

(2003) 11 CAL CK 0047

Calcutta High Court

Case No: F.M.A. No. 288 of 2003

Gyanendra Nath and Another

APPELLANT

Vs

Profession Tax Officer and
Others

RESPONDENT

Date of Decision: Nov. 27, 2003

Acts Referred:

- Constitution of India, 1950 - Article 226, 227
- West Bengal Taxation Tribunal Act, 1987 - Section 14, 2, 4

Citation: (2004) 2 CHN 8

Hon'ble Judges: Rajendra Nath Sinha, J; Dilip Kumar Seth, J

Bench: Division Bench

Advocate: Hirak Mitter and Prasun Ghosh, for the Appellant; Bidyut Kiran Mukherjee and Seba Roy, for the Respondent

Final Decision: Allowed

Judgement

D.K. Seth, J.

This appeal arises out of a judgment and order dated 25th February, 2003 passed in Writ Petition No. 4406(W) of 2002 dismissing the writ petition on the ground of absence of jurisdiction of the High Court in view of Section 14 of the West Bengal Taxation Tribunal Act, 1987 (1987 Act).

2. Mr. Hirak Mitter, learned Counsel for the appellant-writ petitioner, raised two questions. First, that the writ petition could not be dismissed as not maintainable in view of Section 14 of the 1987 Act barring jurisdiction of the High Court. The second is that having regard to the facts and circumstances of the case, the petitioners, though posted at Calcutta, are not persons employed in West Bengal and thus are not subject to the West Bengal State Tax on Professions, Trades, Callings and Employments Act, 1979 (WB Act). He had raised several limbs of this point, namely, that the salary of the appellants-petitioners posted at Calcutta are being paid by

their employer at Chhattisgarh as such they are carrying on profession in Chhattisgarh and not in West Bengal. Even though they may be absent from Chhattisgarh still they are deemed to be employed in Chhattisgarh in view of Section 3 Sub-section (5) of the Madhya Pradesh Vritti Kar Adhiniyam, 1995 (MP Act), applicable in Chhattisgarh.

3. These are disputed by the learned Counsel for the State of West Bengal, Mrs. Seba Roy, led by Mr. Bidyut Kiran Mukherjee, Senior Advocate, on the ground that the appellants being posted at Calcutta, they are carrying on profession within the State of West Bengal. As such they are subject to the WB Act. It is immaterial whether their salary is paid by their employer at Chhattisgarh. The other point urged by Mr. Mukherjee is that Section 14 of the 1987 Act creating a bar of jurisdiction of the High Court renders the writ petition not maintainable. This point of maintainability in view of Section 14 of the 1987 Act found favour with the learned Single Judge dismissing the writ petition as not maintainable.

4. We may refer to the brief facts in order to appreciate the situation. The WB Act came into force in 1979. Whereas the MP Act was enacted in 1995. The profession tax was deducted by the respondent No. 5, Bhilai Steel Plant (BSP) a unit of Steel Authority of India (SAIL), employer of the appellants posted at Calcutta under the MP Act from 1996. Whereas on 5th December, 2001 the authorities under the WB Act issued notices of assessment/show-cause in respect of a period 1979-80 to 1998-99 as well as in respect of the period 1989-90 to 1999-2000. The employer of the appellants applied for refund of the tax collected by the authorities under the MP Act amounting to Rs. 1,55,4137- deducted by it from the salaries of the appellants for the period 1995-96 to 2000-2001. The authorities under the MP Act on 16th January, 2002 made it clear that the payment of professional tax and deduction thereof from the salaries of the appellants would be made at Bhilai under the MP Act. The appellants filed objection before the authorities under the WB Act on 7th March, 2002. In the meantime, the authorities under the MP Act issued certificate of deduction and deposit of professional tax at the office of the authorities under the MP Act for the period 1st April, 1996 till 31st March, 2001. Whereas on 13th March, 2002 the authorities under the WB Act directed the employer of the appellants to deduct professional tax from its employees posted in West Bengal from 1st April, 1979 and deposit the same with the authorities under the WB Act informing them that in default penal action would be taken against it. In this situation while running between the authorities under the MP Act and the WB Act, the appellants had moved the writ petition which having been dismissed as aforesaid the present appeal has been resorted to.

