

IN THE HIGH COURT OF TRIPURA
AGARTALA

W.P.(C) NO.221 OF 2008

Sri Swapan Kumar Paul,
son of late Rajendra Kumar Paul,
resident of B.K. Road, Banamalipur,
Agartala, P.S. East Agartala,
District - West Tripura.

..... Petitioner

– Vs –

1. Oil & Natural Gas Corporation Ltd.,
having its office at Jeevan Bharati Building,
Tower II, 124, Connaught Place, New Delhi-110001,
represented by its Chairman & Managing Director.
2. The General Manager (Finance),
Oil & Natural Gas Corporation Ltd. (Finance Department),
Badharghat Complex, Tripura Asset, Agartala – 799014.
3. The Regional Provident Fund Commissioner,
Employees Provident Fund Organization,
Sub-Regional Office, near Bhoagiri Ashram,
Agartala-Airport Road, Agartala-799006, West Tripura
4. The Union of India,
represented by the Secretary,
Ministry of Revenue, New Delhi.

.....Respondents

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioner : Mr. A.K. Bhowmik, Sr. Advocate
Ms. A. Banik, Advocate

For the respondents : Mr. P.B. Dhar, Advocate
Mr. A. Lodh, CGSC

Date of hearing : 24.07.2014

Date of judgment & order : 31.07.2014

Whether fit for reporting :

Yes	No
	√

JUDGMENT & ORDER

By means of this petition, the petitioner has challenged the Memorandum No.AGT/Legal/EPF-RPFC/2008-09, dated 19.06.2008, Annexure-3 to the writ petition, whereby a sum of ₹4,27,623 (rupees four lac. twenty seven thousand six hundred and twenty three) has been directed to be recovered from the unpaid dues or bills, whatever, of the petitioner, lying with the respondent-Oil & Natural Gas Corporation Ltd. (for short 'ONGC').

2. It appears from the Memorandum dated 19.06.2008 that a proceeding was drawn up under Section 7A of the Employees Provident Fund & Miscellaneous Provisions Act, 1952, for short 'EPF & MP Act, 1952', against the petitioner for not complying with the provisions of the said Act by depositing the statutory dues and on submitting the report/returns in compliance of the provisions of the EPF & MP Act, 1952. The petitioner was summoned in the said proceeding by the notice dated 06.01.2000, Annexure-'C' to the counter-affidavit filed by the respondents No.3 and 4. In sequel, the an advisory dated 28.05.2001, Annexure-'B' to the counter-affidavit

filed by the respondents No.3 and 4, had been issued asking him to appear in person under Section 7A of the EPF & MP Act, 1962. Thereafter, the petitioner appeared through an authorised person and filed the reply to the Regional Provident Fund Commissioner, Employees Provident Fund Organization, Annexure-‘D’ to the counter-affidavit filed by the respondents No.3 and 4, denying the liability on his part.

3. By the final order dated 31.07.2000, Annexure-‘D’ to the counter-affidavit filed by the respondents No.3 and 4, the Regional Provident Fund Commissioner held *inter alia* that “even if one employee is employed, by or through contractors, the contractor would be under statutory obligation to report compliance through the principal employer. As the complete records were not before the Regional P.F. Commissioner, they were advised to produce the records in complete shape before the area E.O. But thereafter though the proceedings were adjourned from time to time none of the contractors appeared nor submitted the records for the purpose of verification for eventual assessment of the dues for the case period. Though it appeared from the circular letter dated 02.02.2000 that the contractors were directed by M/S ONGC Tripura Project, Agartala to arrange production of records before the area E.O., yet it was not complied with, for the reasons known to them.”

4. It has been further recorded in the final order dated 31.07.2000 that “as per the provisions of the EPF & MP Act, 1952 and

the schemes framed thereunder, a duty has been cast on the principal employer to report compliance in respect of employees engaged by or through a contractor vide Section 2(f), 8A, para 30 & 32 of the EPF Scheme, 1952. A duty has also been cast on the contractor under para 36-B of the EPF Scheme, 1952 to submit to the principal employer a statement showing the recoveries of contribution in respect of employees employed by or through him within 7 days of the close of every month as the principal employer is required to furnish such information to the Provident Fund Commissioner". Thereafter, it has been also held that "accordingly, I hold the principal employer M/S ONGC Tripura Project, Agartala responsible for reporting compliance in respect of the employees employed by or through the contractors for the case period". Finally, it has been order as under :

"As a result this office had no other alternative than to work out the Provident Fund liabilities in respect of drivers engaged by M/S Swapan Kr. Paul presuming that he had engaged minimum of 60 drivers for 60 vehicles supplied to M/S ONGC, Tripura Project taking into consideration minimum wages payable to such drivers under payment of minimum wages Act.

