
(2001) 01 SHI CK 0008
In the High Court Of Himachal Pradesh
Case No : Civil Writ Petition No. 13 of 2000

Rakesh Kumar and Others

APPELLANT

Vs

National Hydro Electric Power Corporation and Another

RESPONDENT

Date of Decision : 11-01-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 2, 6

Citation : AIR 2002 HP 70

Hon'ble Judges : M.R. Verma, J; Kamlesh Sharma, J

Bench : Division Bench

Advocate : Deepak Gupta, for the Appellant; K.D. Shreedhar, for No. 1 and C.B. Barowalia, for No. 2, for the Respondent

Final Decision : Allowed

Judgement

Kamlesh Sharma, J.—The petitioners are working as contractors in District Kullu. In this writ petition they have prayed, inter alia, for quashing the circulars Annexures P-5 and P-6 issued by respondent No. 1 and for issuing direction to it to award contracts to the petitioners and similarly situated contractors without furnishing Employees Provident Fund Code Number (hereinafter called the "E.P.F. Code Number").

2. Respondent No. 1 National Hydro Electric Power Corporation (hereinafter called "the Corporation") is Government of India Undertaking, which is assigned the work of execution of Parbati Hydro Electric Project. Bhuntar, Tehsil and District Kullu. which is Joint venture of Union of India and the State of Himachal Pradesh. It has issued the impugned circular dated 18-9-1988 Annexure P-5 advising all the contractors to get E.P.F. Code Number from the Regional Provident Fund Commissioner, Shimla (HP). Similarly, Manager (C). Incharge (P&A) Wing, Parbati Hydro Electric Project. Bhuntar has forwarded letter dated 7-5-1999 of the Corporate Office for compliance and to ensure following guidelines vide his impugned letter dated 19-5-1999 Annexure P-6 :--

"No contract/work order is to be awarded to any contractor/party unless the contractor/party furnishes the Provident Fund Code Number allotted to him for his workmen by the Regional Provident Fund Commissioner and who have obtained licence under the Contract Labour (Regulation and Abolition) Act, 1970."

3. In compliance, vide his letter dated 1-1-2000 Annexure P-7 the Senior Manager (Mech.). Contract & Procurement, Parbati Hydro Electric Project, Bhuniar. District Kullu has asked petitioner No. 5 to submit the documents relating to E. P. F. Code Number latest by 11-1-2000, on receipt of which he would be called for negotiations for the reduction in rates/amount in respect of his tender for package No. 20 pertaining to construction of Breast-Wall on Garasa Sheelagarh Road, as he was the lowest tenderer. The notices inviting tenders Annexures P-3 and P-4, contain one of the conditions that tenders must accompany E. P. F. Code Number or its exemption from the Regional Provident Fund Commissioner besides other documents.

4. On the other hand, respondent No. 2, the Regional Provident Fund Commissioner, Kasumpti, Shimla who was initially issuing the E. P. F. Code Numbers to the contractors, has stopped this practice in pursuance to letter dated 3-7-1998 Annexure P-1 written by Central Provident Fund Commissioner to all the Regional Provident Fund Commissioners directing them to stop the practice of allotting separate E. P. F. Code Numbers to the Contractors. Following the directions issued in the letter Annexure P-1 the Regional Provident Fund Commissioner, Shimla has written letter dated 28-9-1999 Annexure P-2 whereby request for issue of E. P. F. Code Number of one of the contractors, namely, Bir Singh has been rejected on the ground that he was working for respondent No. 1 Corporation, which is already covered under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 and he was directed to comply with the provisions of the said Act through his principal employer i.e. respondent No. 1 Corporation.

5. The petitioners have assailed the decision of respondent No. 1 contained in Annexures P-5 and P-6 that no contract/ work will be awarded to any contractor unless he furnishes the E. P. F. Code Number allotted to him by the Regional Provident Fund Commissioner on the grounds that it is wrong, illegal and violative of Articles 14 and 19(1)(g) of the Constitution as well as the provisions of the Act and the Employees' Provident Fund Scheme, 1952 (hereinafter called "the Scheme") and instructions in the letter Annexure P-1 issued by the Central Provident Fund Commissioner on the basis of letter dated 18-5-1998 by the Government of India, as respondent. No. 1 Corporation being Government of India Undertaking cannot work against the mandate and instructions of the Central Government. According to the petitioners it is discriminatory against the small contractors, who for want of E. P. F. Code Number will not be able to give tender even for small works and all the big and small works will be pocketed by big construction houses and contractors, who having employed large number of permanent work force may be already having permanent E. P. F. Code Number.

