(2019) 02 J&K CK 0117

In the Jammu And Kashmir High Court

Case No : Other Writ Petition (OWP) No. 985 Of 2010 IA No. 1336 Of 2010, 795 Of 2012

D.P. Jain And Co. Infrastructure Pvt — APPELLANT

Vs

Union Of India And Others — RESPONDENT

Date of Decision : 26-02-2019

Acts Referred:
Building And Other Construction Workers (Regulation Of Employment And Conditions Of Service) Act, 1996, — Section 2(1)(g), 2(1)(i), 2(1)(j), 7, 10

Citation : (2019) 02 J&K CK 0117

Hon'ble Judges : Gita Mittal, CJ;Tashi Rabstan, J

Bench : Division Bench

Advocate : R.K.Gupta, Udey Bhasker, L.K.Moza

Final Decision : Dismissed

Judgement

(Oral CJ)

1. With the consent of the parties, this writ petition is taken up for consideration.

2. We have heard Mr. R.K.Gupta, learned senior counsel for the petitioner and Mr. L.K.Moza, learned senior panel counsel at length.

3. The petitioner before us is a company registered under the Companies Act, 1956 which is engaged as contractors with MES department, the respondents herein. The instant case is concerned with an agreement entered into by the petitioner with the MES with regard to contract CA No. CEAFU-115/2009-2010 dated 15th of September, 2010 in respect of the project concerned with resurfacing of runway at Leh. The petitioner is stated to have executed the work pursuant to an allotment letter dated 30th of March, 2010.

4. The issue which arises for consideration in the present case relates to compliance of the provisions under the Building and Other Construction Workers (Regulation of Employment and conditions of Service) Act, 1996 as well as the Building and Other Construction Workers? Welfare Cess Act, 1996. It is the

contention of the petitioner that the petitioner is not the principal employer and that, as per the Building and Other Construction Workers (Regulation of Employment and conditions of Service) Act, 1996, it is only the employer who is required to get registered in view of the definition of the expression "employer" under Section 2(1)(i) and that of "establishment" under Section 2(1)(j) of the enactment. Mr. R.K. Gupta, learned senior counsel for the petitioner has also placed before us the provisions of Section 2(1)(g) of the act of 1996, wherein the expression "contractor" has been defined. In support of the submission that the petitioner is not required to get registered, reliance is placed on the provisions of Section 7 of this statute submitting that a conjoint reading of the Section 2(1)(i) and Section 7 of the Act, it would be evident that the word employer in relation to an establishment as contained in Section 2(1)(i) i.e., includes the owner.

5. Additionally, it is contended that no notice has been issued by the competent authority under Section 10 of the statute to the petitioner, rendering the petitioner liable for non registration of its establishment.

6. So far as the payment of Labour Welfare Cess Tax is concerned, it is the submission of Mr. R.K.Gupta, learned senior counsel that as per the Building and Other Construction Workers (Regulation of Employment and conditions of Service) Act, 1996, the same is liable to be paid by the employer only after the employer registers an establishment under Section 7 of the Building and Other Construction Workers (Regulation of Employment and conditions of Service) Act, 1996 and in this case the owner is Union of India.

7. On these submissions, the petitioner would challenge the action of the MES, i.e., respondents No. 3 and 4 in withholding and deducting payments of the petitioner @ 1% from his pending bills towards Labour Cess. It is urged that this deduction is contrary to the petitioner's contract with the MES. The factual narration contains the manner of working of the contract in which, according to the petitioner, the construction work carried on by it is supervised every day by the respondent No. 3 through the respondent No. 4 and the duly appointed Garrison Engineer (P) of the work project. The petitioner has asserted that the respondents maintained a site order book to issue day to day instructions with regard to the supervision, quality and progress of the work on behalf of the principal employer with regard to the said project. Elaborate assertions explaining the manner in which the petitioner has carried on the construction work have been set out in the writ petition.

8. On this narration, the petitioner has sought issuance of writ of certiorari quashing the conditions of the Labour Welfare Cess Tax mentioned in the contract agreement under "the Building and other Construction Workers (Regulation of Employment and conditions of Service) Act, 1996; the Jammu & Kashmir Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules 2006 and also under the Building and Other Construction Workers? Welfare Cess Act, 1996, as well as, the Building and Other Construction Workers? Welfare Cess Rules.

9. The petitioner seeks issuance of the consequential writ of mandamus directing the respondents No. 3 and 4 to release amount provisionally withheld and for restraining the respondents No. 3 and 4 from applying the provisions of the "the Building and other Construction Workers (Regulation of Employment and conditions of Service) Act, 1996; ?the Jammu & Kashmir Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules 2006?; the Building and Other Construction Workers? Welfare Cess Act, 1996, as well as, the Building and Other Construction Workers? Welfare Cess Rules, to the petitioner with respect to the project in question as the petitioner is not the principal employer and further restraining the respondents from withholding or deducting the amount from the bills/payments of the petitioner.

