

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.CHITAMBARESH

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THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

TUESDAY, THE 05TH DAY OF NOVEMBER 2019 / 14TH KARTHIKA, 1941

RP.No.241 OF 2015 IN ITA. 131/2014

AGAINST THE JUDGMENT IN ITA 131/2014 OF HIGH COURT OF KERALA

REVIEW PETITIONER/S:

M/S.GCDA EMPLOYEES PENSION FUND TRUST
GREATER COCHIN DEVELOPMENT AUTHORITY, KADAVANTHRA,
COCHIN - 682 020 REPRESENTED BY TRUSTEE, THE
SECRETARY, GREATER COCHIN DEVELOPMENT AUTHORITY.

BY ADVS.
SRI.T.M.SREEDHARAN (SR.)
SRI.V.P.NARAYANAN

RESPONDENT/RESPONDENT:

THE COMMISSIONER OF INCOME TAX-I,
CR BUILDING, I.S PRESS ROAD,
COCHIN
PIN - 682 018.

BY SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS REVIEW PETITION HAVING BEEN FINALLY HEARD ON
22.10.2019, THE COURT ON 05.11.2019, PASSED THE FOLLOWING:

“CR”

ORDER

ANIL K.NARENDRAAN,J.

This review petition is one filed by the GCDA Employees' Pension Fund Trust (for brevity, 'the assessee trust'), under Order XLVII of Rule 1 of the Code of Civil Procedure, 1908, seeking review of the judgment of this Court dated 08.10.2014 in ITA No.131 of 2014.

2. Heard the learned Senior counsel for the petitioner and also the learned Standing Counsel for Income Tax Department, representing the respondent-Commissioner of Income Tax-I, Kochi.

3. The assessee trust was formed by the Greater Cochin Development Authority (for brevity, 'the GCDA'), which is an authority constituted under the provisions of the Madras Town Planning Act, 1920 and the Travancore Town Planning Act, 1108, vide G.O.(Ms.)No.19/76/LA&SWD dated 23.01.1976. The GCDA obtained registration under Section 12AA of the Income Tax Act, 1961. By Annexure E Government order, i.e., G.O.

(Ms.)No.201/94/ LAD dated 31.08.1994, the State Government extended pension scheme to the employees of the GCDA, with effect from 01.01.1994, subject to the condition that no expenditure from the Consolidated Fund of the State will be incurred on this issue. Accordingly, Part III of the Kerala Service Rules are made applicable to GCDA employees, with effect from 01.01.1994. The assessee trust was formed by the GCDA, vide Annexure A registered trust deed dated 09.02.2006, to establish a separate fund in order to operate as a recognised Provident Fund for the benefit of the managerial, supervisory and other staff of the GCDA. The words 'Provident Fund' appearing in Annexure A trust deed was substituted by the words 'Pension Fund', vide Annexure B rectification deed dated 30.01.2008.

4. The assessee trust submitted an application dated 27.06.2012 before the respondent-Commissioner of Income Tax-I, Kochi for registration under Section 12AA of the Income Tax Act, which ended in dismissal by Annexure C order dated 28.12.2012, on the ground that, in view of the restriction

imposed in Clause H of Annexure A trust deed, any amendment of the object clause is not possible. For that reason, the respondent was not satisfied with the genuineness of the objectives and activities of the assessee trust. Challenging Annexure C order of the respondent dated 28.12.2012, the assessee trust filed I.T.A.No.503/Coch/2013 before the Income Tax Appellate Tribunal, Cochin Bench, which ended in dismissal by Annexure D order dated 29.11.2014.

5. A reading of paragraph 4 of Annexure D order would show that, before the Tribunal it was contended that the assessee trust was formed with a sole object of providing pension to the employees, who retired from the GCDA and that, in the larger interest, payment of pension has to be considered as a charity. In paragraph 5 of Annexure D order, the Tribunal noticed that, it is not in dispute that the assessee trust was established by the GCDA, a statutory authority established under a State enactment, for providing pension to its employees, who retired from service. It is well settled principles of law that pension is not

a charity. The Government is not doing any charity by paying pension to the retired employees. Payment of pension is nothing but a deferred payment of salary for the work done by the employees.

6. The Tribunal in Annexure D order opined that the fund/trust established by the GCDA for paying pension to its employees, who retired from service cannot be a charitable activity. Instead of paying pension directly to the employees who retired from service, the assessee trust has been established for paying pension. Therefore, the character of payment remains the same. Pension is paid due to the statutory obligation as per the service rules. Hence, it cannot be construed as a public utility as contended by the assessee trust. In view of the above, the Tribunal by Annexure D order rejected the appeal, holding that the assessee trust is not entitled for a registration under Section 12AA of the Income Tax Act, as a charitable Trust.

