(2016) 09 AHC CK 0208

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 47082 of 2016.

Ashok Kumar Lohia - Petitioner @HASH Union of India And 3 Others

Date of Decision : 28-09-2016

Acts Referred:

Building and Other Construction Workers (Regulation of Employment and Conditions of Services) Act, 1996 — Section 1(4), Section 14, Section 2(g)

Citation : (2016) 11 ADJ 295 : (2017) 1 AllWC 1072 : (2017) 1 CLR 373 : (2017) 152 FLR 614 : (2017) LabLR 553 : (2016) 4 UPLBEC 3263

Hon'ble Judges : V.K. Shukla and Mahesh Chandra Tripathi, JJ.

Bench : Division Bench

Advocate : Sunil Kumar Tripathi, Advocate, for the Petitioner; C.S.C., A.S.G.I, for the Respondent

Final Decision : Dismissed

Judgement

1. Ashok Kumar Lohia is before this Court for following reliefs;

(a) a writ, order or direction in the nature of certiorari quashing the impugned orders dated 31.5.2016 and 26.8.2016 passed by the respondent no. 3, Assessing Officer & Deputy Labour Commissioner, Varanasi.

(b) a writ, order or direction in the nature of mandamus to respondent no. 3 to afford opportunity of hearing and decide the pending representation dated 19.8.2016.

(c) a writ, order or direction in the nature of certiorari quashing the impugned Notification dated 20.11.2009 and 15.9.2010, passed by the respondent no. 2, State of U.P. appointing Assessing Officer and Cess Collector.

(d) a writ, order or direction in the nature of mandamus commanding the respondent no. 3 not to enforce the impugned order dated 31.5.2016 and 26.8.2016 passed by the respondent no. 3, Assessing Officer & Deputy Labour Commissioner, Varanasi, against the petitioner and not to resort any coercive measure.

(e) issue any other order or direction as this Hon''ble Court may deem fit and proper in the facts and circumstances of the case.

2. Petitioner claims that he is proprietor of a concern that has constructed a residential building at K. 57/21, Navapura, Daranagar, Varanasi under the caption ''Neelkanth Apartment''. Petitioner has stated that proceedings for assessment of cess under Rule 7 (5) of Building and Other Construction Workers Welfare Cess Rules, 1998 was initiated on 31.5.2016 and assessment to the tune of Rs. 2,92,328/- cess was assessed at the rate of 1% over the construction cost. The relevant extract of the said impugned order is quoted below;

"vr,oa Hkou ,oa vU; lfUuekZ.k deZdkj midj vf/kfu;e] 1996 rr~lEcU/kh fu;ekoyh] 1988 ds fu;e&7(5) ds vUrxZr iznRr ''kfDr;ksa dk iz;ksx djrs gq, ,di{kh; vk/kkj ij Jh v''kksd dqekj yksfg;k lh 33@2 pUnqvk lV~Vh] Hkkjr ekrk efUnj] okjk.klh }kjk 57@21 Mh0,0ch0 jksM+] nkjkuxj] okjk.klh esa dk''kh xkserh la;qDr xzkeh.k cSad ds cxy esa djk;s x;s O;kolkf;d vkoklh; uhyd.B vikVZesUV ds fuekZ.k ij mijksDr fuekZ.k ykxr dk 01 izfr''kr :0 2]92]328@& :0 nks yk[k ckucs gtkj rhu lkS vV~BkbZl ek= midj fu/kkZfjr fd;k tkrk gSA

Jh v''kksd dqekj yksfg;k ds0 57@21 Mh0,0ch0 jksM+ nkjkuxj] okjk.klh (dk''kh xkserh la;qDr xzkeh.k cSad ds cxy esa) dks vkns''k fn;k tkrk gS fd fnukad 16-06-2016 rd mDr fu/kkZfjr midj dh jkf''k m0iz0 Hkou ,oa vU; lfUuekZ.k dY;k.k cksMZ ds i{k esa fMek.M M~kQ~V ds ek/;e ls v/kksgLrk{kjh ds dk;kZy; esa tek djsa rFkk ;g Hkh Li"V djsa fd fuekZ.k dk;Z lekIr gksus dh frfFk fnlEcj] 2013 ds ,d ekg ds Hkhrj dqy fuekZ.k ykxr dk 1 izfr''kr dh nj ls nj midj dh /kujkf''k tek u djus ds fy, D;ksa u mu ij vf/kfu;e dh /kkjk&9] ds vUrxZr lsl dh /kujkf''k ds cjkcj vFkZn.M ,oa vf/kfu;e dh /kkjk&8 ds vUrxZr 2 izfr''kr izfrekg dh nj ls C;kt vkjksfir fd;k tk,A"

3. Petitioner, thereafter, represented the matter and same has been rejected. Petitioner is contending before this Court that the entire proceedings, so undertaken, are unjustifiable and, accordingly, requisite relief be accorded to him.

