

(1998) 10 MAD CK 0044

In the Madras High Court

Case No : Writ Petition No's. 9383 and 12458 of 1989 and W.M.P. No's. 17797 and 17798 of 1989

Honorary Secretary, CMS Matriculation Higher Secondary School

APPELLANT

Vs

Regional Provident Fund Commissioner and Another

RESPONDENT

Date of Decision : 29-10-1998

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17, 17(1)

Citation : (2000) 3 LLJ 128

Hon'ble Judges : Shivaraj V. Patil, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Shivaraj V. Patil, J.—Heard the learned counsel for the parties.

2. The relief sought for in both the writ petitions being the same, based on common set of facts, raising similar contentions, they are disposed of by

this common order. Writ Petition No. 9383 of 1989 is filed by the Honorary Secretary, CMS Matriculation Higher Secondary School,

Ganapathy, Coimbatore, Writ Petition No. 12458 of 1989 is filed by the 50 teachers and staff members of the same school.

3. In the writ petitions, the petitioners have sought for a writ of certiorarified mandamus calling for the records from the respondent - Regional

Provident Fund Commissioner, Coimbatore, in his proceedings No. C3/TN/21737/Enf/CBE-V/89, dated June 28, 1989, and quash the same and

to further direct the respondent to consider their application, dated June 9, 1989, for grant of exemption u/s 17 of the Employees' Provident Funds

and Miscellaneous Provisions Act, 1952, on merits and in the light of the guidelines given in Sections 17(1)(a) and 17(1)(b) of the Act. It is enough to state the facts as can be gathered from Writ Petition No. 9838 of 1989.

4. The CMS Matriculation Higher Secondary School was started in the year 1977 by the Coimbatore Malayala Samajam, a registered society

under the Societies Registration Act, the school has got 72 employees consisting of teaching staff members and other subordinate staff, in the year

1979, a trust was formed providing for the constitution of a provident fund for the school for the benefit of the employees; the rules of the provident

fund provided for employer's contribution at 6 1/4 of the wages and employees' contribution at the same rate, however the employees could

make contribution to the fund at a higher rate; subsequently, the rate was raised to 8.33 per cent of the wages, the provident fund contribution was

being invested in deposits in nationalised banks, which secured a reasonable rate of return from the year 1987, a recurring deposit account was

opened in the name of every member with the Indian Overseas Bank, Coimbatore, for the amount ranging from Rs. 100 to Rs. 1500 per month in

respect of every member of the employees ; on that account, an employee on retirement gets a substantial sum.

5. By the notification in S.O.986, dated February 19, 1982, the Central Government made the Employees' Provident Funds and Miscellaneous

Provisions Act (hereinafter referred to as "the Act"), applicable to all schools, whether or not recognised or aided by the Central Government or a

State Government. According to the petitioner, he was not aware of this notification and the school continued to make contributions to its own

provident fund. On December 30, 1988, the respondent sent a communication to the petitioner stating that it was liable to be covered under the

Act from August 1982 and the petitioner should cover its employees under the Employees' Provident Fund Scheme. In response, the petitioner

wrote to the respondent on June 9, 1989 about the existence of the provident fund benefit already in that school and in that view, the petitioner

sought exemption u/s 17 of the Act. It was also stated that the petitioner had already applied to the Income Tax department to recognise the

provident fund established by the petitioner. By the communication, dated June 6, 1989, the respondent purported to determine the contribution

