(2005) 02 CAL CK 0064

In the Calcutta High Court

Case No : M.A.T. No. 817 of 2002

Regional Provident Fund Commissioner and Others APPELLANT

Vs

Atreyee Welfare Trust and Others RESPONDENT

Date of Decision : 07-02-2005

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 16(1), 17, 17(1)
Income Tax Act, 1961 — Section 271B
West Bengal Non — Government Educational Institutions and Local Authorities (Control of Employees Provident Fund) Act, 1983 — Section 1(4), 2(6)

Citation : (2005) 3 CHN 613 : (2005) 107 FLR 780 : (2005) 3 LLJ 161

Hon'ble Judges : Soumitra Pal, J;Dilip Kumar Seth, J

Bench : Division Bench

Advocate : S.C. Prasad, for the Appellant;Tapan Kumar Mukherjee, B.R. Bhattacharya, Hirenmoy Bhattacharya and M.K. Kundu, for the Respondent

Judgement

Dilip Kumar Seth, J.—As prayed for, the name of the appellant No. 1 be deleted from the cause title at the risk of the appellant. The cause title be corrected here and now. The corrected Vakalatnama has since been filed today be taken on record. The defect, thus, stands removed. After having heard the learned counsel for the parties, the application for] addition of parties, being CAN 10673 of 2004, is allowed. Let the applicants be added as respondents in the appeal without prejudice to the rights and contentions of the parties and subject to such objection that might be taken; at the time of hearing. Let the names of the added respondents be included in the Memorandum of Appeal. The application, thus, stands disposed of.

In Re: CAN 5492 of 2002 & MAT 817 of 2002.

2. While addressing the Court on the question of interim order of stay, the learned counsel for the respective parties had addressed the Court on the merit of the appeal. After having heard the application for interim order, we are of the view that any order on the application would have an impact on the merit of the

appeal itself. Therefore, by consent of the parties, the appeal is treated as on day''s list and is taken up for hearing along with the application for stay.

The Question

3. After having heard the learned counsel for the parties, the short question that falls for determination before this Court is whether the provisions of the West Bengal Non-Government Educational Institutions and Local Authorities (Control of Employees'' Provident Fund) Act, 1983 and the West Bengal Recognised Non-Government Educational Institution Employees (Death-cum-Retirement Benefit) Scheme, 1981 would apply to the present School which is administered by a Trust.

Submission on behalf of the Respondent/School

4. The learned counsel for the School pointed out that the benefit under the 1981 Scheme and the 1983 Act payable to the employees are more beneficial than those available under the Employees'' Provident Funds and Miscellaneous Provision Act, 1952. He also pointed out that only four of the 26 employees have raised this grievance whereas, 22 employees are satisfied with the 1981 Scheme.

5. Mr. Mukherjee also pointed out that pursuant to the 1983 Act and 1981 Scheme, contribution towards Provident Fund and pension are being deposited with the State Bank of India, Balurghat Branch in a particular account in terms of the said Act and the Scheme. This was done on bonafide belief that these were the provisions under which the School is governed since the Rules of the Central Board of Secondary Education provides that in order to obtain affiliation of a school, it must furnish a "No Objection Certificate" from the concerned State Government. It also provides that the School affiliated to the Central Board of Secondary Education shall comply with the provisions relating to the benefits of the teaching and non-teaching staff as available under the Rules and Statutes governing the field in that particular State. While granting no objection, the State Government also indicated that it should comply with the relevant Special Rules relating to benefits and salaries as are applicable in West Bengal. Therefore, according to Mr. Mukherjee, the 1952 Act has no manner of application.

6. Mr. Mukherjee had further contended that since his client had believed bona fide, therefore, there being no mens rea on its part, criminal proceedings should not be initiated against them for following the 1981 Scheme and the 1983 Act in case it is found by this Court that the 1952 Act is applicable and no other.

The appellant''s contention : Supported by four employees:

7. The learned counsel for the appellant supported by Mr. B.R. Bhattacharya, senior counsel, appearing for the four employees, on the other hand, submits that by agreement or executive instruction, a provision of a statute cannot be made applicable if the institution does not satisfy the test of applicability of those provisions. It is only the provisions, which are applicable in its own force that would be applicable to such institutions. He points out to the provisions in 1983

Act and 1981 Scheme as well as to Section 16(1)(c) of the 1952 Act and submits that the provisions of 1981 Scheme and 1983 Act would not be applicable to this institution, therefore, the provisions of the 1952 Act would be applicable. Mr. Bhattacharya had relied on the decision in Presidency High School, Hyderabad v. Union of India 200111 LLJ 887 (AP) to support his contention where a similar question had arisen and where it was held that the provisions of the 1952 Act would be applicable.