5. We would prefer to take the first point first. Section 14 of the 1987 Act creates a bar of jurisdiction of the High Court in relation to the matters covered under the said Act. The vires of similar such provision having been challenged in L. Chandra Kumar's case, the Apex Court had held that this taking away of jurisdiction would

not preclude the High Court from exercising its jurisdiction conferred upon it under Articles 226 and 227 of the Constitution of India. This jurisdiction conferred by the Constitution cannot be taken away through legislation. But, however, it had made the decision of the Tribunal subject to Articles 226 and 227 by a Division Bench. But these jurisdictions can be availed of only after being routed through the Tribunal. True, jurisdiction of the High Court is barred by reason of Section 14 of the 1987 Act in respect of matters covered under the WB Act, a specified State Act within the meaning of Section 2(k) of the 1987 Act.

6. Section 14 of the 1987 Act excludes the jurisdiction of all Courts including the High Courts in respect of matters entertainable by the Tribunal. Exclusive jurisdiction has been conferred on the Tribunal to the exclusion of all other Courts except Supreme Court in relation to the adjudication or trial of disputes, complaints or offences with respect of levy, collection, assessment and enforcement of any tax under any specified State Act and any matter connected therewith or incidental thereto. The jurisdiction of the Tribunal is very wide in relation to the matters within its jurisdiction; but such jurisdiction is confined within the scope and ambit of the specified State Act defined in Section 2(k). The expression "matters connected therewith or incidental thereto" is to be interpreted on the principles of ejusdem generis, namely, connected with or incidental to the matters, covered under the specified State Act. This connection or incidence cannot trench upon the domain of an Act other than the specified State Act. As soon the question of interpretation of the provisions of an Act outside the purview of the State Act becomes involved, the Tribunal created under the 1987 Act cannot assume jurisdiction in respect thereof. Even if we assume for argument's sake that it would be necessary to look into the MP Act for the purpose of ascertaining the impact of the WB Act, even then a decision by the Tribunal would not be binding on the authorities under the MP Act exposing the appellants to the mischief of double taxation by two different authorities. The dispute to the claim by two authorities created under two different Acts, one of which outside the specified State Act, cannot be resolved by the Tribunal established under the 1987 Act. A decision of the Tribunal in such matter would not bind the authorities under the MP Act. The decision of the Tribunal would not reach finality until the dispute is resolved. Therefore, Section 14 providing the exclusion clause would not confer jurisdiction on the Tribunal to adjudicate into matters involving conflicting claims made by any authority under any Act other than the specified State Acts. The Tribunal can enforce the liability under the WB Act, but it cannot prevent the authorities under the MP Act to impose liability on the appellants and resolve the conflict between the authorities under the two Acts.

7. In the present case, the tax is being deducted by the employer of the appellants under the MP Act applicable in the State of Chhattisgarh. The appellants claim that they are governed by the MP Act. In fact, the dispute is as to whether the MP Act will apply or the WB Act would apply. The question boils down to the consideration of comparative effectivity of the respective Act in respect of employees, i.e., the

appellants, posted at Calcutta. Therefore, the determination of the question involved would necessitate consideration of both WB Act and MP Act. Whereas WB Act is confined within the matters related to the State Acts specified in the Schedule of the 1987 Act. The Schedule includes the WB Act, a State Act but it does not include the MP Act. Therefore, in our view, Section 14 of the 1987 Act would not be a bar in entertaining the writ petition, The jurisdiction of the Taxation Tribunal is confined within the State Acts mentioned in the Schedule and not beyond. In exercise of its jurisdiction, it cannot decide any matter falling under or relating to the MP Act. Therefore, the Taxation Tribunal could not assume jurisdiction with regard to the present question. Unless the jurisdiction of the Taxation Tribunal is attracted, the jurisdiction of the High Court cannot be ousted. Therefore, in our view, this High Court has jurisdiction to entertain writ petition in respect of matters outside the specified State Act, as defined in Section 2(k) of the 1987 Act, without being routed through the Tribunal.