payable in respect of the eligible employees for the period August 1982 to March 1989 at Rs. 3,31,900 towards employees' contribution and an equal amount as employer's contribution, to the family fund at Rs. 1,765 from the employer and employees, deposit linked insurance fund at Rs. 12,750, administrative charges at Rs. 12,955 and deposit linked insurance fund administrative charges at Rs. 1,820.60. In all a demand for a sum of Rs. 2,59,370 was made. As regards the petitioner's application for exemption u/s 17 of the Act, the respondent gave a reply, dated June 28, 1989, stating that the provident fund scheme existed in the petitioner's establishment has not been recognised by the Income Tax department; that the pattern of investment made by the petitioner was not entitled to get exemption and apart from all these considerations, exemption u/s 17 of the Act would not normally be granted to an establishment employing less than 100 employees. In that view, the respondent refused to entertain the petitioner's application for exemption and directed the petitioner to comply with the provisions of the Act immediately, failing which recourse will be taken to revenue recovery proceedings, in addition to taking action under the penal provisions of the Act. It is further submitted by the petitioner that as per Section 17 of the Act, exemption could be granted prospectively or retrospectively from the operation of all or any of the provisions of the scheme, subject to such conditions as may be specified in the notification to be published in the Official Gazette by the appropriate Government. Having regard to the rules of provident fund with respect to the rates of contribution, they are not less favourable than those specified in Section 6 of the Act and the employees are also in enjoyment of other provident fund benefits, which on the whole are not less favourable to the employees than the benefits provided under the Act or any scheme in relation to the employees in any other establishment of similar character. At the time of granting exemption, it may be open to the appropriate Government to lay down conditions about the investment of contributions or approval of the income tax department and that Section 17 of the Act does not say that exemption should not be granted to an establishment merely by numerical strength of the employees working in the establishment. The petitioner further stated that while it is left to the discretion of the appropriate Government either to grant or not to grant exemption, certainly it is not open to the Government to reject the application on the

grounds which are not mentioned in Section 17 of the Act. According to the petitioner, it has deprived of a reasonable opportunity to obtain

exemption, by rejecting the application made u/s 17 of the Act at the threshold on the ground that it employed less than 100 employees. It was also

contended that the petitioner-school is not run on commercial basis; it is not receiving any aid from the State Government of Tamil Nadu; the

provident fund accumulations have been invested in securities and immediate finance cannot be arranged to pay the arrears that the petitioner has

no objection to make contribution to the Employees' Provident Funds Scheme prospectively at the rate of 8.33 per cent of wages in respect of its

eligible employees during the pendency of the writ petition. On these facts and grounds, the petitioner has sought for the reliefs as stated above.

6. The respondent has filed separate counter-affidavits in both the writ petitions; but in substance both the counter affidavits are the same,

contending that the petitioner-school was covered under the Act with effect from August 1, 1982 ; the school was asked to pay arrears of

Employees' Provident Fund and Employees' Deposit Linked Insurance Scheme for the period from August 1, 1982 to January 31, 1989; on or

before February 15, 1989, the school was also instructed to implement the provisions of the Family Pension Fund Scheme with effect from

January 1, 1989 ; since the petitioner failed to comply with the order given in the coverage memo it was summoned to appear for an enquiry u/s 7-

A of the Act on March 27, 1989, the manager of the school appeared on that date before the respondent, but without any records ; the enquiry

was postponed to April 10, 1989 ; the Manager was also advised to bring all the records on April 10, 1989 without fail and on that date the

Secretary of the school appeared before the respondent, but did not produce any records ; the Secretary orally informed about the existence of a

private provident fund in the petitioner-school; he was advised to produce a copy of the School's Provident Fund Rules along with the salary and

attendance registers during the next enquiry on May 1, 1989 ; on May 1, 1989, the Manager of the school appeared and sought for adjournment

of the enquiry ; as a special case, enquiry was adjourned to June 1, 1989 ; the Manager of the school appeared on June 1, 1989 and furnished

only a statement containing the salary particulars in respect of the staff for the period from August 1, 1982 to March 31, 1989, no records relating

to school provident fund was produced ; on the basis of salary particulars furnished, the respondent determined the dues and issued order u/s 7-A

of the Act on June 6, 1989; on receipt of the said order, the school addressed in its letterhead to the respondent intimating about the existence of

their own provident fund scheme and wanted exemption u/s 17 of the Act ; the petitioner did not apply for exemption in the prescribed pro forma

and the application for I exemption was made casually in the letterhead of the school; in the letter, they explained that the provident fund

contributions of the employees with a matching contribution of the management are deposited in a recurring deposit maintained in a nationalised

bank and a portion of the accumulated fund amount used to be invested in fixed deposits getting more returns ; the petitioner-school did not

produce the rules and regulations of the provident fund scheme, their provident fund scheme also has not been recognised by the Income Tax

department and the employees in the school were less than 100 , under the circumstances, the respondent rejected the request of the petitioner-

school for exemption by the letter, dated June 28, 1989 and directed to comply with the order, dated June 6, 1989, issued u/s 7-A of the Act ; the

petitioners have filed the writ petitions challenging this order, dated June 28, 1989, of the respondent. It is also stated by the respondent in the

counter-affidavits that the petitioner did not challenge the coverage memo, dated December 30, 1988, and did not come forward intimating the

existence of their private provident fund ; it is only after receiving notice u/s 7-A of the Act, dated March 17, 1989, the school cared to respect the

correspondence from the office of the respondent ; the petitioner-school did not produce records relating to the existence of their provident fund

scheme and the rules governing them, in spite of giving sufficient opportunity ; in the absence of records, it was also not possible to examine as to

whether the scheme of the petitioner was more beneficial to the employees. In this view, the respondent prayed for the dismissal of the writ

petitions.