7. Feeling aggrieved by Annexure D order dated 29.11.2014 of Income Tax Appellate Tribunal, Cochin Bench, the

petitioner filed ITA No.131 of 2014, which ended in dismissal by the judgment dated 08.10.2014, which is sought to be reviewed by filing this review petition.

8. Before this Court, in ITA No.131 of 2014, the learned Senior Counsel for the assessee trust contended that, even if it is true that the distribution of pensionary benefits is to the employees of the GCDA itself, that activity of the assessee trust is a 'general public utility' attracting the provisions of clause (15) of Section 2 of the Income Tax Act and therefore, the assessee trust is entitled to registration as prayed for. The Senior Counsel has also placed reliance on the judgment in **Commissioner of Income Tax v. Bar Council of Maharashtra [(1981) 130 ITR 28 (SC)]**, **Hiralal Bhagawati v. Commissioner of Income Tax [(2000) 246 ITR 188 (Guj)]**, **Coffee Board v. Deputy Commissioner of Agricultural Income Tax [(1964) 52 ITR 126 (Mys)]**, **Commissioner of Income Tax v. Andhra Chamber of Commerce [(1965) 55 ITR 722 (SC)]**, **Commissioner of Agricultural Income Tax v. Rubber Board**

[(1997) 226 ITR 722 (Ker)], Commissioner of Income Tax v. Ahmedabad Rana Caste Association [(1983) 140 ITR 1 (SC)] and Norka Roots v. Commissioner of Income Tax [(2010) 320 ITR 733] in support of his contentions.

9. In the judgment sought to be reviewed, this Court noticed that the object of the trust is to pay pension to the employees of the GCDA or their dependants from out of the corpus collected from the beneficiaries themselves. In other words, the employees of the GCDA are contributing and from out of that contribution, they or their dependants are getting pension. Such an object implemented by the assessee trust cannot be said to be an object of general public utility attracting clause (15) of Section 2 of the Income Tax Act. The decisions cited were cases where the beneficiaries are persons other than the contributories and therefore, the principles laid down in those cases are not applicable to the facts of the case on hand. Regarding the list of institutions holding registration under Section 12A/12AA of the Income Tax, for the financial year 2012-

13, produced as Annexure F, this Court observed that, the eligibility for registration depends upon the object of each of those trusts. The objects of those trusts are not before this Court. In such circumstances, the said list cannot be relied on. Therefore, in the judgment sought to be reviewed, this Court found no reason to disagree with the view taken by the Income Tax Appellate Tribunal in Annexure D order.

10. In the review petition, it is contended that, the employees are not making any contributions towards Pension Fund and the entire amount towards Pension Fund is contributed by the GCDA. However, in the judgment sought to be reviewed, this Court proceeded on the assumption that the employees of the GCDA are contributing and from out of that contribution, the employees and their dependants are getting pension. The above erroneous finding has resulted in the dismissal of ITA No.131 of 2014, which would constitute a mistake apparent from the record, coming within the purview of review jurisdiction under Order XLVII of Rule 1 of the Code of Civil Procedure, 1908.

11. The learned Senior Counsel for the assessee trust would reiterate that, even if the distribution of pension is to the employees of the GCDA, that activity of the assessee trust is a 'general public utility' attracting the provisions of clause (15) of Section 2 of the Income Tax Act. Therefore, the assessee trust is entitled to registration under Section 12AA of the said Act, as sought for.

12. Per contra, the learned Standing Counsel for the Income Tax Department would contend that, even if the entire contribution towards Pension Fund is made by the GCDA, the object of the assessee trust to establish a separate fund, in order to operate as a recognised Pension Fund for the benefit of the managerial, supervisory and other staff of the GCDA is not an activity of 'general public utility' attracting the provisions of clause (15) of Section 2 of the Income Tax Act and therefore, in the judgment sought to be reviewed, this Court rightly agreed with the view taken by the Income Tax Appellate Tribunal in Annexure D order.

13. Section 11 of the Income Tax Act deals with income from property held for charitable or religious purposes and Section 12 deals with income of trusts or institutions from contributions. As per sub-section (1) of Section 12, any voluntary contributions received by a trust created wholly for charitable or religious purposes or by an institution established wholly for such purposes (not being contributions made with a specific direction that they shall form part of the corpus of the trust or institution) shall for the purposes of Section 11 be deemed to be income derived from property held under trust wholly for charitable or religious purposes and the provisions of that section and Section 13 shall apply accordingly. Section 12A of the Act deals with conditions for applicability of Sections 11 and 12. Section 12AA of the Act deals with the procedure for registration by the Commissioner for Income Tax, on receipt of an application for registration of a trust or institution made under clause (a) or clause (aa) of sub-section (1) of Section 12A.