4. Learned counsel for the petitioner has contended before us that the entire proceedings, so initiated, are totally without jurisdiction and not at all subscribed under law and, as such, this Court should come to rescue and reprieve of the petitioner.

5. Learned Standing Counsel, on the other hand, has contended that rightful assessment has been made by the Assessing Officer and Cess Collector under exercise of power conferred under Rule 2 (g) of Building and Other Construction Workers Welfare Cess Rules, 1998 and against the said assessment there is remedy of appeal provided for, as such, no interference be made by this Court and writ petition is liable to be dismissed.

6. Parliament in the year 1996 enacted following two Acts, whose preamble are given below under the name of the Act;

(i) Building & other Construction Workers (Regulation of Employment & Condition of Service) Act, 1996 (hereinafter referred to as BOCW Act of 1996) (Main Act). The Governor, State of U.P., framed rules in exercise of power u/s 62 read with Section 40, which is known as U.P. Building Construction Workers (Regulation of Employment & Conditions of Service) Rules, 2009. (hereinafter referred to as BOCW Rule of 2009).

Preamble : An Act to regulate the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare measures and for other mattes connected therewith or incidental thereto.

(ii) Building & other Construction Workers Welfare Cess Act, 1996 (hereinafter referred to as BOCW Cess Act, 1996) (Supplementary Act). The Central Government in exercise of power u/s 14 (1) of the Act framed, Building & other Construction Workers Welfare Cess Rules, 1998 (hereinafter referred to as BOCW Cess Rules, 1998).

Preamble : An Act to provide for the levy and collection of a cess on the cost of construction incurred by employers with a view to augmenting the resources of the Building and Other Construction Workers Welfare Boards constituted under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996.

7. The purpose of BOCW Cess Act, 1996 is to create resources of "Building and Other Construction Workers Welfare Board constituted under the BOCW Act, 1996. Thus BOCW Cess Act, 1996, is complementary to BOCW Act, 1996. Section 2 (d) of BOCW Cess Act of 1996 clarifies that words and expression not defined under this Act but defined under BOCW Cess Act 1996 shall have the meaning respectively assigned to them in that Act.

8. As per Section 1 (4) of the BOCW Act of 1996, the Act applies to every establishments which employs or had employed on any day of preceding 12 months 10 or more workers I any ''Building or other Construction Work''. Section 3 of BOCW Cess Act, 1996 says that cess shall be collected for the purposes of BOCW Act of 1996 at a rate not exceeding 2% but not less than 1% of the cost of construction. Rule 14 of Building & Other Construction Workers Cess Act, 1996 is reproduced below;

"14. Power to make rules.-(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the manner in which and the time within which the cess shall be collected under sub-section (2) of section 3;

(b) the rate or rates of advance cess leviable under sub-section (4) of section 3;

(c) the particulars of the returns to be furnished, the officer or authority to whom or to which such returns shall be furnished and the manner and time of furnishing such returns under sub-section (1) of section 4;

(d) the powers which may be exercised by the officer or authority under section 7;

(e) the authority which may impose penalty under section 9;

(f) the authority to which an appeal may be filed under sub-section (1) of section 11 and the time within which and the form and manner in which such appeal may be filed;

(g) the fees which shall accompany an appeal under sub-section (2) of section 11; and

(h) any other matter which has to be, or may be, prescribed."