10. Countering the submissions made on behalf of the petitioner, Mr. L.K.Moza, learned senior panel counsel, has asserted that in the event of deployment of labour/construction workers in the execution of project, the petitioner-company is under an obligation and duty to pay the cess for the welfare of the labourers to ensure their welfare which rests entirely upon the petitioner. It has been submitted that the rate quoted by the petitioner includes labour cess. The petitioner had agreed and accepted all the conditions of the contract agreement before its execution and the petitioner is bound to implement every condition laid down in the contract. It is submitted that the liability of the petitioner to make payment of the labour cess is included in the Special Conditions which apply to the contract in question and which bind both the parties.

11. Mr. L.K.Moza, learned senior panel counsel would further submit that the issue urged by the petitioner is no longer res integra. It is submitted that this very issue was agitated by construction companies before the Division Bench of the High Court of Punjab & Haryana in Civil Writ petition No. 6325 of 2009, M/s Anil Construction Company Vs. Union of India and Ors., and the very submissions pressed before this Court stand rejected by the Division Bench of the High Court of Punjab & Haryana vide its decision dated 19th of January, 2010. It is to be noted that the principal employer in the case before the High Court of Punjab and Haryana were also MES.

12. This judgment, though rendered in the context of the Central enactments i.e. the Building and other Construction Workers (Regulation of Employment and conditions of Service) Act, 1996 and the Building and Other Construction Workers' Welfare Cess Act 1996; as well as the local Haryana Building and Other Construction Workers (Regulation of Employment and Conditions of service) Rules 2005, fully applies in the present case.

13. It is to be noted that the Central enactments came to be made applicable to the building and other construction activities in the State of Jammu and Kashmir in the year 2007 pursuant to a Notification issued vide SRO 274 dated 31st of July, 2007. The provisions of the State enactment are on all fours with the provisions of the Haryana Building and Other Construction Workers (Regulation of Employment and Conditions of service) Rules 2005.

14. The parties before us do not dispute that cess is payable. The issue which has to be answered as to whether the same is required to be paid by the Contractor or by the MES i.e., the respondents No. 3 and 4.

15. Payment of cess in the present case is governed by condition No.32 B.1 of the Special conditions of the contract. We extract here under the stipulation as contained in condition No. 32 B.1 of the Special Conditions of contract on which the respondents rely upon:

"32 B.1 The rates quoted by the contractor shall be deemed to be inclusive of all taxes (including Sales Tax/VAT on materials, Sales Tax/VAT on works contracts, Turnover Tax, Service TX, labour Welfare Cess/Tax etc), duties, Royalties, Octroi & other levies payable under the respective statutes. No reimbursement/refund for variation in rates of tax, duties, Royalties, Octroi & other leviews and/or imposition/abolition of new/existing taxes, duties, Royalties, octroi & other leviews shall be made except as provided in 33.B.1.1 to 33.B.1.4 here-in-below."

This condition is challenged by the writ petitioner in this writ petition. It is submitted that this condition does not bind the petitioner.

16. Before the High Court of Punjab & Haryana the Contract contained similar stipulations and condition No. 18.1 regarding payment of cess.

17. On a consideration of the terms of conditions No. 18.1, while fixing the liability, the Punjab & Haryana High Court had concluded as follows:

"A perusal of the aforesaid clause makes it clear that the parties to the contractor are conscious of levy of labour welfare cess/tax and the contractor-petitioner has agreed to assume the obligation to pay the aforesaid labour welfare cess/tax. The controversy in the instant bunch of petition is not with regard to the payment of labour welfare cess or the constitution validity of the same. The controversy is also not raised as to the payment of labour welfare cess/tax. The controversy is confined to that condition incorporated in the agreement between the petitioner-contractor and MES - respondents No.3 & 4 claiming that it is liable to be quashed.

We are further, of the view that when two parties out of their free volition have agreed to do an act or refrain from doing an act which is reduced to writing then the duty of the Court is to enforce such a contract. These principles are clear from the bare reading of Contract Act, 1872. In case of an ambiguity in the contractual clause, however the

Court has limited role to play and normally it is to give effect to the bargain of the parties agreeing to their intention."

(Emphasis supplied)

18. The above conclusion on the issue of construction of the contractual term was supported by the judicial pronouncement reported at AIR 1966 SC 1644, General Assurance Society Ltd. Vs. Chandmull Jain; AIR 1965 SC 1288, Central

Bank of India Ltd. Vs Hartford Fire Insurance Co. Ltd.

19. The Division Bench has specifically rejected the challenge to the condition of the contract on the ground that it was an unfair and unconscionable bargain for placing reliance on (1986) Volume 3 SCC 156, Central Inland Water Transport Corporation vs Brajo Nath Ganguly.

20. In the instant case as well, the petitioner has entered into the contract voluntarily, fully knowing the terms and conditions which would have been guided the working thereon and after understanding its responsibility and obligations.

We are also of the view that in the presence of stipulation contained in conditions 32 B.1 of the Special Conditions of the contract, the petitioner cannot avoid its liability to pay cess thereunder. The obligation to pay labour cess is the duty of the contractor to ensure the welfare of its labour.

In view thereof the challenge pressed before us by way of the instant writ petition is completely devoid of any legal merit.

21. For all these reasons this writ petition is dismissed.

