

(2007) 10 KAR CK 0068
In the Karnataka High Court
Case No : Writ Petition No. 14879 of 2007

R.N. Shetty and Company

APPELLANT

Vs

National Highway Authority of India and Another

RESPONDENT

Date of Decision : 24-10-2007

Acts Referred:

Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 — Section 11
Constitution of India, 1950 — Article 12

Citation : (2008) 2 KarLJ 30 : (2007) 4 KCCR 2741

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : A.G. Holla for K. Shashikiran Shetty, for the Appellant; Shilpa Shah, for Singhania and Partners for Caveator, for the Respondent

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar, J.—Writ petitioner claims to be a contractor who is executing certain works in favour of M/s. National Highways Authority of India (hereinafter referred to as "NHAI") in terms of a contract dated 28-2-2002 (copy at Annexure-F).

2. Petitioner claims to be aggrieved by certain decisions of the employer-NHAI who it appears have communicated their view that in respect of payments made to the contractors deduction of an amount at the rate of 1% is to be effected towards the welfare cess payable under the Building and Other Construction Workers" (Regulation of Employment and Conditions of Service) Act, 1996 (hereinafter referred to as "the Act") and for this purpose addressed a communication dated 8-8-2007 to the Team Leader, M/s. Roughton International Consulting Engineers Group Limited, Hubli (copy at Annexure-A) which according to the petitioner is contrary to the provisions of the Act, rules and various notifications issued for the purpose of the Act and therefore the communication deserves to be quashed.

3. Petitioner has also sought for the relief of declaration by issue of a writ in the nature of mandamus to declare that the petitioner is not liable to pay 1% cess under the Act and a further direction to direct the respondent-NHAI to clear the pending bills presented by the petitioner without deducting this amount.

4. Petitioner has also sought for quashing of yet another communication dated 10-8-2007 emanating from M/s. Roughton International Consulting Engineers Group Limited addressed to the petitioner (copy at Annexure-B) apprising the petitioner that the employer-NHAI have not agreed to the stand of the petitioner that no welfare cess can be deducted at 1% from out of the payments to be made to the petitioner in respect of works executed prior to 1-11-2006 which according to the petitioner amounts to illegal collection of amount from the petitioner purporting to be by way of liability towards payment of welfare cess.

5. Though the matter had come up for orders, Sri A.G. Holla, learned Senior Counsel appearing for the petitioner has requested the matter to be taken up for preliminary hearing and hence the matter is taken up for preliminary hearing.

6. I have heard Sri A.G. Holla, learned Senior Counsel appearing for the petitioner.

7. Submission of Sri A.G. Holla, learned Senior Counsel appearing for the petitioner is that the petitioner is basically not liable to pay cess under the provisions of the Act; that there is no liability on the part of the petitioner to pay any cess and moreover even under the provisions of the Act and in the light of a Government Order dated 18-1-2007 issued by the Government of Karnataka pursuant to certain proceedings of the Government of Karnataka for the purpose of implementing the provisions of the Act, it is specifically indicated therein that where a tender has been submitted or finalised and work is entrusted to a contractor prior to 1-11-2006, in such cases 1% cess has to be paid by the concerned department to the Board as mentioned in the Government Order and therefore there is no liability on the part of the petitioner to pay any amount prior to 1-11-2006 as there is no obligation at all on the department or an enabling provision in favour of the department to collect or recover any cess amount from the contractor for works executed before 1-11-2006 and on the other hand the department itself has to bear this amount.

8. It is submitted on behalf of the petitioner that the effect of the communication dated 18-1-2007 that apprised M/s. Roughton International Consulting Engineers Group Limited is on the petitioner as there is a proposal now to deduct 1% welfare cess payable under the Act from all amounts payable to the petitioner-contractor now pending clearance before the respondent-NHAI irrespective of the fact that such work was executed prior to 1-11-2006 or after 1-11-2006.

9. Sri A.G. Holla, learned Senior Counsel appearing for the petitioner submits that in fact under the provisions of the Act, the cess was required to be remitted to a Welfare Board and even for collecting and remitting the amount to the Board, no machinery had been set up; that the Board itself had come into

existence being constituted by the State Government under the notification dated 15-2-2007; that the State Government in this regard is only acting as an agent of the Central Government as indicated in the statement and objects to the Act; that in the absence of a machinery for computation and recovery of the amount and in the absence of the Board itself being in existence, the Government Order having taken note of this development and having indicated that such cess for the period prior to 1-11-2006 is to be borne by the department itself, there is absolutely no cause or justification for deducting any amounts from the payments to be made to persons like the petitioner who are contractors; that the impact of the communications at Annexure-A and B is to deny this quantum of amount from payment due to the petitioner; that it is an illegal decision and follow up action is imminent and therefore the writ petitioner has approached this Court seeking reliefs as noted above; that it is a fit case where necessary writs should be issued.