8. Similarly, for the purpose of considering this question, it is necessary to consider the impact of the WB Act. Therefore, any provision prohibiting jurisdiction of the High Court by the MP Act would not be attracted to oust the jurisdiction of this High Court, if in course of determination the impact of the WB Act becomes relevant. In these circumstances, we answer the first question in favour of the appellants holding the writ petition maintainable.

9. We could have remanded the matter to the Court below for deciding the question afresh. But the matter being a pure question of law on admitted facts, we do not find it necessary to refer the matter back to the learned Single Judge for decision, particularly in view of the fact that both the learned Counsel had addressed this Court on merits in threadbare. Therefore, we propose to decide this question on merit,

10. Now we may take up the second point. Admittedly, the appellants are posted at Calcutta. The payment of their salary is made in Chhattisgarh, though it might be received by the appellants either at Chhattisgarh or at Calcutta. Admittedly, they are employed in BSP-SAIL operating at Chhattisgarh, having a liaison office at Calcutta and thereby operating in part in West Bengal.

11. On these facts the question is to be determined. In order to decide this question, we would need to refer to the different provisions of the WB Act and MP Act respectively. We, therefore, propose to quote the relevant provisions of the two Acts :

MP	WB
Act	Act

2(c). "Employee"	2(b).
means	"Employee"
a	means
person	a
employed	person
on	employed
salary	on
or	salary
wage	or
and	wage,
includes	and
--	includes
	--
(i)	(i)
a	a
Government	Government
Servant	Servant
receiving	receiving
pay	pay
from	from
the	the
revenues	revenues
of	of
Central	Central
Government	Government
or	or
any	any
State	State
Government	Government
or	or
the	the
Railway	Railway
Fund;	Fund;

(ii)	(ii)
a	a
person	person
in	in
the	the
service	service
of	of a
a	body,
body	whether
whether	incorporated
incorporated	or
or	not,
not,	which
which	is
is	owned
owned	or
or	controlled
controlled	by
by	the
the	Central
Central	Government
Government	or
or	any
any	State
State	Government,
Government,	whether
where	the
the	body
body	operates
operates	in
in	any
any	part
part	of
of	the
the	State,
State,	even
even	though
though	its
its	headquarters
headquarters	may
may	be
be	outside
outside	the
the	State;
State;	

(iii)	(iii)
a	a
person	person
engaged	engaged
in	in
any	any
employment	employment
of	of
an	an
employer	employer,
not	not
covered	covered
by	by
items	items
(i)	(i)
and	and
(ii)	(ii)
above;	above;

2(d).	2(c).
"Employer"	"Employer"
in	in
relation	relation
to	to an
an	employee
employee	earning
earning	any
any	salary
salary	or
or	wages
wages	on
on	regular
regular	basis
basis	under
under	him,
him	means
means	the
the	person
person	or the
or	officer
the	who
officer	is
who	responsible
is	for
responsible	disbursement
for	of
disbursement	such
of	salary
such	or
salary	wages,
or	and
wages	includes
and	the
includes	head
the	of the
head	office
of	or an
the	establishment
office	as
or	well
an	as the
establishment	manager
as	or
well	agent
as	of the
manager	employer;
or	
agent	
of	
the	
employer;	

2(f).	2(f).
"Person"	"Person"
means	means
any	any
person	person
who	who
is	is
engaged	engaged
in	in
any	any
profession,	profession,
trade,	trade,
calling	calling
or	or
employment	employment
in	in the
the	West
State	Bengal,
of	and
Madhya	includes
Pradesh	a
and	Hindu
includes	undivided
a	family,
Hindu	firm,
undivided	company,
family,	corporation
firm,	or
company,	other
corporation	corporate
or	body,
other	any
corporate	society,
body,	club
any	or
society,	association
club	so
or	engaged
association	but
so	does
engaged	not
but	include
does	any
not	person
include	who
any	earns
person	wages
who	on a
earns	casual
wages	basis.
on	
casual	
basis.	

Explanation.

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The
expression
"person"
who
earns
wages
on
casual
basis
shall
mean
a
person
who
earns
wages
on
being
employed
for
a
period
not
exceeding
180
days
in
a
year.