Accordingly, Shri K. Bhattacharjee, E.O. appointed u/s 13(1) of the EPF & MP Act, 1952 has deposed before me and confirmed that an amount of Rs.7,20,824/- (Rupees seven lakh twenty thousand eight hundred twenty four only) is due from the employer including the interest u/s 70 of the Act in relation to M/S ONGC as per the detailed annexed.

NOW, therefore, I, Shri L.N. Sethy, Regional Provident Fund Commissioner, SRO, Agartala in exercise of the powers conferred on me U/S 7A of the EPF & MP Act, 1952 hereby determined the said amount of Rs.7,20,824/- (Rupees seven lakh twenty thousand

eight hundred twenty four only) as per the schedule as due from M/S ONGC, Tripura Project, Agartala on account of Provident Fund, Pension Fund and Insurance Fund Contributions and Administrative Charges towards Provident Fund & Insurance Fund for the period from 8/97 to 5/99 in accordance with the provisions of EPF & MP Act, 1952, the Employees' Provident Fund Scheme, 1952, the Employees' Pension Scheme, 1995 and the Employees' Deposit Linked Insurance Scheme, 1976 and direct that proceeding for recovery of amount in accordance with the provisions of law be initiated. In case the dues are not paid within at 15(fifteen) days from the date of receipt of this order, the employer shall be liable to pay simple interest @12% per annum on the amount due from him under the Act from the date on which the amount has become due till the date of its actual payment."

5. Since by the final order dated 31.07.2000, the respondent-ONGC has been directed by the Regional Provident Fund Commissioner, Agartala to deposit the determined amount within 15(fifteen) days from the date of the order, the ONGC had challenged the said order by filing the writ petition, being W.P.(C) No.430/2000 in the Gauhati High Court, Agartala Bench. But, the said challenge did not succeed. The Regional Provident Fund Commissioner had determined the liability to be discharged by the ONGC under Section 7A of the EPF & MP Act, 1952. By the judgment and order dated 19.12.2006 passed in the said writ petition, being W.P.(C) No.430/2000, it has been observed that :

"In the instant case, the fact that provident fund contribution has not been paid to any of the employees engaged under the contractors in respect of the relevant period is not in dispute. It is also not in dispute that the principal employer has not made the said contribution or has taken steps to ensure deduction of the said contribution either at the time of making payment to the contractors or at the time when the

contract with the contractors were to be enforced and in such view of the matter, having regard to the scheme of the Act, it is considered that the impugned order dated 31.7.2000 and also the consequential impugned order dated 14.9.2000 directing recovery of the said amount from the account of the ONGC, are not vitiated by law."

6. In the due course, the Regional Provident Fund Commissioner had also recovered the said sum from the respondent-ONGC. Thereafter, the ONGC, claiming that they being indemnified and having legal right to recover, by the Memorandum dated 19.06.2008, Annexure-3 to the writ petition, apprised the petitioner that a sum of ₹4,27,623/- be recovered from his unpaid dues or bills. On the face of the said Memorandum dated 19.06.2008, the petitioner has filed this petition.

7. At this juncture, the provisions of Section 8A of the EPF & MP Act, 1952 be referred for having glimpse at the power of the Regional Provident Fund Commissioner of recovery :

"8A. Recovery 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 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 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 allowances, 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."

[Emphasis added]

8. Mr. A.K. Bhowmik, learned senior counsel appearing for the petitioner has submitted that the Regional Provident Fund Commissioner had recovered the due deposit from the ONGC and, the petitioner had no liability either to the ONGC or to the Regional Provident Fund Commissioner. Mr. Bhowmik, learned senior counsel has submitted further that by the judgment dated 19.12.2006, delivered in W.P.(C) No.430/2000, it has been held that :

"By reading the provisions of section 8a of the Act along with the provisions made in paragraphs 30, 32 of the E.P.F. Scheme, 1952 and also the definition given under sections 2(e) and 2(f) of the Act, the principal employer cannot escape the liability in respect of provident fund contribution in respect of employees engaged under the contractors."

