus because Mohd. Usman deposed that plaintiff's office is established inside residential accommodation. But this part of his evidence has not been taken into consideration nor his evidence has been discussed by the first appellate court. Moreover, as has been discussed above, one it is settled that lawyer's profession is not commercial activity, then tariff imposed by the defendant (erstwhile RSEB or JVVNL) to cover the office of a lawyer & even the

plaintiff as commercial establishment is not a correct categorisation of lawyer/advocate's office either at his residence or elsewhere.

29. Hence, in this view of the matter, the first appellate court has committed error of law by not considering this significant aspect of settled law and erroneously held that the advocate/lawyer's chamber/office situated elsewhere is a commercial establishment, inasmuch as the defendant failed to prove and establish either in its pleading or evidence any of the situation showing the plaintiff being indulged in any commercial activity at the suit premises where supply of electricity is provided or showing that the plaintiff's profession of practicing advocate involved any trade or business indulging in commercial activity, therefore, the impugned finding arrived at by the first appellate court is absolutely perverse and further its finding without discussion of plaintiff's evidence including documentary is not sustainable in law and it was not justified to reverse trial court's finding decreeing the plaintiff's suit in his favour.

30. As a result of aforesaid discussion, this second appeal succeeds and is hereby allowed. The impugned judgment & decree dated 6.10.97 of the ADJ No. 2, Jaipur City is set aside and the judgment & decree of the trial Court is restored and affirmed. No order as to costs. The record be sent back forthwith.

Appeal allowed.

Cases Referred.

1. AIR 1964 Mad 131
2. AIR 1969 SC 63
3. AIR 1984 SC 1700,
4. AIR 1999 Mad Pra 246