10. Respondents have entered Caveat through Counsel Smt. Shilpa Shah.

11. Smt. Shilpa Shah, learned Counsel appearing on behalf of the respondents-Caveator would submit that it was a term of the contract that the cess payable under the provisions of the Act will be enforced and the contract is subject to various labour welfare legislations including the present Act in terms of clause (o) of special Condition No. 2 regarding compliance with labour regulations and therefore no exception can be taken even if deduction is made; that the proposed decision even if implemented is only in consonance with the provisions of the Act and not in any way illegal or improper.

12. Though Sri Holla, learned Senior Counsel appearing for the petitioner would submit that the impact of correspondence between the respondents and the so-called M/s. Roughton International Consulting Engineers Group Limited is on the petitioner and therefore the petitioner is aggrieved, learned Senior Counsel is unable to show any adverse action/order/demand sought to be enforced on the petitioner under the provisions of the Act. In fact, the inter se communication between the respondents and M/s. Roughton International Consulting Engineers Group Limited and in turn between M/s. Roughton International Consulting Engineers Group Limited and the petitioner are made subject-matter for issue of writs of certiorari, but there is no direct communication from the respondent-NHAI to the petitioner

13. Though it is submitted by Sri Holla, learned Senior Counsel appearing for the petitioner that M/s. Roughton International Consulting Engineers Group Limited as a representative of NHAI, it is not forthcoming on a perusal of the contract under Annexure-F.

14. Be that as it may, the relationship between the petitioner and the respondent is a contractual relationship. If the petitioner is aggrieved by certain decisions of the respondents, assuming that it is there and is sought to be communicated to them through their consulting engineers M/s. Roughton International Consulting

Engineers Group Limited as a representative on the part of the respondent-NHAI, the complaint is essentially one of breach of terms of the contract.

15. If it is a breach, assuming that it has taken place due to a wrong understanding of the provisions of the Act either by the respondents or by any other authority, and ultimately the effect or impact assuming that it is deleterious to the petitioner, is by a breach of the terms of the contract in the matter of proper payment of the amount payable to the petitioner on due execution of the contract in favour of the employer. This is essentially a matter between the petitioner-contractor and the respondent-employer-NHAI if at all it has happened. Such breaches even assuming that the respondent-NHAI is an authority to be treated as "State" within the meaning of the expression under Article 12 of the Constitution of India, it is not a subject-matter which is fit for examination in writ jurisdiction. It is neither necessary nor feasible to examine the breaches of a contract in writ jurisdiction for the purpose of proper enforcement of the contract.

16. The impact on the petitioner if at all assuming it takes place in future is one of lesser payment than what is contemplated under the terms of the contract. Writ petition virtually turns out to be one to ensure that the respondent-NHAI complies with the terms of the contract and to prevent any breach being committed. Such examination cannot be undertaken in writ jurisdiction. Though it is submitted that the enforcement is in violation of the statutory provisions, even then it is not a matter that can be examined in writ jurisdiction, particularly, as under the provisions of the Act, there are procedures provided for and the liability is not directly fastened on the petitioner but on an employer who has the responsibility and who is making payment to the contractor and onus is on the employer to make payment. The employer if is aggrieved by any action on the part of any statutory authorities functioning under the Act has the option to avail of the appellate remedy provided u/s 11 of the Act.

17. While a writ in the nature of declaration as sought for cannot be issued for declaring any private rights of the petitioner which if at all arises in terms of the contract and it is always for person like the petitioner to work out its contractual rights in any other manner known to law, there is no occasion to quash either Annexure-A or Annexure-B which are essentially the communication between the respondents and its so-called agency and between the so-called agency of the respondent and the petitioner as noticed in the earlier part of this order.

18. In fact, I do not find any cause of action to entertain this writ petition as there is nothing pointed out which is an implementation of any provision contrary to the statutory provisions or any irregularity committed by any statutory authority.

19. Though Sri Holla, learned Senior Counsel appearing for the petitioner would submit that the Court should examine the impact of the developments of the communications as per Annexure-A and B and if they are to be implemented, it

results in a hard blow to the petitioner as it could result in deduction of large amount upto the extent of Rs. 20 crores from the payments due to the petitioner, such possibility in future cannot be a ground for present examination in writ jurisdiction as even if it is a statutory violation it cannot be examined unless the violation has taken place and on the other hand in the instant case, the entire relationship between the petitioner and the respondent-NHAI being a contractual relationship, there is no occasion to invoke any other statutory provisions for impugning the decisions taken by the respondent-NHAI.