9. Building & Other Construction Workers Welfare Cess Rules, 1998

"Rule 2 (f) "Cess Collector" means an officer appointed by the State Government for collection of cess under the Act;

Rule 2 (g) "Assessing Officer" means a gazetted officer of a State Government or an officer of a local authority holding an equivalent post to a gazetted officer of the State Government appointed by such State Government for assessment of Cess under the Act;"

10. By means of notification dated 20.11.2009 in exercise of the powers conferred under Sub-rules (f) and (g) of Building and Other Construction Workers Welfare Cess Rules, 1998 and with a view to perform the duties and responsibilities as envisaged under Section 5 of Building and Other Construction Workers Welfare Cess Act, 1996 read with Rule 7 of the rules, the Governor has appointed officers mentioned in Column 2 for their respective jurisdiction mentioned in Column 3 to be ''Assessing Officer'' and ''Cess Collector'' as mentioned in Columns 4 and 5 of the Schedule mentioned hereinunder for purposes of assessment of Cess and collection thereof, in respect of all Building and Other Construction Work completed or being carried out by Government, Semi Government, Agencies, Corporations, Co-operative Societies, Private Agencies, Companies, Firms or Construction Agencies and also owners of such Private Residential Buildings with total construction cost of Rs. 10 lakhs and above, as envisaged under Building and Other Construction Workers Welfare Cess Act, 1996 (Act 28 of 1996).

SCHEDULE

Sl. No.

Designation of Officer

Jurisdiction

Conferred Powers

Cess Assessing Officers

Cess Collector

1

2

3

4

5

1

All District Magistrates (Or Chief Development Officers and/or Additional District Magistrate, Finance and Revenue, as authorised by the District Magistrate)

All Building or Other Construction Works, completed or under construction, amenable under the provision of the Cess Act and rules made thereunder, as mentioned above within the limits of territorial jurisdiction in the district.

Assessing Officer

Cess Collector.

11. This much fact has also been clarified that all the Assessing Officers and Cess Collectors shall within their respective jurisdiction assess the cess at the rate of 1 per cent of construction cost without any monetary limitations as authorised vide Government of India Notification No. S-61011/9/95/RW, dated October 12, 1996 issued under sub-section (1) of Section 3 of Building and Other Construction Workers Welfare Cess Act, 1996.

12. The Regional Additional/Deputy Labour Commissioners, all Assistant Labour Commissioners posted in such regional offices and Labour Enforcement Officers posted in remaining district shall provide secretarial support and assistance to the District Magistrate in exercise of powers and responsibilities as envisaged herein above.

13. This is further, clarified that all Builders/Employers/Building owners/ Developers/Promoters shall submit the return on prescribed Proforma 1 within the time as stipulated under Section 4 of Building and Other Construction Workers Welfare Cess Act, 1996 read with Rule 7 of Building and Other Construction Workers Welfare Cess Rules, 1998.

14. Thereafter by means of notification dated 15.9.2010 in exercise of the powers conferred under sub-rules (f) and (g) of the Rule 2 of Building and Other Construction Workers Welfare Cess Rules, 1998, all District Magistrates have been appointed "Assessing Officer" and "Cess Officer" within the area of their

local jurisdiction vide Government Notification No. 1412/36-2-2009-251 (SM)/95, dated November 20, 2009 in addition thereto and in exercise of powers under sub-rules (f) and (g) of Rule to as mentioned therein above and with a view to perform the duties and responsibilities as envisaged under Section 5 of Building and Other Construction Workers Welfare Cess Act, 1996 read with Rule 7 of the Rules, the Governor is pleased to appoint the officers mentioned in Column 2 of the Schedule below, for their respective territorial jurisdiction mentioned in Column 3 as "Assessment Officer" and "Cess Collector" as mentioned in Columns 4 and 5 works respectively in respect of all constructed under their respective control or jurisdiction, undertaken directly or through contractors and also private residential houses with total construction cost of Rs. 10 lakhs and above (in respect of which approval/sanction is in their competence/jurisdiction) under Building and Other Construction Workers Welfare Cess Act, 1996 (Act No. 28 of 1996).

Assessment of Officer and Cess Collector

Sl. No.