Section	Section
3.	3.
Levy	Levy
and	and
Collection	Charge
of	of
Tax.	Tax.
--	--
(1)	(1)
Subject	Subject
to	to
the	the
provisions	provisions
of	of
Article	Article
276	276
of	of
the	the
Constitution	Constitution
of	of
India,	India,
and	there
this	shall
Act	be
there	levied
shall	and
be	collected
levied	a
and	tax
collected	on
tax	professions,
on	trades,
professions,	callings
trades,	and
callings	employment,
and	in
employments	accordance
	with
	the
	provisions
	of
	this
	Act

(2)	(2)
Every	Every
person	person
who	engaged
carries	in
on a	any
trade	profession,
either	trade,
himself	calling
or	or
by	employment
an	and
agent	falling
or	under
representative	one
or	or
who	the
follows	other
a	of
profession	the
or	classes
calling	mentioned
other	in
than	the
agriculture	second
or	column
who	of
is in	the
employment	Schedule
either	shall
wholly	be
or	liable
in	to
part	pay
in	to
Madhya	the
Pradesh.	State
and	Government
who	tax
falls	at
under	the
one	rate
or	mentioned
the	against
other	the
classes	
specified	
in	
column.	
(2)	

of	class
the	of
Schedule	such
shall,	persons
on	in
the	the
basis	third
specified	column
in	of
the	the
Schedule	said
in	Schedule:
respect	
thereto	
be	
liable	
to	
pay	
tax	
at	
the	
rate	
mentioned	
against	
the	
class	
of	
such	
person	
in	
column	
(3)	
of	
the	
said	
Schedule:	

Provided that notwithstanding anything contained in the Schedule, where a person is covered by more than one entry of the Schedule, tax under this Act shall be payable by such person at the highest rate of tax specified in respect of such entries.	Provided that notwithstand ing entry (23) in the Schedule shall apply only to such classes of persons as may be specified by the State Government by notification from time to time.
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(3)

(4)

(5)

Any

person

who

is

in

employment

in

Madhya

Pradesh

shall

be

deemed

to

be

in

employment

even

though

he

may

be

absent

therefrom

on

leave

or

otherwise.

Section	Section
4,	4.
Employer's	Employer's
liability	liability
to	to
deduce	deduce
and	and
pay	pay
tax	tax
on	on
behalf	behalf
of	of
employees.	employees.
--	--
The	The
tax	tax
payable	payable
under	under
this	this
Act	Act
by	by
any	any
person	person
earning	earning
a	a
salary	salary
or	or
wages	wage
shall	shall
be	be
deducted	deducted
monthly	monthly
in	in
the	the
prescribed	prescribed
manner	manner
by	by
his	his
employer	employer
from	from
the	the
salary	salary
or	or
wages	wage
payable	payable
to	to
such	such
person	person,
	before
	such

before	salary
such	or
salary	wage
or	is
wages	paid
is	to
paid	him,
to	and
him	such
and	employer
such	shall,
employer	irrespective
shall,	of
irrespective	whether
of	such
whether	deduction
such	has
deduction	been
has	made
been	or
made	not
or	when
not,	the
when	salary
the	or
salary	wage
or	is
wage	paid
is	to
paid	such
to	person,
such	be
person,	liable
be	to
liable	pay
to	tax
pay	on
tax	behalf
on	of
behalf	all
of	such
all	persons:
such	
persons:	

Provided that if the employer is an officer of the Central Government or a State Government, such employer shall discharge the said liability in such manner, as may be prescribed.	Provided that if the employer is an officer of Government, the State Government may, notwithstanding anything contained in this Act, prescribed by rules the manner in which the employer shall discharge the said liability:
--	--

(2)	Provided
When	further
any	that
person	where
earning	any
a	person
salary	earning
or	a
wages	salary
--	or
	wage
	--

(a)	(a)
is	is
also	also
covered	covered
by	by
one	one
or	or
more	more
entries	entries
other	other
than	than
entry	entry
1	1
of	in
the	the
Schedule	Schedule
and	and
the	the
rate	rate
of	of
tax	tax
in	under
any	such
such	entry
other	or
entry	any
is	of
more	such
than	entries
the	is
rate	higher
of	than
tax	that
under	in
entry	entry
1	1,
of	or
the	
said	
Schedule.	

