

(2021) 03 JH CK 0195

In the Jharkhand High Court

Case No : Writ Petition(C) No. 2882, 2900, 2901, 2903 of 2013

M/s. Triveni Engicons Pvt. Ltd.

APPELLANT

Vs

M/s. RITES Ltd. And Ors

RESPONDENT

Date of Decision : 25-03-2021

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2021) 03 JH CK 0195

Hon'ble Judges : Sujit Narayan Prasad, J

Bench : Single Bench

Advocate : Piyush Chitresh, Rajiv Ranjan, Dipak Kumar Sinha

Final Decision : Dismissed

Judgement

The matter has been taken up through video conferencing.

These batch cases are under Article 226 of the Constitution of India, wherein the following prayers have been made:-

(a) For the issuance of appropriate writ/writs, order/orders, direction/directions in the nature of mandamus commanding upon the respondents to refund the deductions made on account of labour welfare cess from the running account bills of the petitioners in as much as the said deductions are in contravention of the letter no.4013 dated 13.09.2010 issued by the Development Commissioner, Govt. of Jharkhand, Ranchi to the various departments for regulating the levy of labour welfare cess;

(b) For the issuance of appropriate writ/writs, order/orders, direction/directions in the nature of certiorari setting aside the order issued by the respondent no.3 vide letter no.RITES/DVC-KTPP/Civil-Pkg.1A/2009/1786 dated 18.08.2012 (In W.P.(C) No.2882 of 2013) and vide letter no.RITES/DVC-KTPP/Civil-Pkg.II/2009/1787 dated 18.08.2012(In W.P.(C) No.2903 of 2013), where under the claim of the petitioner for refund of deductions made on account of labour welfare cess has been rejected in a most arbitrary manner without any

application of mind [Prayer in W.P.(C) Nos.2882 of 2013 & 2903 of 2013]and ;

(c) To hold and declare that action of the respondents in deducting labour welfare cess from the running account bills of the petitioner inspite of the direction of the development Commissioner, Govt. of Jharkhand, Ranchi to recover the same from emergency fund expenses/incidental expenses is wholly arbitrary, illegal and fit to be quashed.

2. The brief facts of the case as per the pleading made in these writ petitions are that in pursuant to notice inviting tender and a letter of acceptance issued to the petitioners on different dates by the respondents for the work of laying and linking of railway track, RCC Apron, supply of P. Way fittings, lane approach road and construction of box culverts etc. in connection with construction of railway siding work for Koderma Thermal Power Projects of DVC, Dist. Koderma, Jharkhand, the aforesaid work having been allotted in favour of the writ petitioners. The writ petitioners have entered into an agreement for execution of the said work. The writ petitioners have started the work as also the running account bills have been submitted for outstanding dues from time to time.

It is the grievance of the writ petitioners that from the outstanding dues, the deduction of 1 per cent was made to the balance payable on account of Labour Welfare Cess.

According to the writ petitioners, such deduction had been made from the running account bills of the petitioners to the extent of 1 per cent Cess, which is absolutely illegal exercise of the respondent authorities.

It has further been stated that the said deduction made in pursuant to the decision as contained in letter no.4013 dated 13.09.2010 issued by the Development Commissioner, Government of Jharkhand, Ranchi had clarified the position for levy of Cess under the Building and other Construction Workers Welfare Cess Act, 1996. It has specifically been provided therein that 1 per cent Cess must be provided for in the estimate of the project expenses and in case where such provisions have not been made, the same is to be recovered from the emergency fund expenses of the concerned department.

According to the writ petitioners, such stipulation having not been made in the agreement, therefore, deduction of 1 per cent Cess from the running account bills of the writ petitioners is highly arbitrary and illegal and therefore, request has been made to refund the said amount and having given no heed thereof, these writ petitions have been filed.

3. Mr. Deepak Kumar Sinha, learned counsel for the respondent nos.1, 2 and 4 has contested the case by filing the counter affidavit which inter-alia contains the facts that as per Clause-37 of the Contract wherein, under Clause-37(i), it has been stipulated that Sales Tax/VAT or any other Tax on materials, Sales Tax on Works (if any) and Tax of any type on Labour Service Tax and Cess under "The Building and other Construction Workers Welfare Cess Act 1996 and Cess Rules

1998" in respect of this Contract shall be payable by the Contractor and the Employer, shall not entertain any claim whatsoever in this respect.

