(2017) 12 J&K CK 0010

In the Jammu And Kashmir High Court

Case No : 159 of 2017

Suheel Ahmad Bhat & Ors. APPELLANT

Vs

Union of India & Ors RESPONDENT

Date of Decision : 02-12-2017

Acts Referred:

Citation : (2017) 12 J&K CK 0010

Hon'ble Judges : Mohammad Yaqoob Mir, Ali Mohammad Magrey

Bench : DIVISION BENCH

Advocate : M. A. Qayoom, M. Y. Parray, Tahir Majid Shamsi, R. A. Khan

Final Decision : Dismissed

Judgement

1. These two Letters Patent Appeals are filed against the final order/Judgment dated 15th May, 2017, for short impugned judgment, passed by the

learned Single Bench in a bunch of writ petitions, being Nos. OWP no. 389/2016 titled Suheel Ahmad Bhat & Ors., v. Union of India & Ors., &

OWP No. 151/2016 titled Abdul Majeed Bhat & Ors., v. Union of India and others, whereby the Writ Petitions, have been disposed of by a

common judgment by extending the ratio of the judgment delivered by Single Bench on 10th March, 2017, passed in case titled Ghulam

Mohammad Baldar & Ors., v. Union of India and others (OWP no. 254/2017). The writ petitions have been disposed of with the following

directions:-

Apparently, none of the petitioners/contractors have approached the competent Authority in terms of the provisions of the

Employees Provident Funds Scheme, 1961, and instructions contained therein, therefore, the petitioners will be at liberty to approach the competent authority in terms of the Employees Provident Funds Scheme, 1961, and instructions contained therein, to seek

exemption of a Class of employees. If such a request is made, the authority shall consider it on its main merits and decide the same

expeditiously preferably within a period of four weeks from the date of receipt of copy of representation when placed along with this

order. This will enable the petitioners/contractors to know their position viz-a-viz the pending contracts and the ensuing contracts as

well. Accordingly, all the writ petition, excepting OWP 113/2016, OWP No. 227/2016 and OWP No. 228/2016, which are

segregated from the bunch of cases and kept on board for tomorrow, shall stand disposed of along with connected IAs in the above

terms.

2. It would be profitable to have the glance at the events leading to the filing of instant appeals. BRIEF FACTS

3. Before adverting to the facts, it would be apt to mention that since both the appeals are an outcome of one single judgment and raise the similar

issues for consideration, therefore, facts of both petitions are taken note of conjointly and both shall be governed by this single judgment, thus:

4. The appellants had filed two writ petitions, OWP no. 389/2016 and 151/2016 with the following prayers:

I) Writ of Certiorari, quashing the following orders:

Circular dated 15.07.2015 (Annexure-A) Order No. 66546/Manual/77/E8 dated 06.11.2015 (Annexure-B), Order No.

66546/Manual/488/E8 dated 03.12.2015 (Annexure-E), Order No. 42551/Cir/BAI/967/E8 dated 07.12.2015, (Annexure-F),

Order No. 80200/Policy/187/E8 dated 08.12.2015 (Annexure-G), Order No. 66546/Manual/495/E8 dated 31.12.2015

(Annexure-H), as the said circular and orders are bad, unconstitutional and not applicable to the petitioners.

II) Writ of Mandamus, this Hon''ble Court be pleased to command the respondents not to act upon the impugned circular and orders

(Annexure-A, B, E, F, G & H). The respondents be further commanded to allow the participation of the petitioners in the tender

process without giving the provident fund code as prescribed in the impugned circular and orders.

III) Writ of Mandamus, this Hon''ble Court be pleased to command the respondents to allow the petitioners to continue their business

as contractors in the respondent department without causing any hindrance or obstacle in any manner whatsoever so that the earning

of livelihood by the petitioners is ensures.

IV) The Hon''ble Court may pass any other writ, order or direction, which it deems just and proper under the facts and

circumstances of the case in favour of the petitioners and against the respondents.

5. The appellants are stated to be working as Military Engineering contractors with the respondents. The Ministry of Labour and Employment,

Government of India, issued a circular dated 15th July, 2015, by virtue of which the Chief Secretaries of all the States have been directed to

instruct the appropriate authorities in respect of the following:

A) While awarding various contracts, it should be ensured that the contractors shall have Provident Fund Code Number and also a

condition be included in the NIT that any sub-contractor engaged should also have Provident Fund Code.