The respondent/employee''s contention:

8. The learned counsel appearing for the 22 employees supported Mr. Mukherjee and contended that they are more benefited if they are governed under the 1981 Scheme and the 1983 Act. He submits that in case the provisions of these Acts are not applicable to the Institution, in that event, the benefit received by them being more beneficial than which is receivable under the 1952 Act, exemption should be granted by the State Government or the Central Government, as the case may be, u/s 17 of the 1952 Act and the interest of the employees should be protected.

Applicability of the 1952 Act : Vis-a-vis the 1983 Act & the 1981 Scheme:

9. After having heard the learned counsel for the parties, the question appears to be very simple and can be decided only on the question of law. The facts are more or less admitted. The School is recognised by the Central Board of Secondary Education. It is only a "No Objection Certificate" that was issued by the State Government. Now it is to be seen whether the School comes within the definition of "Non-Governmental Educational Institutions" on which the 1983 Act or the 1981 Scheme applies. As, rightly pointed out by Mr. Bhattacharya, by reason of an executive instruction or order, an application of a statute cannot be extended if it is otherwise inapplicable/Or in other words, the application of a provision, of a statute cannot be forestalled by a direction issued by the executives. Inasmuch as, if the School does not fulfil the test of applicability of the 1981 Scheme and 1983 Act, in that event, it cannot be governed by the provisions of the said Scheme and the Act. Automatically, it will then be governed by the 1952 Act in view of Section 16(1)(c) of the 1952 Act.

10. Section 16 prescribed in Sub-section (1) as to upon which kind of establishment the provisions of the 1952 Act would not apply. Clause (c) provides that it would not apply to any establishment set up under the Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any Scheme or Rule applicable under that Act governing such benefits. Admittedly, this Institution does not come under Clauses (a) and (b). At the same time, it is not an establishment set up by any provincial or State Act the employees whereof are entitled to the benefits of contributory provident fund or old age pension in accordance with the Scheme or Rule framed under that Act. Nothing has been shown to us that the Central Board of Secondary Education granted the

recognition under any Act providing for any Scheme framed under that Act that the employees would get any benefit of the contributory provident fund or old age pension. Therefore, the application of the 1952 Act cannot be excluded even if it is so mentioned that the School would be governed by the 1981 Scheme and the 1983 Act.

11. The 1983 Act in Section 1 Sub-section (4) makes it applicable to all "Non-Government Educational Institutions" except the educational institutions administered by religious or linguistic minorities or under any Trust or not in receipt of financial assistance from the State Government. Admittedly, the School is not in receipt of any financial assistance from the State Government. Admittedly, this Institution is being administered under a Trust. Therefore, this Institution is excepted from the application of the 1983 Act as contemplated in Sub-section (4) of Section 1.A "Non-Government Educational Institution" has been defined in Section 2(6) of the said Act to mean an educational institution not maintained or managed by the State Government. Admittedly, the present Institution is neither maintained nor managed by the State Government. Therefore, it may be a Non-Government Educational Institution, provided it is included within the inclusive definition given in Section 2(6). Admittedly, the institution does not come under Clauses (i) and (ii) thereof. Now let us examine whether it comes under Clause (iii). In order to come under Clause (iii), it has to be an institution, by whatever name called, affiliated to a university or recognised under any enactment for the time being in force. Thus, it appears that the School, being recognised or affiliated by the Central Board of Secondary Education, it is definitely a Non Government Educational Institution. But in order to come within the purview of the 1983 Act, it must satisfy the applicability test u/s 1 Sub-section (4) under which we have already examined and found that the present Institution is excepted.

12. Now let us examine the applicability of the 1981 Scheme. The Scheme in sub-para 3 provides that the Scheme will apply to employees of State Government sponsored or Aided Educational Institutions (Including D. A. getting Schools) as indicated in Statement 1 of the said Scheme. In order to be an educational institution within the purview of the 1981 Scheme, it must come under para-5 Clause (b) of Chapter II of the said Scheme, namely an institution approved or affiliated with the West Bengal Board of Secondary Education, West Bengal Council of Higher Secondary Education and such other Board or Director, as the case may be mentioned therein which does not include Central Board of Secondary Education. The word ''affiliated'' or ''approved'' used in the definition of educational institution in para-5 Clause (b) is defined in para-5 Clause (a) Sub-clause (i) to mean the recognition of the institutions by the Board etc. mentioned therein which did not include the Central Board of Secondary Education. Therefore, the institution cannot be an educational institution affiliated or approved within the meaning of the 1981 Scheme and as such, the provisions of the said Scheme cannot be applied in respect of the staff of the said School. At the same time, the Statement-I of the said Scheme does not include the Central

Board of Secondary Education.

