

(2016) 11 CAL CK 0036
In the Calcutta High Court
Case No : In W.P 3075 (W) of 2016

M/s. R.K. Trading Co. (India)

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-11-2016

Acts Referred:

Citation : (2017) LabLR 63

Hon'ble Judges : Mr. Samapti Chatterjee, J.

Bench : Single Bench

Advocate : Mr. Jasobanto Rakshit, Learned Advocate, for the P.F. Authority; Mr. Kaushik Chanda, Learned, Advocate and Mr. Tarun Jyoti Tiwari, Learned Advocate, for the U.O.I; Mr. Tapas Dutta, Learned Advocate, for the Petitioners

Final Decision : Dismissed

Judgement

Samapti Chatterjee, J. - Assailing the impugned letter dated 6th November, 2015 issued by the Respondent no. 6, director (Contract) for Engineer-in-Chief, Military Engineer Services thereby directing the petitioners to participate in the tender process during the evolution of "T" bid (Cover-1) of e-tendering, and that uploading of copy of Provident Fund Code number in addition to the other documents required shall be mandatory. It was also mentioned in the said impugned order that it should be clearly mentioned that contractor not in possession of this EPF Code number shall be disqualified in bid evolution and his financial bid shall not be opened.

2. The petitioners' case in nutshell is as follows:

The petitioners are engaged in carrying on business of maintenance/E.P.R completion and finishing services such as glazing, plastering, flooring, wall tailing, installation, electrical fittings, etc. and the number of workers in the petitioners' establishment are below 20.

3. It is also the case of the petitioners that the petitioners also engaged Subcontractor for labour for execution of the said job. They provide service to

the Headquarters, Commercial Works Engineer Military Engineer Services in Kolkata and other branches. It is also submitted that the impugned letter dated 6th November, 2015 has been issued in compliance of the letter issued by the Secretary, (Ministry of labour and employment), Government of India, dated 15th July, 2015 to the effect that all construction workers are to get their benefit of social security, the contractors and sub-contractors shall have provident fund code number in order to participate in the bid and it should also be ensured that all workers deployed by contractors or sub-contractors are enrolled with the number of the provident fund and should be given to the universal account number.

4. It is also case of the petitioner that they are not covered under the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the said Act) as the number of workers engaged in their establishment are below twenty and they are not the principal workers.

5. Mr. Dutta, learned advocate appearing for the petitioners vehemently urged that when Employees Provident Fund Act 1952 was introduced then the employees engaged by/through a contractor was not included in Para 2 (f) (iii) of the scheme. Thereafter pursuant to a notification dated 15th October, 1958 Para 2 (f) (iii) of the scheme was substituted and employees engaged under any contractor was included within the Employees Provident Fund Act 1952. Therefore, Mr. Dutta emphasized that by Notification No. G.S.R. 1467 dated 2nd December, 1960 whereby it was added that, where an employee is employed by/through a contractor for work of an establishment the principal employer shall be responsible for complying with the provision of Act 1952 and the scheme framed thereunder in relation to such employees.

6. Mr. Dutta further vehemently urged that by this amendment the principal employer is held responsible for making contribution of provident fund for engaging employees by/through a contractor. But that notification was struck down by the Hon"ble Supreme Court in 7 Judges Bench decision reported in 1962 AIR 1402 (M/s. Orissa Cement Ltd v. Union of India) thereby holding that the notification dated 15th January, 1958 and 2nd December, 1960 are unconstitutional and void as those do not impose any obligation on the contractor to the principal employer the amount paid by him on account of the employees.

After that the Act 1952 was further amended on 30th November, 1963.

7. Mr. Dutta further contended that as per Section 2 (f) (i) of the Act 1952 the word "Employee" includes any person by /through a contractor in connection with the work of the establishment.

8. Mr. Dutta further contended that Hon"ble Supreme Court in series of cases held that under the Provident Fund Act it is the principal employer who is statutorily liable for payment of their contribution under Provident Fund Act 1952 for their employees and to give effect to that provision the principal employer is

entitled to recover the amount of contribution payable by the employers to contractor for them. In support of his contention Mr. Dutta relied on following Supreme Court decisions :-

- (i) AIR 1962 SC 1402 (Orissa Cement Ltd v. U.O.I) (7 Members bench Decision);
- (ii) (1990) 1 SCC 68 (Food Corporation of India v. Provident Fund Commissioner) (relevant para 5-9);
- (iii) (1991) 3 SCC 119 (District Exhibitory Association, Muzzaffarnagar and Ors v. Union of India & Ors (relevant para 20);
- (iv) (2008) 2 SCC 247 (Bharat Heavy Electricals Ltd v. Employee's State Insurance Corporation) (relevant para 21 & 29);
- (v) AST 229 of 2015 (NTPC v. RPFC-I & Ors) (relevant para as marked)

9. Mr. Dutta further strongly argued that the repairing and maintenance of the building and furniture and also electrical job are not covered by building and construction industry in terms of notification dated 11th October, 1980. Therefore, those contractors and the employees are not covered under the Act. 1952.