Mr. Bhowmik, learned senior counsel has submitted that the petitioner has no liability to refund the said amount to the respondent-ONGC. That apart, the petitioner has never indemnified the ONGC in respect of such recovery by the Regional Provident Fund

Commissioner nor has the ONGC got any legal right to recover the said sum from the petitioner.

9. The respondent-ONGC, by filing the counter-affidavit, has submitted that since the petitioner has failed to produce the compliance report or the records of making payment of due deposit, the respondent-ONGC has been saddled with the liability of payment of due deposit in terms of the provisions of Section 8A of the EPF & MP Act, 1952.

10. Mr. P.B. Dhar, learned counsel appearing for the respondent-ONGC has produced some records in support of the averments as made in their counter-affidavit, on obtaining the leave of this court. Mr. Dhar, learned counsel has submitted that the relevant period under consideration is August,1997 to May,1999. The petitioner had undertaken that work during that period, covered by the contract dated 23.09.1996. He has further contended that the petitioner is bound by the said contract. Clause 4.14 of the said contract provides that :

"The contractor shall be responsible to comply with all the statutory, regulations, Bye-laws including, but not limited to M.V. Act, Shops & Commercial Establishment Act, Labour Laws etc. and for payment of any Taxes, Duties, Levis etc. and will be solely responsible for any breach of any of the applicable Act, Rules, Regulations, Notifications etc. and shall keep ONGC absolutely indemnified against any action arising from any non-compliance as aforesaid."

Further, Clause 4.22 of the contract, in no uncertain terms has provided that:

"The contractor shall be responsible to comply with the provision of E.P.F. & M.P. Act, 1952 in letter & spirit. He will be responsible to obtain E.P.F. code for his establishment from P.F. Commissioner and deduct appropriate amount of provident fund from the wage paid to his employees which shall be deposited by him directly with the P.F. Commissioner."

11. Mr. Dhar, learned counsel appearing for the respondent-ONGC, having referred to both the provisions, has submitted that the due deposit has been recovered by the Regional Provident Fund Commissioner from the respondent-ONGC for default of the petitioner in payment of the due deposit. By the said contract, it has been agreed vide clause 20.03 as under :

"The Corporation reserve the right to recover from the bill(s) and security deposit of the tenderer the amounts due to the Corporation against any penalties or as a result of any claim(s) compensation(s) or due to any statutory imposition etc. without Notice. The Corporation also reserves, the right to withhold any payment to safeguard the interest of the Corporation against any due(s), claim(s), legal disputes etc. The decision of the Chief Manager (Logistics) in this regard shall be final and binding on the tenderer."

By the said clause, according to Mr. Dhar, learned counsel, the respondent-ONGC is entitled to recover the entire money that has been recovered by the Regional Provident Fund Commissioner on account of due deposit of the petitioner, the contractor.

12. Mr. Bhowmik, learned senior counsel appearing for the petitioner has submitted that the respondent-ONGC cannot have any right to recover the amount that has been recovered from them by the Regional Provident Fund Commissioner in view of the judgment and order dated 19.12.2006, delivered in W.P.(C) No.430/2000, wherein it has been held by the Gauhati High Court that :

"In the instant case, if the liability of the petitioner Corporation is held to be rightly adjudicated by the statutory authority under the Act, the fact that the beneficiaries have not been identified is not a matter, which should lead this Court to say that the impugned order dated 31.07.2000 is an order vitiated by law requiring interference by this Court."

13. Mr. A. Lodh, learned Central Govt. Standing Counsel, appearing for the respondent-Regional Provident Fund Commissioner has submitted that in this controversy the respondents No. 3 and 4 have nothing to contend in particular, except placing the proper records which has not been submitted by the petitioner. He has however submitted that the respondent-ONGC having been considered the principal employer in terms of Section 8A of the EPF & MP Act, 1952, had been saddled with the liability of making payment of the said sum. The Gauhati High Court, after a close scrutiny, has held that the final order dated 31.07.2000 does not suffer from any infirmity.

14. While appreciating the rival contentions as raised by the learned counsel for the parties, the questions those fall for consideration are that :

- (i) Whether the judgment and order dated 19.12.2006 passed in W.P.(C) No.430/2000 is "end of all the matters by eclipsing the contractual liability"? and
- (ii) whether this court would exercise its jurisdiction to determine the dispute arising from the contract?