6. Respondent No. 1 Corporation has filed reply to the writ petition on the

affidavit of its Manager (Personnel). In the preliminary submissions it is stated that it has projects/units all over the country and it undertakes execution of civil and electrical works either directly or through the contractors. It is admitted that a policy decision has been taken that intending bidders for the execution of contractual works must have E. P. F. Code Number or its exemption from the Regional Provident Fund Commissioner. Since a large number of labour force is involved for the execution of its works, it is essential to ensure that labour laws are fully implemented for which reason the requirement of having the E. P. F. Code Number is insisted upon before any contractor can be considered for the award of work. As a matter of fact, the various conditions mentioned in the notice inviting tenders Annexures P-3 and P-4 are essential to know, establish and assess the capability of a contractor to undertake and execute civil or electrical works. It is further stated that respondent No. 2 the Regional Provident Fund Commissioner cannot decline to issue the E. P. F. Code Number to a contractor if he fulfils the requisite conditions and applies for the same, as the provisions of the Act have been made applicable to Building and Construction industry u/s 1(3)(b) of the Act. If respondent No. 2 has refused to accept the request of the petitioners for the allotment of E. P. F. Code Number, it is under a wrong impression that they are working for respondent No. 1 Corporation. On the other hand, respondent No. 1 Corporation has not denied its responsibility as principal employer to pay the contributions payable by it in respect of the employees directly employed and also employees employed by or through contractors but has added that responsibility has also been fastened on the contractors under para 30(2) of the Scheme, which provision has not been taken into consideration while issuing instructions Annexure P-I to the Regional Provident Fund Commissioners.

7. On merits it is reiterated that as per the policy decision of respondent No. 1, no contract/work will be awarded to any contractor unless he furnishes the E. P. F. Code Number allotted to him by the Regional Provident Fund Commissioner and also the licence obtained under the Contract Labour (Regulation and Abolition) Act, 1970. Referring to Section 8-A of the Act and paragraphs 30(2) and 36-B of the Scheme it is further asserted that the contractors also owe responsibility/duty to recover and deposit with the principal employer the contribution payable by the employees as well as their own. Respondent No. 1 Corporation has placed on record guidelines dated 16-12-1991 (Annexure R-1) issued to all the projects/offices under its control situated in different parts of the country in pursuance of its policy decision, The said policy decision has further been reiterated by circular dated 1-12-1999 (Annexure R-II).

8. According to respondent No. 1 Corporation, the interpretation of Section 6 of the Act and Para 30(3) of the Scheme as given by Provident Fund Department, is erroneous and the instructions issued on 9-8-1999 Annexure R-IV are not in consonance with the said provision. It is further stated by the respondent No. 1 Corporation that its impugned policy is in line with the policy of its other sister organisations in the power sec-tor, such as, National Thermal Power Corporation

and Power Grid Corporation of India Ltd., under the Ministry of Power, Government of India, who have issued similar guidelines/policy vide Annexures R-V and R-VI. It is specifically denied that the impugned policy discriminates against the small contractors, as it is being applied uniformly to all the contractors irrespective of the size and number of workmen employed by them.

9. Respondent No. 2 has also filed separate reply on the affidavit of its Regional Provident Fund Commissioner, Shimla, in which two preliminary objections have been taken that the writ petition is not maintainable as no cause of action has accrued to the petitioners against it and that being statutory body respondent No. 2 has only complied with the directions of the Government of India contained in letter, Annexure RD/T dated 18-5-1998, whereby it has been restrained from issuing separate E, P. F. Code Numbers to the contractors. On merits, according to respondent No. 2, no reply is called for from it.