7. The learned counsel for the petitioners in their arguments reiterated the contentions raised in the writ petitions and submitted that the respondent

was not right in rejecting the application made by the petitioner-school seeking exemption u/s 17 of the Act on the ground that the number of

employees working in the petitioner-school establishment was less than 100 ; the Provident Fund Scheme introduced by the petitioner-school is

more beneficial to the employees and it has been working well ; out of the contribution amount deposited in the nationalised bank in a recurring

deposit. Some amount was further invested in fixed deposit ; as a result, the employees on retirement would get considerable sum of money ; the

respondent did not consider the application of the petitioner-school filed for exemption reasonably.

8. Per contra, the learned counsel for the respondent argued in support and justification of the impugned order. She submitted that exemption u/s

17 of the Act could not be claimed by the petitioner as a matter of right and granting of such exemption was not automatic ; the petitioner-school

did not satisfy the requirements and conditions for granting exemption, in that the petitioner-school neither produced the rules relating to the

Provident Fund Scheme introduced by them, nor produced any documents to show the nature of the scheme in spite of sufficient time and

opportunities given to them further the so-called scheme introduced by the petitioner-school had not been recognised by the Income Tax

department; the petitioners have not challenged the earlier order, dated June 6, 1989, made u/s 7-A of the Act and the coverage order covering

the petitioner-school for the purpose of the scheme under the Act by the order, dated December 30, 1988. The learned counsel also added that

even application for exemption was not made properly in the prescribed form, but it was only casually made on the letterhead of the school, that

too after the order, dated June 6, 1989, was passed by the respondent making the petitioner-school liable to pay the contribution. Under the

circumstances, according to the learned counsel for the respondent, the writ petitions are devoid of any merit and they are liable to be dismissed.

9. I have considered the submissions made by the learned counsel for the parties. It was not disputed before me that the petitioner-school was

covered under the Employees' Provident Fund, by the order, dated December 30, 1988. The respondent passed the order

Ref.No.C3/TN/21737/ Enf/CBE.V/89, dated June 6, 1989, u/s 7-A of the Act, after giving sufficient time and opportunity. The order, dated

December 30, 1988 covering the petitioner-school for the purposes of the Act, in relation to the scheme and the aforementioned order, dated June

6, 1989, passed u/s 7-A of the Act directing the petitioner-school to remit the contribution amount mentioned in the said order, were not

challenged. On the other hand, by the letter, dated June 9, 1989, the petitioner-school again informed the respondent that they have their own

Provident Fund Scheme which was more beneficial to the staff and further in the same letter requested the respondent to exempt them from

handing over the funds to the department and allow them to retain the same. The petitioner did not make application in the prescribed form

separately seeking exemption u/s 17(1) Act. After receiving notice u/s 7-A of the Act, the Manager of the petitioner-school appeared before the

respondent on March 27, 1989 without any records, the enquiry was adjourned to April 10, 1989; on that date the Secretary of the petitioner-

school attended the enquiry and informed that the school is having its own Provident Fund Scheme from 1979 ; from the mere information given by

him, it could not be ascertained whether the private provident fund introduced by the petitioner-school was more beneficial than the Employees"

Provident Fund, the Secretary assured that he would produce the copy of the Provident Fund Rules and other records on the next date of enquiry

; the enquiry was again adjourned to May 1, 1989 even on that date, the secretary of the school sought for further time for production of records ;

as a special case the enquiry was adjourned to June 1, 1989; the Manager of the petitioner-school attended the enquiry on June 1, 1989, but only

produced a statement containing the particulars of wages and dues payable in Account Nos. 1 and 10 in respect of their employees for the period

from August 1982 to March 1989. As can be seen from the order, dated June 6, 1989, the respondent worked out the contribution payable by

the petitioner-school on the basis of the salary particulars given by the Secretary. In the said order, it is also recorded that ""Sri Sukumaran Nair,

the Manager of the petitioner-school accepted the school's liability towards the provident fund due."" It is only when the respondent rejected the

request of the petitioner for exemption u/s 17(1) of the Act by the impugned order, these writ petitions are filed.

