

(2012) 01 KL CK 0152

In the High Court Of Kerala

Case No : W.R.C. No"s. 9970 of 2008; 1992, 2747, 5023, 8995, 9612, 9660, 10754, 10842, 15482, 25703, 26499, 27467, 30286, 33534, 35373, 35666, and 35823 of 2010; 923, 999, 5629, 5727, 7080, 9862, 14188, 14392, 15150, 15845, 19920, 26203, 27425, 30242 and 33727 of

Subhaga Kumar, M.K. Emakulam

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 31-01-2012

Acts Referred:

Constitution of India, 1950 — Article 12
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 16(1), 16(1)(a), 16(1)(b), 16(1)(c), 16(2)

Citation : (2012) LLR 625

Hon'ble Judges : V. Chitambaresh, J

Bench : Single Bench

Advocate : T. Rajesh, for the Appellant; Rose Michael, Government Pleader For Respondent Nos. 1 and 3, Mr. K.R. Sunil, Senior, Advocate For Respondent No. 2, Mr. N.N. Sugnapalan, Senior, Advocate For Respondent No. 4 and Mr. Nagaraj Narayanan, Senior, Advocate, for the Respondent

Judgement

V. Chitambaresh, J.—The Petitioners in this bunch of Writ Petitions are employees of the State Co-operative Bank and the District Co-operative Banks. They challenge the orders of exclusion purportedly passed under the Employees' Provident funds and Miscellaneous Provisions Act, 1952 (the "Act" for short). I shall refer to the parties and the exhibits in W.P. (C) No. 15150/2011 for the sake of convenience. Two of the Writ Petitions have been filed seeking to enforce the exclusion orders impugned in the other Writ Petitions. The Petitioners enrolled themselves under the Employees' Pension Scheme, 1995 framed u/s 6A of the Act while In service. The Petitioners retired from service during the years 2000-2005 and have since been drawing pension under the scheme aforesaid. The disbursement was abruptly halted by an order of exclusion passed by the Employees' Provident Fund Organisation. Ext. P3 is the order of exclusion passed

by the Regional Provident Fund Commissioner I, Kerala, it infer alia reads as follows:

The Applications filed by the State Co-operative Bank and 14 District Cooperative Banks seeking exemption from the Employees' Pension Scheme, 1995 u/s 17(1C) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 read with para 9 of Employees' Pension Scheme, 1995, have been examined by this Office. The Self-Financing Pension Scheme introduced by the Government of Kerala for the benefit of the employees of these institutions is having certain provisions which are incompatible with the provisions of the Employees' Provident Fund and Miscellaneous Provisions Act 1952 and the Schemes framed thereunder.

In view of such incompatibilities the question of granting exemption u/s 17(10) of the Act is found not feasible and hence the possibility of granting exclusion under 16(1)(b) of the Act has been examined by the undersigned as instructed by the Ministry of Labour, Government of India and our Head Office.

In view of the Legal provisions explained above and of the fact that the State sponsored Self-Financing Pension Scheme is applicable to employees of the Cooperative Institutions listed below, these institutions are hereby excluded from the purview of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 u/s 16(1)(b) with effect from 1.4.2005, the date from which the Self-Financing Pension Scheme has been made applicable to the employees of these institutions.

2. Section 16(1) of the Act which has been called in aid by the Employees' Provident Fund Organisation is extracted below.

This Act shall not apply--

(a) to any establishment registered under the Co-operative Societies Act, 1912 (2 of 1912), or under any other law for the time being in force in any State relating to Co-operative Societies, employing less than fifty persons and working without the aid of power; or

(b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any Scheme or Rule framed by the Central Government or the State Government governing such benefits; or

(c) to any other establishment set up under any 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 framed under that Act governing such benefits.

3. It could, thus, be seen that there is a statutory exclusion under sub-clauses (a), (b) & (c) of Section 16(1) of the Act of the establishments mentioned

therein. Section 16(1)(a) clarifies that the Act does not apply to any establishment registered under the Co-operative Societies Act employing less than fifty persons and working without the aid of power. The, State Co-operative Bank and the District Co-operative Banks admittedly employ more than fifty persons and hence there is no statutory exclusion u/s 16(1)(a) of the Act. section 16(1)(b) states that the Act does not apply if the establishment belongs to or is under the control of the Central Government or a State Government. It is settled law that there is no control of the State Government over the State Co-operative Bank and District Cooperative Banks registered under the Kerala Cooperative Societies Act, 1969. Reference in this connect to P. Bhaskaran & others v. Additional Secretary & other, 1987 (2) KLT 903 (FB); Thalapalam Service Cooperative Bank Ltd. v. Union of India, 2009 (3) 1001, is profitable.