(b)	(b)is
is	simultaneously
simultaneously	engaged
in	in
employment	the
of	employment
more	of
than	more
one	than
employer;	one
	employer;

and such person furnishes to his employer a certificate in the prescribed form declaring that he has been registered under sub-section (2) of section 8 and shall pay the tax himself, then the employer or employers of such person shall not deduct the tax from the salary or wages payable to such person and such employer or employers, as the case may be, shall not be liable to pay tax on behalf of such person.:

and such person furnishes to his employer or employers a certificate in the prescribed form declaring inter alia, that he shall obtain a certificate of enrolment under subsection (2) of section 5 and pay the tax himself, then the employer or employers of such person shall not deduct the tax from the salary or wage payable to such person and such employer or employers, as the case may be, shall not be liable to pay tax on behalf of such person.

Provided that such person may opt to have the amount of tax deducted by the employer or employers from his salary or wages and thereupon the amount so deducted shall stand adjusted towards the tax payable by such person for the year.

12. Having regard to the scheme of the two Acts as discussed above, it appears that both the Acts have defined "employee", "employer" and "person" almost in identical manner. The "levy and collection of tax" and the "employer's liability to deduct and pay tax on behalf of employees" are almost in identical lines.

Under both the Acts, the liabilities fastened on the employee create a liability on the employer to deduct and pay the tax on behalf of the employees- Both u/s 2(c) of the MP Act and Section 2(b) of the WB Act, "employee" means a person employed on salary or wages and includes (i) a Government servant receiving pay from the revenues of the Central Government or any State Government or the Railway Fund; (ii) a person in the service of a body incorporated or not, controlled by Central or State Government operating in any part of the State even though its headquarter may be outside the State. Thus, this definition does not restrict the employment of the employee only with the State Government concerned, namely, of Chhattisgarh under the MP Act and West Bengal under the WB Act. It includes a Government servant receiving pay from the revenues of any State Government or employed in a body incorporated or not controlled by Central or State Government operating in any part of the State even though the headquarter may be outside. The definition of "employee" proceeds to define employee to mean a person employed. The "person" is defined to mean u/s 2(f) (in both the Acts), any person engaged in any employment in the State of Madhya Pradesh (in the present context the State of Chhattisgarh wherever referred to) or West Bengal respectively. Thus, the primary consideration for fastening liability to pay profession tax is on a person engaged in any employment including Government servant in the State of Madhya Pradesh or in the State of West Bengal respectively, irrespective of the fact whether he is serving the Government of or a body corporate or not in either of these two States or of any other State. When the liability is primarily on the person employed/Government servant, it is the definition of "employee" and "person", which would be the deciding factor.

13. The levy and collection of tax under the MP Act is provided in Section 3 of the MP Act. Sub-section (2) fasten the liability on every person who is in employment either wholly or in part in Madhya Pradesh and falls under any one or the other classes specified in column-2 of the Schedule. Sub-section (5) of Section 3 clarifies the situation that the absence of the employee on leave or otherwise from Madhya Pradesh would not relieve the liability of the employee. Whereas Section 3 of the WB Act does not provide for any such provision. However, we are not concerned with this provision in relation to West Bengal since the employees are, in fact, employed in West Bengal and are not absent therefrom. The MP Act confines the liability on persons employed wholly or in part in Madhya Pradesh, even though he might be absent from Madhya Pradesh on account of leave or otherwise. Mr. Mitter had attempted to point out that this Sub-section (5) of Section 3 of the MP Act fastens the liability on the employees posted at Calcutta. Inasmuch as, though they are absent from Madhya Pradesh yet they shall be deemed to be in employment in

Madhya Pradesh. But this proposition seems to be fallacious. The absence has been qualified as on account of leave. The expression "or otherwise" used in Sub-section (5) of Section 3 has to be interpreted as ejusdem generis. This expression "otherwise" would mean something analogous or ancillary to leave. This absence cannot connote absence on account of any reason other than leave or such reason analogous or ancillary to leave. It would not include a person posted outside the State on account of his transfer or on deputation. Posting of a person outside State otherwise than on account of leave or matters ancillary thereto would not be deemed to be an employment in Madhya Pradesh. Absence on account of transfer or deputation or posting outside State cannot be brought within the purview of Sub-section (5) of Section 3. On account of such posting outside State, the employee cannot be said to be in employment in Madhya Pradesh, even though the Head Office is within the State either wholly or in part.

