(2007) 08 CAL CK 0050

In the Calcutta High Court

Case No : F.M.A. No. 290 of 1997

Board of Trustees, Braithwaite Burn and Jessop Construction Co. Ltd. — APPELLANT

Vs

Rabindra Nath Roy Chowdhury — RESPONDENT

Date of Decision : 17-08-2007

Acts Referred:

Companies Act, 1956 — Section 14(2A), 418, 418(2)
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17(1), 17(3)
Income Tax Rules, 1962 — Rule 67

Citation : (2007) 4 CHN 1 : (2007) 115 FLR 358 : (2008) 1 LLJ 21

Hon'ble Judges : Pranab Kumar Chattopadhyay, J;Kalidas Mukherjee, J

Bench : Division Bench

Advocate : Dipak Kumar Ghosh and Ranjay De, for the Appellant;S.C. Prasad, for the Respondent

Final Decision : Allowed

Judgement

Pranab Kumar Chattopadhyay, J.—The short question that arises before us for consideration in this appeal is whether the employees of the exempted establishment are entitled to enjoy the benefit of interest at the statutory rate even though the appropriate Government did not issue any notification amending the exempted scheme?

2. By an order dated 12.02.1955, clerical and supervisory staff, subordinate staff, operators and coolies were granted provisional exemption under paragraph 27A of the Employees'' Provident Funds Scheme, 1952 subject to condition specified in Section 17(3) of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952. On 15.09.1988, respondent No. 1 was informed about retirement on 31st December, 1988 on attaining the age of superannuation. After a lapse of more than 4 years from the date of said retirement, the learned Advocate on behalf of the respondent No. 1 wrote to the Regional Provident Fund Commissioner on 16.11.1992 for a direction upon the appellant company to pay

interest at the Central Government rate. On 30.11.1992, the Regional Provident Fund Commissioner wrote to the trustees of the appellant company to pay balance amount of interest calculated at statutory rate even in absence of any notification covering the establishment to pay statutory rate.

3. It is the case of the appellants that the trustees did not pay less than the rate which the employees were entitled to at the time when the exemption was granted. By the written communication dated 1st January, 1993, Board of Trustees of the appellant company, namely, the appellant No. 1 herein informed the Regional Provident Fund Commissioner that the Provident Fund is an exempted fund and are guided by the provisions of Income Tax Act and the amount towards the contribution in the members'' account is credited with interest based on the earning by the fund which is audited and certified by the auditors and, as such, there is no scope for reviewing the interest paid to the respondent No. 1.

4. On 7th September, 1993, a writ petition was filed by the respondent No. 1 praying for a direction to calculate the interest at the statutory rate. The learned Single Judge thereafter by the judgment and order under appeal dated 15th November, 1995 allowed the said writ petition upon holding that the employees of exempted establishment are entitled to enjoy benefits of provident fund including statutory interest.

5. Admittedly, exemption was granted in the present case under para 27A of the Employees'' Provident Funds Scheme, 1952 subject to the conditions specified in Section 17(3) of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952. The letter dated 12th February, 1955 issued by the Ministry of Labour, Government of India in this regard is set out hereunder:

GOVERNMENT OF INDIA MINISTRY OF LABOUR No. R-275/WB/709 Dated: Calcutta 12.2.1955

From : Shri D. Mallik Regional Provident Fund Commissioner, W.B. Theatre Road, Ground Floor, Calcutta -16 To : The Acting Secretary The Braithwate Burn & Jessop Construction Company Limited P-13, Misson Row, Estn. Calcutta - 1 Sub : Provident Exemption of classes of employees in the factory of Braithwate Burn & Jessop Construction Co. Ltd., Calcutta under paragraph 27 of the Employees'' Provident Funds Scheme, 1952.

Sir,

With reference to your letter No. 8/AKM/P dated the 15th January, 1954 I am to state that the under mentioned classes of employees in your factory are granted provisional exemption under para 27A of the Employees'' Provident Funds Scheme, 1952 subject to the conditions specified in Section 17(3) of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952.