Designation of Officer

Jurisdiction

Cess Assessment Officer

Cess Collector

1

Secretary

Development Authority

All construction works undertaken either directly or within their competence in the territorial area of their jurisdiction (excepting only private residential houses with total cost of construction)below Rs. 10 Lakhs, Cess Assessment Officer

Cess Collector

2

Officer not below the rank of Executive Engineer of the Public Works Department

All construction works undertaken either directly or within their control within the area of their local jurisdiction

Cess Assessment Officer

Cess Collector

3

Officer not below the rank of Executive Engineer of the Irrigation Department

All construction works undertaken either directly or within their control within the area of their local jurisdiction

Cess Assessment Officer

Cess Collector

4

Officer not below the rank of Executive Engineer of the U.P. Power Corporation

All construction works undertaken either directly or within their control within the area of their local jurisdiction

Cess Assessment Officer

Cess Collector

5

Officer not below the rank of Secretary, Mandi Parishad

All construction works undertaken either directly or within their control within the area of their local jurisdiction

Cess Assessment Officer

Cess Collector

6

Officer not below the rank of Project Manager of U.P. Bridge Corporation

All construction works undertaken either directly or within their control within the area of their local jurisdiction

Cess Assessment Officer

Cess Collector

7

Officer not below the rank of Executive Engineer of the U.P. Rajkiya Nirman Nigam

All construction works undertaken either directly or within their control within the area of their local jurisdiction

Cess Assessment Officer

Cess Collector

8

Officer not below the rank of Executive Engineer of the U.P. Rajkiya Nalkoop Nigam

All construction works undertaken either directly or within their control within the area of their local jurisdiction

Cess Assessment Officer

Cess Collector

9

Officer not below the rank of Executive Engineer of the U.P. Jal Nigam

All construction works undertaken either directly or within their control within the area of their local jurisdiction

Cess Assessment Officer

Cess Collector

10

Officer not below the rank of Executive Engineer of the Samaj Kalyan Nigam

All construction works undertaken either directly or within their control within the area of their local jurisdiction

Cess Assessment Officer

Cess Collector

11

Officer not below the rank of Executive Engineer of the U.P. Avas and Vikas Parishad

All construction works undertaken either directly or within their competence in the territorial area of their jurisdiction (excepting only private residential houses with total cost of construction below Rs. 10 Lakhs)

Cess Assessment Officer

Cess Collector

12

Nagar Ayukt/Addl./Dy. Nagar Ayukt of Nagar Nigam

All construction works undertaken either directly or within their competence in the territorial area of their jurisdiction (excepting only private residential houses with total cost of construction below Rs. 10 Lakhs)

Cess Assessment Officer

Cess Collector

13

Executive Engineer of Nagar Palika Parishad/Nagar Panchayat

All construction works undertaken either directly or within their control within the area of their local jurisdiction

Cess Assessment Officer

Cess Collector

14

Block Development Officer

All construction works undertaken either directly or within their competence in the territorial area of their jurisdiction (excepting only private residential houses with total cost of construction below Rs. 10 Lakhs)

Cess Assessment Officer

Cess Collector

15

Asstt./Dy./Addl. Labour Commissioner

All construction works undertaken either directly or within their competence in the territorial area of their jurisdiction (excepting only private residential houses with total cost of construction below Rs. 10 Lakhs)

Cess Assessment Officer

Cess Collector

16

Zila Basic Shiksha Adhikari

All construction works undertaken either directly or within their control within the area of their local jurisdiction

Cess Assessment Officer

Cess Collector

15. The above mentioned officers have been made fully responsible for assessment and collection of cess under Building and Other Construction Workers Welfare Cess Act, 1996 (Act No. 28 of 1996) and Building and Other Construction Workers Welfare Cess Rules, 1998. The cess, so collected, has to be deposited within 30 days of cess collection in the account of "the U.P. Building and Other Construction Workers Welfare Board."

16. The above said officers, for the purpose of assessment of cess, are obligated to follow the same procedures, guidelines, directions and standards as are already applicable in their respective department with the approval of State Government and, in case, in any department such approved procedure, guidelines, directions and standards are not available, then in that case, recourse

has to be taken to such approved procedure, guidelines and directions as are already in practise in similar matters in any other department of Government for the purposes of assessment of cess.

17. The Regional Additional/Deputy Assistant Labour Commissioners of the Department of Labour, who are appointed Assessment Officers and Cess Collectors as herein above, in their respective territorial jurisdiction, are obligated to closely monitor the assessment of cess and collection thereof with a view to their effective implementation and shall also, in case for want of clarity, provide clarifications to officers of their Department as and when required.