B) The contract conditions should stipulate that all the workers deployed by contractors or sub-contractors are enrolled as members

of Provident Fund and should be given the Universal Account Number (UAN)

C) While clearing the bills of such contractor, certificate be obtained that all workers employing directly or indirectly by him are

registered for EPF and the due contributions have been credited into their account.

6. Thereafter, the respondents have issued the order dated 6th November, 2015, providing therein that the evaluation of T-Bid Cover-I of e-

tendering, uploading of copy of Provident Fund Code number in addition to other documents required, shall be mandatory and the NIT should

clearly mention that the contractor not in possession of this number shall be disqualified in T-Bid evaluation and his financial bid shall not be

opened.

7. The appellants through their association, submitted representations before the respondents with the request that the stipulation of getting EPF

code number by the bidders be waived off for all works to be executed in the State of Jammu and Kashmir, which did not find favour from the

respondents.

8. Subsequent thereto, a letter no. 42552/Cir/BAI/967/E8 dated 07.12.2015, was issued by the respondents with respect to inclusion of works,

contracts under the trade list with reference to provisions of J&K Employees'' Provident Funds and Miscellaneous Provisions Act, 1961.

Accordingly in fulfillment of the relevant provisions of the Act, all the engineering branches of the department were directed to make suitable

clauses in the tender documents of respondent department and it was compulsory for the contractors to mention EPF number in the tender bids

and in terms of letter No. 80200/Policy/187/E8 dated 08.12.2015, it had been ordered that no tender will be opened without EPF number of the

contractors.

9. The Circular dated 15.07.2015, Orders nos; 66546/Manual/77/E8, 66546/ Manual/488/E8; 42551/Cir/BAI/967/E8, 80200/Policy/187/E8 and

66546/Manual/495/E8 dated 15.07.2015; 06.11.2015; 03.12.2015; 07.12.2015; 08.12.2015 and 31.12.2015 respectively, were assailed in the

batch of writ petitions which were disposed of by a single judgment, impugned herein. Some more aggrieved contractors had prior to the decision

rendered in the batch of writ petitions impugned in these appeals filed writ petition (OWP No. 254/2017) titled Ghulam Mohammad Baldar and

Ors. Vs. Union of India and Ors., which stands disposed of in terms of final order passed by the learned Single Bench on 10.03.2017, relevant

paragraphs whereof are taken note of and extracted in the impugned Judgment.

10) The challenge to the orders and circular was laid inter alia on the grounds that the circular and the orders have been issued in furtherance of the

Employees Provident Funds and Miscellaneous Provisions Act (EPF&MP) Act, 1952, (for short Act of 1952), which is not applicable to the

State of Jammu and Kashmir, therefore, these are illegal and arbitrary orders; that the circular and the subsequent orders are also not applicable to

the petitioners/ appellants being not qualified as a contractor to be termed as ''employer'' and the same applies to factory owner, labour agency,

organization and like other entities who are doing regular works through fixed number and kind of workers. Etcetera.

11. Learned Single Bench on consideration of the writ petitions filed by the appellants and in light of the decision rendered in OWP No. 254/2017,

disposed of the writ petitions by applying the Judgment rendered in the said writ petition. In order to appreciate the controversy involved in the

matter for the disposal of the present appeals, it has become necessary to refer the grounds of challenge to the orders and circulars made in the

writ petitions, which has reference inter alia on the grounds that the circulars and the orders have been issued in furtherance of the Employees

Provident Funds and Miscellaneous Provisions Act (EPF&MP) Act, 1952, not applicable to the State of Jammu and Kashmir, therefore, are

illegal and arbitrary orders, that the circulars and orders are not applicable to the appellants-petitioners being not qualified as contractors to be

termed employer and the same applies factory owner, labour agency, organization and like other entities, who are doing regular works through

fixed number and kind of workers.

12. The writ petitions, were disposed of by the Writ Court in terms of impugned judgment dated 15.5.2017, holding that the Act of 1952 is not

applicable to the State of J&K and asked the appellants to approach the competent authority under the provisions of Employees Provident Fund

Scheme, 1961 and instructions contained therein, to seek exemption and if such a request is made, the authority shall consider it on its own merits

and decide the same expeditiously, preferably within a period of four weeks from the date of receipt of the representation.