14. The liability of the employer to deduct and pay tax under the MP Act on behalf of the employee would arise only when the person satisfies the test of the definition of "employee" read with the definition of "person" in Sections 2(c) and 2(f) of the MP Act and not otherwise. Unless the employee is employed wholly or part in Madhya Pradesh, he would not be liable to pay tax and the employer would not be liable to deduct and pay tax on behalf of the employee under the MP Act. On the other hand, on account of their posting at Calcutta, they are employed in West Bengal as defined in Sections 2(b) and 2(f) of the WB Act. Inasmuch as they are employees within the meaning of Section 2(b)(ii) of the WB Act being persons engaged in employment in West Bengal. Therefore, the provisions of the WB Act would be applicable in their case. By reason of Section 4, the employer Bhilai Steel Plant, a Unit of SAIL is liable to deduct and pay tax under the WB Act to the authorities entitled to receive tax under the WB Act.

15. The payment of salary by the employer in Chhattisgarh is not the determining factor; it is the place of employment, which is the determining factor. Similarly, the receipt of salary by the employee in Chhattisgarh would not be relevant when the employee is engaged in employment in the State of West Bengal. It is the engagement in employment in the particular State is the determining factor irrespective of the place where the salary is paid or received or the headquarter is situated.

16. In the present case, the employees of the appellant are employees within the meaning of Section 2(b)(ii) of the WB Act and Section 2(c)(ii) of the MP Act employed in the State of West Bengal where the employer is also operating within the meaning of the respective definition. As such the appellants would be liable to pay profession tax in West Bengal under the WB Act and their employer is liable to deduct and pay tax under the WB Act to the authorities under the WB Act.

17. In these circumstances, the authorities under the WB Act is entitled to levy or charge and collect tax under the WB Act from the appellants posted in West Bengal

during the period of such employment in West Bengal. The State of Chhattisgarh shall transmit the said amount collected for such period on account of the appellants to the authorities under the WB Act. In case the amount deducted is in excess of the amount chargeable under the WB Act, in that event, the excess amount would be adjusted against the tax arrear or future payable by the appellants concerned. In case the amount deducted fall short of the amount payable under the WB Act, in that event, the same shall be dealt with in accordance with law. However, neither any penalty shall be imposed upon, nor penal action shall be taken against the appellants or their employer for any default or otherwise, nor any interest shall be charged on the arrears for any period prior to January, 2004. The amount deducted at the rate applicable under the MP Act in its entirety shall be deposited with or transmitted to the authorities under the WB Act within the month of January, 2004. The employer/respondent No. 5 shall deduct tax at the rate applicable in West Bengal and transmit the same to the State of West Bengal, for the month of December, 2003 onwards be deducted by the employer and be transmitted to or deposited with the authorities under the WB Act. The appellants/employees shall also be at liberty to opt for enrolment u/s 4 of the WB Act. However, we are not inclined to enter into the merits of the demand made by the authorities under the WB Act. The appellants shall be at liberty to dispute the demand on any ground available in law if they are so advised and in case it is so needed, it will be open to the appellants to get the dispute resolved through the machinery provided under the WB Act including WB Taxation Tribunal under the 1987 Act, as the case may be. All points on merit are kept open.

18. In the result, the appeal succeeds and is allowed as above. The judgment and order dated 25th February, 2003 passed in Writ Petition No. 4406 (W) of 2002 appealed against is hereby set aside. The writ petition, thus, succeeds to the extent indicated above and is disposed of in terms of the above order.

19. There will, however, be no order as to costs.

20. Urgent xerox certified copy, if applied for, be supplied to the parties within seven days from the date of application.

R.N. Sinha, J.

21. I agree.