10. During the hearing of the writ petition by order dated 20-12-2000 respondent No. 2 was directed to produce the instructions under which the Code Number is issued and also the instructions/letters referred to in Annexure P-1 to the writ petition. In compliance to this order the Regional Provident Fund Commissioner, Shimla has filed affidavit dated 27-12-2000 and placed on record the documents referred to in letter dated 3-7-1998 Annexure P-1. It is stated in para 2 of the affidavit, "That, there is no provision in the Employees' Provident Funds and Misc. Provisions Act, 1952 and Schemes framed thereunder for the allotment of Code Numbers, but as per the procedure followed for administrative reasons, each establishment when fulfils the conditions of coverage as required under the Employees' Provident Funds and Misc. Provisions Act, 1952 and required to deposit the Provident Fund dues, the establishment is given a Serial No. which is called Code Number and is an identification number of that establishment in the Provident Fund office." And in para 3, "That, establishment which is covered under the Employees' Provident Funds and Misc. Provisions Act, 1952 is required to deposit the Provident Fund contributions in respect of its own employees and also the employees engaged by or through contractors. Any covered establishment having a code number and engaging employees by or through contractors and facing administrative/accounting difficulty in depositing Provident Fund contributions in respect of such employees of contractors in its own code number, if applies to the Provident Fund office is given sub-Code Number for depositing contributions of contractors' employees."

11. So far letters dated 20-7-1990, 2-1-1991 and 24-3-1994 Annexures RA to RC referred to in letter dated 3-7-1998 Annexure P-1 are concerned, these contain instructions for issuance/allotment of Code Numbers, Sub-Code Numbers by the Regional Provident Fund Commissioners. It is stated in letter dated 24-3-1994 Annexure RC that the allotment of Code Numbers facilitate identification of an establishment as an Independent, distinguishable and distinct cover unit under the Act. However, need for allowing separate Code Number/Sub-Code Number has been recognised and permitted in the manner prescribed in

respect of factory establishments situated in different States and/or otherwise meeting the genuine administrative requirement of multi unit large scale organisation with independent set up. Also in the case of contractors employees primarily in the large scale industrial units where the employer does not favour mixing up the provident fund accounts of contractors employees, such request can be acceded to. In the event of any such situation the Regional Commissioner should satisfy himself with the requirement in the first instance, and shall refer the matter in self contained manner citing justification for the suggested deviation to the Central Office for scrutiny and concurrence.

12. Letter dated 18-5-1998 Annexure RD/T is addressed by the Secretary, Government of India, Ministry of Labour, New Delhi to the Central Provident Fund Commissioner in respect of status of coverage of contract labour under the Act directing to stop the practice of allotting separate Code Numbers to the Contractors forthwith as it is contrary to the provisions of Section 6 of the Act and para 30(3) of the Scheme. The reason for issuing these instructions, as given in this letter, is that the contractors keep on changing the workers depending on the place they get a new contract without depositing the Provident Fund in respect of the workers engaged by them while executing the earlier contract.

13. From the pleadings of the parties, the following points emerge for consideration :--

1. Whether respondent No. 1 Corporation can put condition of E. P. F. Code Number of its exemption from the Regional Provident Fund Commissioner as one of the conditions in its notice inviting tenders or in other words, its policy decision that no contract/work order is to be awarded to any contractor/party unless the contractor/ party furnishes the Provident Fund Code Number allotted to him for his workmen by the Regional Provident Fund Commissioner is legal and valid?

2. Whether respondent No. 2 the Regional Provident Fund Commissioner can refuse to allot separate E. P. F. Code Number to a contractor who applies for it on the ground that he works for the principal employer?

14. We have heard learned counsel for the parties and gone through the record. It is not in dispute that there is no provision in the Act and the Scheme for the allotment of E. P. F. Code Number but it is given to each establishment covered by the Act in order to facilitate its identification as an independent, distinguishable and distinct cover unit under the Act. The practice of issuing separate Code Numbers to the contractor working with big employers, particularly construction houses, Like respondent No. 1 Corporation, has been discontinued under the instructions from the Government of India for the practical reason that the contractors keep on changing the workers depending on the place they get a new contract without depositing the Provident Fund in respect of the workers engaged by them while executing the earlier contract. In

other words, as such contractors are not permanent, they may take away the Provident Fund deducted from the wages of the workers along with their own share. When such cases came to the notice of the Central Provident Fund Commissioner, he issued instructions to discontinue the practice of issuing E. P. F. Code Numbers to the contractors from time to time, which were ultimately approved by the Government of India vide letter dated 18-5-1998 Annexure RD/T on record. The perusal of this letter shows that on examination of the matter the Government of India found that issuance of separate E. P. F. Code Numbers to the contractors is contrary to the provisions of Section 6 of the Act and para 30(3) of the Scheme.