1. Clerical and supervisory staff 2. Subordinate staff 3. Operators 4. Coolies Yours faithfully Sd/ D. Mallik Regional Provident Fund Comma.

6. Mr. Ghosh, learned Counsel representing the appellants submits that Section 17(3)(b) of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the said Act) provides that the exempted employees would be entitled to interest payable at the time of exemption. The said provision of Section 17(3)(b) is set out hereunder:

Section 17(3)(b) . shall not, at any time after the exemption, without the leave of the Central Government, reduce the total quantum of benefits in the nature of pension, gratuity or provident fund to which any such person or class of persons was entitled at the time of the exemption;

7. It has been submitted on behalf of the appellants that the respondent No. 1 retired on 31st December, 1988 and consequent upon his retirement all the legal dues including the fund upto the date of retirement was paid to the said respondent No. 1.

8. From the records of the case we find that after a lapse of more than 4 years from the date of retirement of the employee concerned a written complaint was filed by his learned Advocate before the Regional Provident Fund Commissioner alleging that the Board of Trustees of Provident Fund of the appellant company in connivance with the employer did not pay yearly interest at an appropriate rate to which the said employee was entitled to and the said learned Advocate also requested the Regional Providence Fund Commissioner to issue necessary direction to the appellants for payment of interest at the statutory rate. The Regional Provident Fund Commissioner thereafter by the letter dated 25th January, 1993 directed the trustees to pay statutory rate of interest even in absence of any complaint to the effect that the said trustees had been paying interest at a rate below the rate prevalent at the material time of exemption.

9. Mr. Ghosh, learned Counsel of the appellant submits that no notification was issued pertaining to the exempted establishment to pay interest at the statutory rate. Mr. Ghosh further submits that Rule 67 of the Income Tax Rules provides the pattern of investment of the provident fund money and there is no scope for earning any additional amount of interest than the interests available from the aforesaid pattern of investment. Mr. Ghosh also referred to Section 418(2) of the Companies Act which provides that no employee shall be entitled to receive interest at a rate exceeding the rate of interest yielded by such investment.

10. It has been specifically urged on behalf of the appellants that the trustees herein cannot be asked to pay interest at the statutory rate. Assailing the judgment and order under appeal, learned Counsel of the appellants submits that the trustees herein cannot be saddled with the financial burden for making payment of additional interest in absence of any specific notification issued by the prescribed authority.

11. Mr. Ghosh, learned Counsel of the appellants referred to and relied on the Division Bench judgment of this Hon''ble Court in the case of Electric Lamp Manufacturers (India) Ltd. and Anr. v. Regional Provident Fund Commissioner

and Ors. reported in 1996(2) CLR 890, wherein Justice S. B. Sinha, speaking for the Bench held as follows:

25...The Board of Trustees and/or the employer in our considered opinion cannot be saddled with any other or further monetary liability unless such a condition is specifically imposed upon them.

12. Mr. Ghosh also relied upon the decision of the Supreme Court in the case of Jiyajeerao Cotton Mills Ltd. Vs. Dev Kumar Holani and others, , wherein the Hon''ble Supreme Court specifically held as hereunder:

9...The revised terms and conditions did not and could not have become applicable automatically, and in order to make them applicable they were required to be incorporated by the appropriate Governments in the notification granting exemption u/s 17(1)(a)....

13. It has been argued on behalf of the appellants that the learned Single Judge while deciding the writ petition failed to appreciate that there was no reduction in the nature of Provident Fund which the members of the fund under the trustees were entitled to at the time of exemption. Referring to the statement relating to the final settlement of the Provident Fund dues of the respondent No. 1 as mentioned at page 113 of the Supplementary Paper Book, Mr. Ghosh, learned Counsel of the appellants submits that the interest as accrued by the investment of funds was duly credited and further submits that no employee is entitled to receive interest at a rate exceeding the rate of interest yielded by the investment of such funds as per provisions of Section 418 of the Companies Act.