13. Mr. M. A. Qayoom, learned counsel for the appellants has while reiterating the grounds of challenge submitted that the writ Court erred in law

by not quashing the circulars and the orders impugned in the writ petitions after holding that the Act of 1952 is not applicable to the State of Jammu

and Kashmir, that the writ Court has not returned any finding, as regards the applicability of the Act of 1961 and the rules framed thereunder to the

appellants; that the writ Court has not considered as to whether the appellants are running any establishment or a business concern, which can be

notified by the Government to be an establishment for the purpose of the Act or direct the appellants to follow the Act of 1961, therefore, the

impugned Judgment is bad in law; that the impugned Judgment has been passed in a slipshod manner and the controversy raised in the writ petitions has remained to be decided, therefore, the impugned Judgment is bad in law.

14. We have heard learned counsel for the parties, perused the records and considered the matter.

15. Mr. M. A. Qayoom, learned counsel for the appellants submits that the Employees Provident Funds and Miscellaneous Provisions Act

(EPF&MP) Act, 1961 cannot be made applicable to the appellants, as they do not constitute a firm, organization or establishment that is notified

by the Government, as such. Therefore, he submits that the writ Court has erred in law by asking the appellants to approach the competent

authority in terms of the provisions of the Act of 1961 to seek exemption of a class of employees. Learned counsel therefore, prayed that the

impugned Judgment be set aside. Learned counsel while strengthening his grounds of challenge has made reference to relevant provisions of the

1961 Act to demonstrate that the appellants, contractors executing small contracts in the respondent department does not constitute an

establishment, which is a factory engaged in any industry specified in Schedule-I of the Act, and in which ten or more persons are employed at any

time and also to any other establishment or business, which the Government may by notification in the Government Gazette declare as such.

Learned counsel submits that in terms of Sub-Section (2) of Section 1, the Act is extended to the whole of State of Jammu and Kashmir, the Act

in terms of Sub-Section (3) of Section 1 does not apply to the contractors, as they do not constitute any establishment, which is factory engaged in

any industry specified in Schedule-I. Mr. Qayoom, learned counsel for the appellants, has also referred to clause (c) of Section 2 defining

Employer, Clause (g) of Sub Section 2 defining factory, item 65 of Schedule-I of the Act and SRO 446 of 2015 dated 07.12.2015. The relevant

provisions quoted by Mr. M. A. Qayoom, with the purpose that the same does not apply to the appellants are taken note of.

The Jammu and Kashmir Employees Provident Funds Act, 1961:-

... (2) It extends to the whole of the State of Jammu and Kashmir.

(3) Subject to the provisions contained in Section 18, it applies-

(a) to every establishment which is a factory engaged in any industry specified in Schedule-I and in which (ten or more) persons are employed at any time; and

(b) to any other establishment or business which the Government may, by notification in the Government Gazette, declare to be an

establishment for the purposes of this Act.

2. Definitions.- In this Act, unless the context otherwise requires ..

(c) ''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 Jammu and Kashmir Factories Act, 1957, the person so named; and

(ii) in relation to any other establishment, the person who is 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;

(g) ''factory, means any premises including the process thereof, in any part of which a manufacturing process is being carried on or is

ordinarily so carried on, whether, with the aid of power or without the aid of power; Schedule-I.

65. Engineers, Architects and SRO 535 dated 24.09.1979 Engineering Contractors engaged in building and construction, designing

and consultancy services. SRO-446

56. Sand queering/road/bridge/building construction by Departments or Corporations of State/Central Government private

Companies.

16. Mr. M. A. Qayoom, learned counsel for the appellants with reference to extracted provisions of the Act and the rules, submits that same are

not applicable to the appellants, contractors executing small works.

17. Mr. T. M. Shamsi, learned ASGI appearing counsel for the respondents submits that the Act of 1961 is very much applicable to the

appellants. He submits that in terms of notification SRO 446 dated 17.12.2015, the Act has been made applicable to building construction by

Departments or Corporations of State/Central Government, with further application of notification SRO 533 of 1979 dated 24.09.1979, which

declares the Engineers, Architects and Engineering Contractors engaged in building and construction, designing and consultancy services, as

establishments for purpose of the Employees Provident Funds and Miscellaneous Provisions Act (EPF&MP) Act, 1952.