10. In the impugned order, it is clearly stated that the said fund introduced by the petitioner-school to its employees to deposit the amount in

recurring deposit scheme would not get any recognition either from the Income Tax or under the provisions of the Employees" Provident Funds

and Miscellaneous Provisions Act, 1952 the pattern of investment explained by the petitioner could not get exemption u/s 17(1) of the Act, that

apart, exemption u/s 17 of the Act would not normally be granted to an establishment employing less than 100 employees. On these grounds, the

impugned order was passed rejecting the request of the petitioner made for exemption u/s 17 of the Act. The argument of the learned counsel for

the petitioner so far as the ground that exemption could not be granted to an establishment employing less than 100 employees made against the

petitioner-school in the impugned order, cannot be sustained in the light of the order, dated November 2, 1989, made by the learned single Judge

(M. sriNIVASAN, J., as he then was) in Writ Petition No. 10832 of 1989. Paragraph 3 of the said order reads:

3. There is no such condition in Section 17(1)(a) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and so long as the

Act remains unamended, it is not open to the Central Provident Fund Commissioner to say that the establishment having employment strength of

less than 200 will not be entitled to invoke Section 17(1)(a) of the Act. It is certainly open to the authorities to consider the draft scheme offered

by the employer and reject it if it is not beneficial to the workers. In the present case, the rejection having been made on an irrelevant ground, it

cannot be sustained. Consequently, the order, dated May 31, 1989 made by the second respondent is quashed.

I respectfully agree with the said decision. But, that by itself does not help the petitioner-school, as the petitioner-school failed to satisfy the "other

requirements, such as recognition of the fund by the Income Tax department and satisfying the respondent that the private provident fund

introduced by the petitioner-school was more beneficial to employees.

11. Added to this, as already stated above, referring to the order No. C3/TN/21737/Enf/ CBE.V/89, dated June 6, 1989, the petitioner-school

failed to produce the relevant records in support of its stand in the proceedings initiated u/s 7-A of the Act. The petitioner-school suffered the said

order, under which the liability of contribution was fixed and demanded from the petitioner-school, which order is not challenged. During the

course of the arguments, the learned counsel for the petitioner-school produced copy of the letter C.No. 1422(1)/79-80, dated October 23,

1991, issued from the office of the Commissioner of Income Tax, Coimbatore, to the effect that the Commissioner of Income Tax, Coimbatore,

has approved the fund of the petitioner-school with effect from August 2, 1989. That is for the period subsequent to the impugned order, dated

June 28, 1989. The said letter, dated October 23, 1991, issued by the office of the Commissioner of Income Tax shows that the fund of the

petitioner-school was approved with effect from August 2, 1989.

12. The grievance of the petitioners in W.P. No. 12458 of 1989 is that in case the amount invested in the recurring deposit or the fixed Deposit,

pursuant to the fund created by petitioner-school, is withdrawn prematurely, they will be put to great hardship. Whether the private provident fund

scheme introduced by the petitioner-school is more beneficial when compared to the provident fund scheme under the Act, is itself a matter which

could not be examined for want of necessary records, as is evident from the order dated June 6, 1989. In my view, the employees shall not be

deprived of the benefit of the provident fund scheme, whether the amount is deposited in a nationalised bank or it is deposited under the provident

fund scheme. Hence, I do not find any merit in the Writ Petition No. 12458 of 1989. Thus, finding no merit in the writ petitions, they are dismissed.

13. However, I make it clear that having regard to the subsequent event, viz., the Commissioner of Income Tax, Coimbatore, having approved the

fund of the petitioner-school with effect from August 2, 1989, as is evident from the letter, dated October 23, 1991, it is open to the petitioner-

school to apply seeking exemption u/s 17 of the Act in the proper form supported by necessary documents, if so desired. In the event such an

application is made within four weeks from today, respondent shall pass orders on such application on merits and in accordance with law, having

regard to all the relevant aspects, as can be taken note of u/s 17 of the Act.

14. There shall be no order as to costs in the writ petitions. W.M.P. Nos. 17797 and 17798 of 1989 are, consequently, dismissed.