14. As per clause (15) of Section 2 of the Income Tax Act,

'charitable purpose' includes relief of the poor, education, yoga, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility. As per the first proviso to clause (15) of Section 2, the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity. As per the second proviso to clause (15) of Section 2, the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is twenty-five lakh rupees or less in the previous year.

15. The first and second provisos to clause (15) of Section 2 of the Income Tax Act was substituted by the Finance Act, 2015

with effect from 01.04.2016. After the amendment, the proviso to clause (15) of Section 2 provides that, the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity, unless- (i) such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and (ii) the aggregate receipts from such activity or activities during the previous year, do not exceed twenty per cent, of the total receipts, of the trust or institution undertaking such activity or activities, of that previous year.

16. In the instant case, as evident from Annexure A trust deed and Annexure B rectification deed, the assessee trust was formed to establish a separate fund in order to operate as a recognised Pension Fund for the benefit of the managerial,

supervisory and other staff of the GCDA. The Government, while extending pension scheme to the employees of the GCDA by Annexure E order, whereby Part III of the Kerala Service Rules are made applicable to the employees of GCDA, with effect from 01.01.1994, made it clear that, no expenditure from the Consolidated Fund of the State will be incurred on this issue. Therefore, as rightly noticed by the Income Tax Appellate Tribunal in Annexure D order, instead of paying pension directly to the employees who retired from service, the GCDA formed the assessee trust for payment of pension to its retired employees.

17. It is well settled that pension is not a charity or bounty nor is it a conditional payment solely dependent on the sweet will of the employer. Pension is in the nature of deferred payment earned for rendering long and satisfactory service with the employer. It is a social security measure, consistent with the socio-economic requirements, providing safeguards to the employees in their later years of life, who have shed their sweat and blood for their employer during their long service.

18. In **State of Rajasthan v. Mahendra Nath Sharma [(2015) 9 SCC 540]** the Apex Court noticed that, the antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through court has been swept under the carpet by the decision of the Constitution Bench in **Deokinandan Prasad v. State of Bihar [(1971) 2 SCC 330]**, wherein the Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion. It is only for the purpose of quantifying the amount, having regard to service and other allied matters, that it may be necessary for the authority to pass an order to that effect, but the right to receive pension flows to the Government servant not because of any such order but by virtue of the rules. This view

was reaffirmed in **State of Punjab v. Iqbal Singh [(1976) 2 SCC 1]**.

19. Payment of pension to the retired employees of the GCDA, in discharge of the statutory obligation under Part III of the Kerala Service Rules, is not a charity or bounty nor is it a conditional payment solely dependent on the sweet will of the GCDA. Therefore, the question whether the contribution towards Pension Fund is made by the employees or by the employer, i.e., the GCDA, has no relevance while considering an application for registration under Section 12AA of the Income-tax Act, subject to the conditions in Section 12A, read with clause (15) of Section 2 of the said Act. Even if the entire contribution towards Pension Fund is paid by the GCDA, the object of the assessee trust to establish a separate fund in order to operate as a recognised Pension Fund for the benefit of the managerial, supervisory and other staff of the GCDA would not fall within the definition of 'charitable purpose' as defined in clause (15) of Section 2 of the Act. The said object of the assessee trust cannot also be said to

be an activity of 'general public utility' attracting the provisions of clause (15) of Section 2 of the Act. Therefore, the finding in the judgment sought to be reviewed that the employees of the GCDA are contributing to the Pension Fund and from out of that contribution, the employees and their dependents are getting pension, would not constitute a mistake apparent from the face of the record, coming within the review jurisdiction of this Court under Order XLVII Rule 1 of the Code of Civil Procedure, 1908.

20. In **Thungabhadra Industries Ltd v. Government of Andhra Pradesh [AIR 1964 SC 1372]** the Apex Court held that, review is, by no means an appeal in disguise, whereby an erroneous decision is reheard and corrected, but lies only for correcting patent errors. Later, in **Lily Thomas v. Union of India [(2006) 3 SCC 224]** the Apex Court reiterated that, the power of review can be exercised for correction of a mistake but not to substitute a view. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review.

21. Whilst exercising the power of review, this Court cannot be oblivious of the provisions contained in Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 and that, the limits within which this Courts can exercise the power of review have been well settled in a catena of decisions.

In the result, this review petition fails, and the same is, accordingly, dismissed.

Sd/-
V.CHITAMBARESH
JUDGE

Sd/-
ANIL K. NARENDRAN
JUDGE