13. Thus, it appears that the provisions of the 1981 Scheme and the Act of 1983 would not be applicable in respect of the present School. Therefore, by reason of Section 16(1), the School cannot be excluded from the application of the 1952 Act and as such, the 1952 Act would be applicable to the Institution.

The 1952 Act: Section 17(1): Exemption?

14. If it appears that the benefits available under the 1981 Scheme and 1983 Act are more beneficial than those available under the 1952 Act, it would be open to the Institution to apply before the appropriate Government for exemption u/s 17(1). If it is so advised, the Institution may apply before the appropriate Government, which, in our view, would be the Central Government, within a period of fortnight. If such an application is made, the appropriate Government shall consider the same and dispose of the application within a period of two months from the date of receipt of such application and communicate the decision within a period of fortnight from the date of such decision.

Criminal liability: Mens rea

15. In view of the situation and from the facts, which are admitted, it appears that the School had been complying with the provisions of the 1981 Scheme and 1983 Act bonafide and had been depositing the amounts with the State Bank of India, Balurghat Branch in Account No. WB 25839. Thus, it does not appear that the Institution had deliberately failed to comply with the provisions of the 1952 Act; on the other hand, on a bonafide belief had continued to comply with the provisions of 1981 Scheme and 1983 Act. Thus, it cannot be held that there was any mens rea to attract any criminal liability on account of such non-compliance. In Commissioner of Income Tax Vs. Capital Electronics (Gariahat), , in which one of us (D.K. sETH, J.) was a party, this Court had occasion to deal with similar question in relation to a proceeding u/s 271-B of the Income Tax Act, 1961, it was held that when the default was not absolute Section 271-B would not be attracted in the absence of any element of criminality since the proceeding was not criminal in nature but a coercive method for securing/ensuring compliance of civil liability. So the concept of mens rea in the form of absolute default would not be attracted. The penalty could be avoided if there was explanation for the default to the satisfaction of the authority and the dissatisfaction must be clear and definite. If there is ambiguity, the benefit would accrue to the assessee.

Order:

16. In the present case, as we find from the Scheme of the 1952 Act, having regard to the facts and circumstances of the case the penal provision is a coercive method for securing compliance of civil liability. Until an element of criminality is satisfied, the imposition of penal provision containing some amount of discretion may not be attracted. In the circumstances, we restrain the authorities under the 1952 Act from initiating any proceedings for penalty or

from proceeding therewith if there be any or from imposing any penal interest or any other penalty on the Institution for the period until one month after the expiry of the communication of the decision on the application u/s 17(1) by the Central Government for any lapse for any period prior to the expiry of the date provided herein.

17. At the same time, in case the exemption is not granted and the fund is switched over to those under the 1952 Act, in that event, the amount already deposited in the said account shall be credited to and be adjusted and recovered from the Bank and transferred to the account of the appropriate fund under the 1952 Act, and all benefits therein shall be extended to the employees accordingly. This exercise shall be completed within three months from the date of communication of the order refusing exemption by the appropriate Government and till expiry of such period the interest of the employees shall be protected as it can be done under the provisions of the said Act.

18. In case the appropriate Government finds that the benefit under the 1981 Scheme and the 1983 Act are more beneficial, in that event, it should grant exemption u/s 17(1) and communicate the same within the time stipulated. In case it finds that it is not more beneficial than the 1952 Act, the Government should record its reasons, which should be communicated to the Institution along with the decision. However, the exemption from criminal liabilities is confined only to me strict compliance of the provisions of the 1981 Scheme and the 1983 Act and shall not extend to its non-compliance, if there be any.

19. It is submitted by Mr. Mukherjee that a criminal proceeding has already been initiated. It would be open for Mr. Mukherjee to take appropriate steps in such criminal proceedings in terms of this order provided he is able to establish that he has completely complied with all the provisions strictly in terms of the Scheme of 1981 and the 1983 Act.

20. However, in the meantime, the contribution in terms of the Scheme/of 1981 and the Act of 1983 shall be continued to be deposited till one month/after the communication of the decision by the appropriate Government.

21. In case the institution fails to make an application u/s 170) before the appropriate Government within the time stipulated, the order restraining the criminal proceedings shall stand recalled.

22. The appeal and the application, thus, stand disposed of.

23. Xerox plain copy of the operative part of this order be given to me learned counsel for the parties, duly counter-signed by the Assistant Registrar (Court), on their usual undertaking.

Soumitra Pal, J.

24. I agree.