15. On the basis of letter dated 18-5-1998, instructions dated 3-7-1998 Annexure P-1 were issued by the Central Provident Fund Commissioner, which were being followed by Respondent No. 2 and other Regional Provident Fund Commissioners. First of all we will examine as to whether the stand of Government of India that issuance of separate E. P. F. Code Numbers to the contractors is in violation of Section 6 of the Act and para 30(3) of the Scheme is correct or not.

16. The word "employer" is defined in Section 2(e) of the Act. It is :--

"employer" means--

(i) In relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and, where a person has been named as a manager of the factory under Clause (f) of Sub-section (1) of Section 7 of the Factories Act, 1948 (63 of 1948), the person so named; and

(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:"

The word "employee" is defined in Section 2(f). It is :--

"employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets, his wages directly or indirectly from the employer, and includes any person--

(i) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961). or under the standing orders of the establishment;"

Section 6 provides for contributions and matters which may be provided for in Schemes. It is :--

"The contribution which shall be paid by the employer to the Fund shall be ten per cent of the basic wages, dearness allowance and retaining allowance if any for the time being payable to each of the employees whether employed by him directly or by or through a contractor, and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires, be an amount exceeding ten per cent of his basic wages, dearness allowance and retaining allowance if any, subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this Section.

Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this Section shall be subject to the modification that for the words "ten per cent", as both the places where they occur, the words "twelve per cent" shall be substituted :

Provided further that where the amount of any contribution payable under this Act involves as fraction of a rupee, the Scheme may provide for the rounding-off of such fraction to the nearest rupee, half of a rupee or quarter of a rupee.

Explanation 1 -- For the purpose of this Section dearness allowance shall be deemed to include also the cash value of any food concession allowed to the employee.

Explanation 2 -- For the purpose of this Section, "retaining allowance" means an allowance payable for the time being to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services."

Section 8A Provides for mode of recovery of moneys by employers and contractors. It is :--

"8A. (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 any 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 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.

Explanation -- In this section, the expressions, "dearness allowance" and "retaining allowance" shall have the same meaning as in Section 6.

Para 30 of the Scheme further provides for payment of contribution. It is :--

"30. (1) The employer shall, in the first instance, pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him directly or by or through a contractor, the contribution payable by such member (in this Scheme referred to as the member's contribution).

(2) In respect of employees employed by or through a contractor, the contractor shall recover the contribution payable by such employee (in this Scheme referred to as the member's contribution) and shall pay to the principal employer the amount of member's contribution so deducted together with an equal amount of contribution (in this Scheme referred to as the employer's contribution) and also administrative charges.

(3) It shall be the responsibility of the principal employer to pay both the contributions payable by himself in respect of the employees directly employed by him and also in respect of employees employed by or through a contractor and also administrative charges.

Explanation -- For the purposes of this paragraph the expression "administrative charges" means such percentage of the pay (basic wages; dearness allowance, retaining allowance, if any, and cash value of food concessions admissible thereon) for the time being payable to the employees other than an excluded employee, as the Central Government may, in consultation with the Central Board and having regard to the resources of the Fund for meeting its normal administrative expenses, fix".

Para 36 provides for the duties of the employers, 36.

(1) Every employer shall send to the Commissioner within fifteen days of the commencement of this Scheme, a consolidated return in such form as the Commissioner may specify, of the employees required or entitled to become members of the Fund showing the basic wage, retained allowance if any and dearness allowance including the cash value of any food concession paid to each of such employee :

Provided that if there is no employee who is required or entitled to become a member of the Fund, the employer shall send "NIL" return.

(2) Every employer shall send to the Commissioner within fifteen days of the close of each month a return--

(a) in Form 5, of the employees qualifying to become members of the Fund for

the first time during the preceding month together with the declarations in Form 2 furnished by such qualifying employees, and

(b) in such form as the Commissioner may specify of the employees leaving service of the employer during the preceding month.

Provided that if there is no employee qualifying to become a member of the Fund for the first time or there is no employee leaving service of the employer during the preceding month, the employer shall send a "NIL" return.