It has further been stated therein that as per the contract in case of any dispute, the alternative mechanism for resolution of such dispute is available and therefore, the instant writ petitions are not fit to be entertained.

4. This Court after having heard the learned counsel for the parties and after appreciating their rival submissions, has been gathered that the writ petitioners are seeking direction from this Court having the jurisdiction to exercise the power conferred under Article 226 of the Constitution of India for refund of the amount of 1 per cent Cess under the provision of Building and other Construction Workers Welfare Cess Act, 1996.

It is not in dispute that the writ petitioners have been allotted work for execution, for which, the agreement have been entered into.

The agreement contains a Clause being Clause-37 which reads as hereunder:-

"Taxes Payable by Contractor The Contractor shall have valid registration with Excise Deptt. For Service Tax and with works Contract Cell of Sales Tax Deptt. Of the State and shall submit a copy of the same to the Engineer along with first running account bill.

i) Sales Tax/VAT or any other Tax on materials, Sales Tax on Works (if any) and Tax of any type on Labour Service Tax and Cess under "The Building and other Construction Workers Welfare Cess Act 1996 and Cess Rules 1998" in respect of this Contract shall be payable by the Contractor and the Employer, shall not entertain any claim whatsoever in this respect.

ii) The Contractor shall deposit royalty and obtain necessary permit for supply of the red bajri, stone, kankar etc, from local authorities.

iii) If pursuant to or under any law, notification or order any royalty, cess or the like becomes payable by the Employer and does not any time become payable by the Contractor to the State Government or Local authorities in respect of any material used by the Contractor in the works then in such a case, it shall be lawful to the Employer and it will have the right and be entitled to recover the amount paid in the circumstances as aforesaid from dues of the Contractor.

iv) Tax Deduction at Source will be done by the Employer towards Income Tax, Sales Tax on works, Labour Welfare Cess and any other tax as required by law, from the Running Account and Final Bills."

Thus, it is evident that the contention with respect to the refund of the said amount deposited/deducted by way of 1 per cent Cess which is being executed to be refunded on the ground that such amount is to be deposited by the State Government and not by the Contractor but such contention is in conflict with the condition under Clause-37 which contains a condition that any type on Labour Service Tax and Cess under the building and other Construction Workers Welfare

Cess Act, 1996 and Cess Rules, 1998 in respect of this Contract shall be payable by the Contractor and the Employer, shall not entertain any claim whatsoever in this respect.

5. According to the considered view of this Court that the power conferred to this Court sitting under Article 226 of the Constitution of India being a summary proceeding, is to be exercised only in case of admitted fact and when the fact is in dispute, no such direction can be issued by the writ Court sitting under Article 226 of the Constitution of India to issue Writ of Mandamus as has been sought for herein by seeking a direction upon the respondents to direct the respondent nos.1, 2 and 4, the contesting respondents to refund the amount deposited or deducted to the tune of 1 per cent by way of Cess under the provision of Building and other Construction Workers Welfare Cess Act, 1996.

6. Moreover, under the contract, stipulation has been made for resolution of dispute through alternative mechanism, as would be evident from Clause-25 thereof and in that view of the matter also, it will not be proper for the writ Court to exercise the extraordinary jurisdiction conferred to this Court under Article 226 of the Constitution of India.

7. The fact would have been different if the amount which is being refunded, if it would have been admitted by the respondents but the very basis of the claim of the writ petitioner about refund of the said amount is in conflict with Clause-37 of the Contract as referred and quoted hereinabove.

8. This court, therefore, is of the considered view that in such a disputed question of fact and further in view of availability of alternative dispute redressal mechanism as provided under Clause-25, it would not be proper for this Court to exercise the extraordinary jurisdiction conferred under Article 226 of the Constitution of India.

9. Accordingly, these writ petitions stand dismissed with the aforesaid observation/directions as indicated above.

10. However, it is left open for the writ petitioners to resort to the alternative dispute redressal mechanism as per the condition contained under Clause-25, if the writ petitioners, so wish.

11. It goes without saying that if the writ petitioners will resort to the alternative dispute redressal mechanism as per the stipulation made under Clause-25, the dismissal of the writ petitions will not come in the way of adjudication of the matter on its merit.