18. This Court, in terms of order dated 3rd October, 2017, added Commissioner/ Secretary to Government, Labour and Employment

Department, Government of J&K, as respondent no. 20, with a direction to take instructions with regard to applicability of the J&K Employees

Provident Funds and Miscellaneous Provisions Act, 1961 and the Employees Provident Fund Scheme of 1961 to the MES contractors.

19. In compliance to the directions, the affidavit has been filed by respondent no. 20, stating therein that, the Central Provident Fund Act, 1952, is

not applicable in the J&K State as the J&K State has its own J&K Employees Provident Fund Act, 1961. It is further stated therein that as per

Item No. 56 of the schedule of J&K Employees Provident Fund Act, 1961, ""Sand queering/road/bridge/building construction by Department or

Corporation of State/ Central Government/ Private Companies"" is also entitled for Provident Fund Act, 1961, under SRO No. 446 dated

17.12.2015.

20. We have considered the submissions made, but we do not see any ground much less a plausible ground having been projected to make out a

case for seeking quashment of the decision of the respondents for simple reason that the provisions of Jammu and Kashmir Employees Provident

Funds and Miscellaneous Provisions Act (EPF&MP) Act, 1961 and the rules are very much applicable to the appellants- contractors, as the

Engineering Contractors engaged in building and construction, designing and consultancy services have been declared as establishments for the

purpose of the Act in terms of SRO 535 of 1979 dated 24.09.1979. Needless to mention that the said notification has been issued by the

Government of Jammu and Kashmir in exercise of powers conferred by clause (b) of Sub-Section (3) of Section 1 of the Jammu and Kashmir

Employees Provident Funds and Miscellaneous Provisions Act (EPF&MP) Act, 1961, therefore, contention raised by Mr. M. A. Qayoom, learned counsel for the appellants that the provisions of the Act does not apply to the appellants is not only misconceived but also misdirected. Not

only that the further notification issued in terms of SRO 446 of 2015 dated 17.12.2015 by the Government of Jammu and Kashmir in exercise of

powers conferred by Section 5 of the said Act, the Government added the establishments showing in Annexure to the said notification in Schedule-

I of the said Act for the purpose of the Act and item 56 of the said notification added to the Schedule-I includes the departments involved in

building construction including the Central Government Departments. Therefore, the works being executed by the appellants does qualify for the

application of EPF Act 1961.

21. Let''s analyze the object behind the decision, which has reference to achieve the object as enshrined in the preamble of the Act, which aims to

provide social security in the form of Provident Fund to workers 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). The Employees Provident Funds and Miscellaneous Provisions Act (EPF&MP) Act, 1961 is applicable to all

establishments engaged in building and construction industry. This is imperative that all constructors who engage workers to carry out the

construction activity get themselves registered with the Employees Provident Fund Organization and deposit the necessary contributions with

EPFO. Further, it has been mandated that all construction workers should be provided universal Account Number by the contractor by

appropriately registering them on EPFO Portal. It has been further observed that in spite of the legal provision, the actual coverage of construction

workers under the social security net is an issue of concern to both the Central and State Governments. Due to non-availability of social security

this vulnerable section of population are deprived of minimum social security required for a decent work system. It is further observed that a large

number of civil constructions are carried out under the aegis of Central/State Governments or Local Bodies or Autonomous

Undertakings/Authorities of the Government. Therefore, a large number of construction workers get engaged in such projects due to lack of

monitoring, many of them did not get covered under the social security system. The Government on one hand pays for the necessary cost

(including social security cost) to the contractors for engaging these workers, but unscrupulous contractors do not pass the same to the workers by

failing to deposit the same to the Provident Fund Organization and with the intervention of the concern Ministry/agency awarding the work, it can

be ensured that all such construction workers do get their entitled social security benefits, therefore, the decision taken by the respondents is well

reasoned and social security oriented.

22. The issues raised in the writ petitions with reference to claim projected have been well registered and on the basis of reply filed by both Central

and State Government as also on the basis of analyzing of provisions of the Act and the rules, we have reached to the conclusion that the writ

Court has not erred in law, and there is no legal infirmity in the Judgment impugned.

23. In view of what has been stated hereinabove, the instant appeals are held to be without merit, therefore, dismissed.

24. Registry to keep the copy of the order on each file.