(3) (Omitted.)

(4) Every employer shall maintain an inspection note book in such form as the Commissioner may specify, for an Inspector to record his observations on his visit to the establishment.

(5) Every employer shall maintain such accounts in relation to the amounts contributed to the Fund by him and by his employees as the Central Board may, from time to time, direct, and it shall be the duty of every employer to assist the Central Board in making such payments from the Fund to his employees as are sanctioned by or under the authority of the Central Board.

(6) Notwithstanding anything herein before contained in this paragraph, the Central Board may issue such directions to employer generally as it may consider necessary or proper for the purpose of implementing the Scheme, and it shall be the duty of every employer to carry out such directions."

And para 36B provides for the duties of the contractors. It is :--

"Every contractor shall, within seven days of the close of every month, submit to the principal employer a statement showing the recoveries of contributions in respect of employees employed by or through him and shall also furnish to him such information as the principal employer is required to furnish under the provisions of the Scheme to the Commissioner."

17. The Joint reading of the above provisions makes it clear that though the contractor recovers the contribution payable by his employees and further pays it to the principal employer together with an equal amount of contribution and also administrative charges, yet it is primarily the responsibility of the principal employer to pay both the contributions payable by him in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor, and also administrative charges. As per the definition of "employee" under the Section 2(f) of the Act, any person employed by or through a contractor is also an employee, as such, there is no distinction between the employees directly employed by the employer or through the contractor for the purpose of implementation of the provisions of the Act and the Scheme. Therefore, in the absence of any specific provision in the Act that the contractor has to obtain a separate E.P.F. Code Number in respect of the employees engaged by him to discharge the work of the principal employer and

in view of the specific duty cast upon the employer to file return and to pay the contribution payable by himself and also on behalf of the members employed by him directly or by or through a contractor the contribution payable by such members, no fault can be found with the instructions issued by the Government of India to the Central Provident Fund Commissioner, who has further issued instructions Annexure P-1 to all the Regional Provident Fund Commissioners. Moreover, the object behind discontinuing the practice of issuing separate E.P.F. Code Numbers to the contractors, which had no sanction of law, is the benefit of the workers/employees engaged by the employer through the contractors, as is made clear in letter dated 18-5-1998 Annexure RD/T.

18. Therefore, Point No. 2 is answered in affirmative. The instructions issued by the Government of India and being followed by the Department of Provident Fund for not issuing separate E.P.F. Code Numbers to the contractors are legal and valid, and respondent No. 2 and other Regional Provident Fund Commissioners may refuse allotment, of separate E.P.F. Code Numbers to the contractors by following the said instructions.

19. In view of the above findings, the policy decision of the respondent No. 1 Corporation, on the basis of which it has issued the impugned Annexures P-5 and P-6 that no contract/work order is to be awarded to any contractor/party unless the contractor/party furnishes the Provident Fund Code Number allotted to him for his workers by the Regional Provident Fund Commissioner is unreasonable. Wholly unwarranted and without the authority of law. Learned counsel for the respondent No. 1 Corporation has not been able to answer the question that by putting the impugned condition for allotment of the contract/work, which provision of labour law has been ensured? If the object is to assess the capability of a contractor to undertake and execute the civil and electrical works, as urged by the learned counsel for respondent No. 1 Corporation, there can be many other methods, which may be evolved by Respondent No. 1 Corporation. Moreover, Respondent No. 1 Corporation being Government of India undertaking, cannot formulate any policy, which is against the instructions issued by the Government of India vide letter dated 18-5-1998, which is being followed by the Department of Provident Fund, more so, when this policy is against the provisions of the Act and the Scheme as discussed hereinabove, and instead of promoting the object of the Act and the Scheme, it defects the same. For taking this view we have relied upon the judgment of High Court of Karnataka at Bangalore in Writ Petition No. 25754/98 decided on 1-12-1998.

20. Therefore, Point No. 1 is answered in negative and the instructions contained in the impugned Annexures P-5 and P-6 are quashed. Respondent No. 1 Corporation is directed not to insist upon the conditions of separate E.P.F. Code Number for issuing tender or for allotting contract/work to the contractors. The writ petition is allowed accordingly. There is no order as to costs.