14. For the aforementioned reasons, the learned Counsel of the appellants submits that the direction by the Regional Provident Fund Commissioner, dated 30"' November, 1992 and the subsequent order passed by the learned Single Judge while deciding the writ petition on 15th November, 1995 cannot be sustained in the eye of law in view of the clear provisions of the statute and also the law already declared by the Division Bench of this Court as well as the Hon''ble Supreme Court.

15. Mr. S.C. Prasad, learned Counsel of the respondent Regional Provident Fund Commissioner, however, submits that the benefits provided to the employees of the establishment of the appellant No. 1 cannot be lesser than the statutory rate of interest which from time to time has been declared by the Central Government. As such, any low payment of interest than the statutory rate to the members by the Board of Trustees is an offence under Sub-section (2A) of Section 14 of the said Act for which the Board of Trustees should be held responsible under the provisions of the said Act and scheme framed thereunder. Mr. Prasad further submits that the decision of the Supreme Court in the case of Jiyajeerao Cotton Mills Ltd. (supra) has no manner of application in the present case in view of the clear provision of the statute as according to the said learned Counsel, scheme of the exempted unit should be better than the 1952 Act. Mr. Prasad further submits that the appellants herein have given low rate of interest

to the respondent No. 1 than that of the statutory rate declared by the Central Government from time to time which is not permissible.

16. We fail to understand the submissions of the learned Counsel of the respondents as we neither find any provision in the statute nor any such provision has been specifically referred to or relied upon by the said learned Counsel of the respondents whereby and whereunder an employer of the exempted establishment is liable to pay statutory rate of interest in absence of any notification issued by the appropriate Government in this regard. In our opinion, decision of the Supreme Court in the case of Jiyajeerao Cotton Mills Ltd. (supra) is very much applicable in the facts of the present case. Section 17(3)(b) of the Act of 1952 clearly provides that the employer in relation to an exempted establishment shall not, at any time after the exemption, without the leave of the Central Government, reduce the total quantum of benefits in the nature of pension, gratuity or Provident Fund to which any such person or class of persons was entitled to at the time of the exemption.

17. In the present case it is nobody''s case that the appellants herein have reduced the rate of interest in relation to the Provident Fund amount after the grant of exemption to the establishment of the appellant No. 1 by the appropriate Government. We also do not find any notification issued by the Central Government directing the establishment of the appellant No. 1 to pay interest at the statutory rate as has been claimed by the respondent No. 1.

18. In view of the decision of the Hon''ble Supreme Court in the case of Jiyajeerao Cotton Mills Ltd. (supra), we are of the opinion that unless a notification is issued and published by the appropriate Government in the Official Gazette amending the exempted scheme in respect of an exempted establishment, the Regional Provident Fund Commissioner cannot issue any direction to the concerned employer to change the rate of interest in respect of the Provident Fund account as sought to have been done in the present case. However, we are also of the opinion that in case of directing enhancement of the rate of interest appropriate Government must take note that the Board of Trustees cannot be asked to pay interest at such enhanced rate which the said trustees may not earn from their sources of investment.

19. The earlier Division Bench judgment of this Hon''ble Court in the case of Electric Lamp Manufacturereres (India) Ltd. and Anr. is very much applicable in the facts of the present case.

20. The conditions under which the exemptions were granted do not provide for payment of interest at the rate declared by the Central Government or any other statutory rate. In the present case, it has not been established that any condition specified in Section 17(3) of the Employees'' Provident Fund and Miscellaneous Provisions Act, 1952 has been violated by or at the instance of the appellants herein.

21. For the aforementioned reasons, the direction issued by the Regional

Provident Fund Commissioner, West Bengal to the trustees of the appellant company, namely, the appellant No. 1 herein by the letter dated 25th January, 1993 for payment of interest at the statutory rate by the appellants herein cannot be sustained and the same is, therefore, quashed. For the identical reasons, the order under appeal dated 15th November, 1995 passed by the learned Single Judge also cannot be sustained and the same is hereby set aside.

22. This appeal thus stands allowed. There will be no order as to costs.

23. Let urgent xerox certified copy of this judgment and order, if applied for, be given to the learned Advocates of the parties on usual undertaking.

Kalidas Mukherjee, J.

24. I agree.