10. Mr. Dutta further contended that if the Central Government incorporate some material in the tender process then Government has to notify the same in official gazette under Section 1 (e) of the Employees Provident Fund Act, 1952 but in the case in hand no such notification has ever been published. Therefore, Mr. Dutta submitted that Page 25 and 26 of WP. No.3075 (W) of 2006 are only mere official orders which have no statutory flavour.

11. Mr. Dutta also referred the following Sections of Employees Provident Fund Act 1952 Section 2 (e) (ii) and (f) (i) and Section 8A (1) (2) (3) which are quoted below :-

Section 2 (e) (ii) ?In relation to any other establishment, the person who, or the authority which, has the ultimate control over the affairs of the establishment, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent.

Section 2 (f) (i) ?Employed by or through a contractor in or in connection with the work of the establishment;

Section 8A ?Recover of moneys by employers and contractors-(1) [The amount of contribution (that is to say, the employer's contribution as well as the employee's contribution in pursuance of any Scheme and the employer's contribution in pursuance of the Insurance Scheme)]; and any charges for meeting the cost of administering the Fund paid or payable by an employer in respect of an employee employed by or through a contractor may be recovered by such employer from the contractor, either by deduction from any amount payable to the contractor under any contract or as a debt payable by the

contractor.

(2) A contractor from whom the amounts mentioned in sub-section (1) may be recovered in respect of any employee employed by or through him, may recover from such employee the employee's contribution [under any Scheme] by deduction from the basic wages, dearness allowance and retaining allowance (if any) payable to such employee.

(3) Notwithstanding any contract to the contrary, no contractor shall be entitled to deduct the employer's contribution or the charges referred to in sub-section (1) from the basic wages, dearness allowance, and retaining allowance (if any) payable to an employee employed by or through him or otherwise to recover such contribution or charges from such employee."

12. Before parting with his argument Mr. Dutta submitted that letters dated 06.11.2015, 15.07.2015 and letter dated 27.04.2016 are issued in contravention of the statutory provision of Section 1 (3) (b), 2 (e) (ii), 2 (f) (i) and 6 and 8A of the Act, 1952 which are to be struck down and clause inserted in the tender document i.e. "Scan copy of provident fund code no." (page no 30,34, 36, 39, 42, 44 of the W.P. 3075 (W) of 2016) contrary to the statutory provision of sections 1 (3) (b), 2 (e) (ii), 2 (f) (i), 6 and 8A of the Act, 1952, should also be deleted/omitted.

13. Per contra, Mr. Kaushik Chanda, Learned Solicitor General vehemently contended that the petitioner cannot deviate from the clauses of the tender where it is mentioned as follows :-

"During evaluation of "T" bid (Cover-1) of e-tendering, uploading of copy of Provident Fund Code number in addition to other documents required shall be mandatory. It should be clearly mentioned in NIT that contractor not in possession of this number shall be disqualified in "T" bid evaluation and his finance bid shall not be opened."

14. Mr. Chanda further contended that one of the aspect of the said tender is to follow the terms and conditions of the schemes framed under Employees Provident Fund and Miscellaneous Provisions (EPF and MP) Act, 1952 which has been circulated to all Chief Secretary of this State Government by the Government of India, Ministry of Labour and Employment vide its letter dated 25th July, 2015. Some extract of the said letter is quoted below :-

"1. I am directed to say that the Employee Provident Fund Organisation administers the Employee Provident Funds and Miscellaneous Provisions Act, 1952, (the Act) and the schemes framed there under which aim to provide social security in the form of Provident Fund, pension and insurance to all employee who are employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who get wages directly or indirectly from the employer and which includes any person employed by or through a contractor in or in connection with the work of the establishment and

apprentices engaged (other than the apprentice under the Apprentice Act, 1961).

2. The EPF & MP Act, is applicable to all establishment engaged in Building and Construction industry. Thus it is imperative that all contractors who engage workers to carry out the construction activity get themselves registered with the Employees Provident Fund organisation and deposit the necessary contributions with the EPFO. Further, it has been mandated that all construction worker should be provident Universal Account Number (UAN) by the contractor by appropriately registering them on the EPFO portal."

15. Mr. Chanda further vehemently urged that under Section 8 (a) of the EPF Act it is mandatory for all the firms to obtain EPF code number under Section 3 (b).

16. Mr. Chanda further contended that the petitioners in all the petitions mentioned as above have already obtained EPF Code which clearly shows that they have complied with the condition as laid down in the tender as well in letter dated 25th July, 2015.

17. Mr. Chanda also emphasized, since the petitioners have already obtained EPF Code therefore they should not be aggrieved by the tender notice dated 6th November, 2015 as well as letter issued by Government of India dated 25th July, 2015.

18. Mr. Chanda further vehemently urged that letter dated 25th July, 2015 was issued for the social security of the worker. In the said letter it was clearly mentioned that authorities are to ensure that the contractor provide provident fund code number and it was also a mandatory direction that in all notices Inviting Tender Provident Fund Code should be mentioned.