15. There cannot be any amount of doubt that the proceeding under Section 7A of the EPF & MP Act, 1952 was initiated against the contractor, the petitioner herein, asking him to furnish the relevant records, showing compliance of the provisions of the said Act. But, the petitioner did not produce such records. When taking recourse to Section 8A of the EPF & MP Act, 1952, the Regional Provident Fund Commissioner has saddled the liability with the respondent-ONGC as the principal employer. The Gauhati High Court while exercising its jurisdiction to determine whether the final order dated 31.07.2000 suffers from any illegality or infirmity, has observed in no uncertain terms that :

"With reference to the argument advanced that under the terms of the contract executed between ONGC and the contractors, it is the responsibility of the contractor to take care of the statutory liabilities under the Act, this Court is of the view that in the instant case, the contractors have not discharged their liabilities and, therefore, with reference to Section 2(f) of the Act even employees engaged through contractors are covered within the ambit of the Act. Therefore, the ONGC, only

with reference to the terms of the contract enacted between the ONGC and the contractors, cannot be held to be not liable on account of provident fund in respect of employees under the contractors.”

16. The passage as reproduced hereinbefore has been tuned with the provisions of Section 8A of the EPF & MP Act, 1952. It does not eclipse the terms and conditions as agreed to and reduced in the said contract dated 23.09.1996. However, if there is any conflict as regards the primacy and supremacy of the statutory provisions and the provision as embodied in the contract, it is settled law that any clause in contrast to the statutory provision becomes void, but if the conflict is of such nature that does not directly come in conflict with the provisions made in the contract, the said provision cannot be held to be void.

17. There is no conflict with the terms and conditions as engrafted in clause 4.22 and 20.3 with the provisions of Section 8A of the EPF & MP Act, 1952. The liability primarily lies with the contractor, the petitioner herein. For his default, the entire liability has been shifted to the principal employer, the respondent-ONGC. By invoking the provisions of Section 8A of the EPF & MP Act, 1952, the Regional Provident Fund Commissioner has shifted the entire liability with the respondent-ONGC and recovered the entire sum. By the judgment and order dated 19.12.2006, this controversy has not been adjudicated. Moreover, the petitioner was not a party in the said proceeding, being W.P.(C) No.430/2000. The question that has been

decided by the said judgment and order dated 19.12.2006 is whether by the final order dated 31.07.2000 the Regional Provident Fund Commissioner has committed any illegally or not? The answer as given by the said judgment and order dated 19.12.2006 is in the negative. But, nowhere the said judgment it reflects that the contractor is absolved from any liability. The respondent-ONGC, by invoking the provisions embodied in the contract, has recovered the sum equal to which had been recovered by the Regional Provident Fund Commissioner from the respondent-ONGC.

18. The controversy that has been raised in this writ petition is not about the manner in which the sum had been recovered, but about whether the contractor has got any liability to pay the said amount. A conjoint reading of Section 7A and Section 8A of the EPF & MP Act, 1952 demonstrate that the primary liability lies with the contractor. Since the principal employer has the liability to ensure compliance of the provisions of the EPF & MP Act, 1952 by the contractor, in the event of default, the Regional Provident Fund Commissioner has been authorised to recover the entire amount from the principal employer by invoking the provisions of Section 8A of the EPF & MP Act, 1952. This recovery is a penal measure. The provisions of Section 8A of the EPF & MP Act, 1952 do not in any manner eclipse or impact on the provisions of the contract entered between the contractor and the respondent-ONGC. The contractor and the respondent-ONGC are bound by the provisions as made in the said

contract. As such, if there is any contractual liability to keep the respondent-ONGC indemnified as regards the EPF payment or default thereof, the petitioner cannot get absolved from that liability. From a close reading of the Contract, this Court finds that the liability of payment of EPF deposit for the employees remains with the contractor and by the said indemnity clause the respondent-ONGC, the principal employer is kept indemnified from such liability. This Court shall not exercise its jurisdiction further under Article 226 of the Constitution of India for considering any other aspect as the controversy emanates from interpretation of a private contract.

19. Having held so, the writ petition is dismissed. However, the liberty is reserved with the petitioner to raise the other questions that may emanate from performance, part-performance or non-performance of any provision of the said contract in the competent forum.

There shall be no order as to costs.

JUDGE

ROY