4. The following excerpt from the full Bench decision cited above will be apposite to the context:

The Co-operative Societies are not created by the Co-operative Societies Act and they are not statutory bodies. They are only functioning in accordance with the provisions of the Act. These institutions would have legal existence even if the Co-operative Societies Act was not in force. Moreover, the Government have no shares in the Co-operative Societies. There is no deep and pervasive State control. The Management of the Societies does not vest in the Government or in the representatives of the Government. The Management is under the effective control of a Committee elected by the members of the societies. The statutory regulation or restriction in the functioning of the societies is not "an imprint of State under Article 12".

The dictum in Regional Provident Fund Commissioner Vs. Sanatan Dharam Girls Secondary School and Others, , relied on in Ext. P3 order is clearly distinguishable. That case dealt with educational institutions set up under the Rajasthan Non-Government Educational Institutions Act, 1989. It Was found therein that the State Government exercised financial control, functional control and administrative control over the institutions. Moreover the State Act aforementioned had received the assent of the President subsequent to the applicability of the Act which is not so in the case on hand.

5. Section 16(1)(c) is to the effect that the Act does not apply to any establishment "set up" under any Central, Provincial or State Act. The legislature has cautiously used the word "set up" in contra distinction to the word "registered" u/s 16(1)(a) of the Act with a purpose. It needs no elaboration to find out that the State Co-operative Bank and the District Co-operative Banks are not set up under the State Act even though registered under the Kerala State Co-operative Societies Act. The irresistible conclusion therefore is that Section 16(1) (b) & (c) do not apply to the State Co-operative Bank or the District Co-operative Banks and they are covered by the Act. 56

6. True it is that section 16(2) of the Act empowers the Central Government by

Notification in the Official Gazette to exclude a class of establishments from the operation of the Act. The power to so exclude is available to the Central Government only and that too by Notification in the Official Gazette either prospectively or retrospectively. Ext. P3 in the instant case has been passed by the Regional Provident Fund Commissioner I, Kerala who has absolutely no authority to grant exclusion.

7. The various Banks had sought exemption from the scheme framed under the Act u/s 17(1C) of the Act. Section 17(1C) of the Act is as follows:

The appropriate Government may, by Notification in the Official Gazette, and subject to the condition on the pattern of investment of pension fund and such other conditions as may be specified therein, exempt any establishment or class of establishments from the operation of the Pension Scheme if the employees of such establishment or class of establishments are either members of any other pension scheme or propose to be members of such Pension Scheme, where the pensionary benefits are at par or more favourable than the Pension Scheme under this Act.

The Regional Provident Fund Commissioner has in Ext. P3 order though it fit not to grant exemption u/s 17(1C) of the Act. He has arrived at a conclusion that the provisions of the Self-Financing Pension Scheme introduced by the State Government are Incompatible with the provisions of the Act and the scheme framed thereunder. The Regional Provident Fund Commissioner after having disallowed exemption u/s 17(1C) of the Act should have stopped there. He had no Jurisdiction to grant exclusion purportedly u/s 16(1)(b) of the Act which was not even sought for by any of the Banks.

8. Ext. P4 order of exclusion passed by the State Government is consequential to Ext. P3 order passed by the Regional Provident Fund Commissioner and is wholly dependent. The State Government has also no power to grant exclusion u/s 16(1)(b) of the Act for reasons already stated supra. The State Government can at best grant exemption from the Scheme u/s 17(1C) of the Act on Application made to it. The Application no doubt has to be routed through the Regional Provident Fund Commissioner as per Clause 39 of the Employees' Pension Scheme, 1995 framed under the Act. But none of the Banks have secured exemption u/s 17(1C) even though one has obtained exemption u/s 17(1)(a) of the Act alone. Resultantly Exts. P3 & P4 orders granting exclusion from the provisions of the Act are quashed. This judgment will not stand in the way of any of the establishment or class of establishments moving for exemption u/s 17(1C) of the Act afresh. No provision of law has been shown to me to establish that the Employees' Pension Scheme, 1995 and the State Self-Financing Pension Scheme cannot co-exist if there is no exclusion or exemption. Suffice it to say that the employees who have en-rolled and availed the pension under the State Self-Financing Pension Scheme will remain unaffected. The question as to whether the Employees' Pension Scheme, 1995 is more beneficial than the State Self-Financing Pension Scheme or vice versa is left open.

The Writ Petitions are disposed of as above.