19. Mr. Chanda further contended that this term was introduced as a uniform contract condition to bring equality amongst all the contractors. Therefore, the Contractor who has EPF Code and who does not have EPF Code cannot be treated as equal as the contractor who is having EPF Code will have more financial liability than the contractor who does not have any EPF Code, therefore, they cannot be treated as same footings.

20. Mr. Chanda further contended that most of the petitioners have already obtained EPF Code, therefore, this writ petition has become infructuous.

21. Mr. Chanda further vehemently urged that the petitioner just to bypass their financial liabilities engaged workers below 20 number so that they are not to bear the cost of EPF for the workers but the volume of job and to complete the job within time needed more than 20 workers. Therefore, by the said Notice Inviting Tender (hereinafter referred to as NIT) categorically mentioned that the contractors who are having EPF Code will be eligible to apply for the bid and the contractors who do not have the EPF Code will not be eligible to apply for the NIT. Therefore, since the petitioners are not having EPF Code as per the terms of contract they are not eligible to participate in the bid.

22. Mr. Chanda further referred to Section 1 (3) (B) of the Employees' Provident Fund Act and also Section 8A of the said Act.

23. Mr. Chanda also contended that it is mandatory under Section 1 (3) (B) of the said Act for the firm to obtain the EPF Code but the petitioners herein failed to obtain EPF Code therefore, they are not eligible as per the terms of the NIT to participate in the said bidding. In support of his contention Mr. Chanda relied on "List Of Classes Of Establishments To Which The Employees' Provident Fund Act has been made applicable Under Section 1 (3) (B) and 39 (iv) "Engineers and engineering contractors, not being exclusively engaged in building and construction industry ."

24. Mr. Chanda further vehemently urged that scope to interfere in the Government Tender by the Court is very remote unless it is patently arbitrary and illegal contrary to the interest of the public at large. In support of his contention Mr. Chanda relied on Hon'ble Supreme Court decisions reported in 1994 (6) SCC Page-651 Paragraph-94 (Class 4 onwards), 1990 (1) SCC Page-492, 2005 (6) SCC Page 138 Paragraphs-13 and 15, 2015 (7) SCC Page-728 Paragraph-71 and 2009 (2) CHN Page-122 Paragraphs-3, 20 & 28.

25. Before parting with his argument Mr. Chanda submitted that since the petitioners failed to comply with the essential terms/conditions of the NIT, therefore petitioners are not eligible to participate in the said bidding. Accordingly, these writ petitions have no merit and those should be dismissed with costs.

26. Considering the submissions advanced by the learned Advocates and after perusing the records I find that it is one of the essential conditions of the said NIT that the participants should have the Provident Fund Code. But in the present case since the petitioners were not having the Provident Fund Code they failed to fulfil the condition laid down in the NIT which clearly indicates that the petitioners are lacking in fulfilment of one of the major conditions of the said NIT.

27. I also cannot ignore the fact that during pendency of those writ petitions most of the petitioners have obtained their Provident Fund Code. That being the scenario in my considered view since the petitioners have fulfilled this condition as laid down in the NIT therefore, the petitioners could not have any grievances against the condition laid down in the NIT.

The Court cannot shut its eyes on the issue that for the better security of the workmen/employees such condition has been imposed in the NIT that the contractors who have EPF Code will be eligible to participate in the bid and who have not the EPF Code will not be eligible to participate in the said process. I cannot ignore the fact that this process has been adopted by the Government for the benefit and the betterment of the employees at large. Therefore, in my considered view the condition for obtaining EPF Code that those contractors who are having EPF Code will be eligible to participate in the said process is not against the interest of the workers/employees working under the contractor. It is

very much for the benefit and betterment of the workers/employees who are working under the contractors. Since this condition is for the social security of the workmen, therefore, the petitioners could not have any grievance to the said condition of the NIT.

28. I also cannot ignore the fact that the petitioners did not challenge List Of Classes Of Establishments To Which The Employees" Provident Fund Act Has Been Made Applicable Under Section 1 (3) (B) and 39 (iv) "Engineers and engineering contractors, not being exclusively engaged in building and construction industry ."

29. I also find some substance in the submission of Mr. Chanda that since this condition in the NIT is for the benefit, security and the betterment of the workers/employees who are working under the contractor, therefore, the Court would not interfere with the said contract, as the Hon"ble Supreme Court in the catena of decisions warned the Court not to interfere any Government contract unless it is patently illegal or wholly against the interest of the public at large.

30. The citations relied on by Mr. Dutta may be good laws but not applicable in the fact of the present case. In the present case the impugned term in the NIT is neither illegal nor against the interest of public. Therefore, I have no hesitation to hold that the impugned letters dated 15th July, 2015 as well as 6th November, 2015 do not deserve any interference by this Hon"ble Court.

31. Accordingly, these writ petitions stand dismissed but no order as to costs. Since the writ petitions stand dismissed therefore, interim order passed in those writ petitions also stand vacated.

32. Urgent photostat certified copy of this order, if applied for, be supplied to the parties after fulfilling all the formalities.