18. A bare perusal of the notification would go to show that in exercise of the powers conferred under Sub-rules (f) and (g) of Building and Other Construction Workers Welfare Cess Rules, 1998 and with a view to perform the duties and responsibilities as envisaged under Section 5 of Building and Other Construction Workers Welfare Cess Act, 1996 read with Rule 7 of the rules, the Governor has been pleased to appoint officers mentioned in Column 2 for their respective jurisdiction mentioned in Column 3 to be Assessing Officer and Cess Collector as mentioned in Columns 4 and 5 of the schedule mentioned hereinunder for the purposes of assessment of cess and collection thereof, in respect of all Building and Other Construction Work completed or being carried out by Government, Semi Government, Agencies, Corporations, Co-operative Societies, Private Agencies, Companies, Firms or Construction Agencies and also owners of such Private Residential Buildings with total construction cost of Rs. 10 lakhs and above, as envisaged under Building and Other Construction Workers Welfare Cess Act, 1996. Once in exercise of such an authority Assessing Officer and Cess Collectors have been appointed, then the averments mentioned by the petitioner that there is no authority conferred upon State Government to appoint Assessing Officer or Cess Collectors is unjustifiable. The authority in question under which such arrangements have been made is clearly referable to the provisions quoted, in view of this, the arguments, that have been so advanced, that Assessing Officer has been wrongly nominated by the State Government, cannot be accepted by us.

19. Constitutionality of Cess Act and Rules framed thereunder was subjected to challenge before the Delhi High Court in the case of Builders Association of India v. Union of India, 2007 SCC online Delhi 327. Delhi High Court upheld the validity of said provisions. The matter was taken to Apex Court in the case of Deewan Chandra Builders and Contractors v. Union of India, 2012 (1) SCC 101, the Apex Court, in its turn, has dismissed the challenge and has taken the view that the levy is in fact a ''fee'' and not a ''tax''.

20. Apex Court in the case of A. Prabhakara Reddy & Company v. State of Madhya Pradesh & others, 2016 (1) SCC 600, has taken the view that the provisions are beneficial measures for the welfare of the workers and provisions provided thereof should not defeat the rights of workers whose protection is the primary aim. Relevant paragraphs 11, 12, 13 and 14 are extracted below;

"11. The learned counsel highlighted the provisions in the Cess Act and Rules framed thereunder such as Rules 3, 4, 5 & 7 providing for levy of cess; time and manner of collection; transfer of the proceeds of the cess to the Board; and assessment of the cess, to support his contention that there is no basis under the law to support the plea of the appellants that the contracts or work orders finalised before constitution of Board must be made immune from levy of cess on the ground that cost of construction must always be treated as a single entity and therefore incapable of two divisions, one pertaining to pre-Board period and the other relating to after the constitution of the Board. He supported the views of the High Court that there can be no estoppel against statute and hence, even if a contract or work order does not provide for payment of recovery of cess by the contractor or the principal, the statute providing for cess cannot become ineffective. It is also the stand of the respondents that had the cess been a tax, the liability to pay the same would be coterminous with the entire cost, if construction was after coming into force of the Cess Act but since it has been held to be a fee, the respondents have acted reasonably and effected its levy by raising demands only to cover such cost of construction which coincides with and begins from the constitution of the Board.

12. Although the learned Senior Counsel for the appellants had taken us through the entire scheme of the Main Act as well as the Cess Act and also the Rules framed thereunder, but nothing helps the appellants'' case and in view of limited issues arising from determination, we do not feel persuaded to go into details of the Cess Act and the Rules unnecessarily. We are of the considered view that after the Cess Act and the Rules came into effect and the Board was constituted, with the notification specifying the rate of cess to be levied upon the cost of construction incurred by the employer already in place, the respondents were duty bound to collect the cess by raising the demands in respect of the on going construction works if the workers in such construction activities were eligible for benefits under the BOCW Act.

13. The fact that the task of registering the workers and providing them the benefit may take sometime, would not affect the liability to pay the levy as per the Cess Act. Any other interpretation would defeat the rights of the workers whose protection is the principal aim or primary concern and objective of the BOCW Act as well as the Cess Act. The Cess is a fee for service and hence, its calculation, as per settled law is not to be strictly in accordance with quid pro quo rule and does not require any mathematical exactitude. The scheme of the BOCW Act, the Cess Act and the Rules warrant that the lawfully imposable cess should be imposed, collected and put in the statutory welfare fund without delay so that the benefits may flow to the eligible workers at the earliest. The scheme of the BOCW Act or the Cess Act does not warrant that unless all the workers are already registered or the welfare fund is duly credited or the welfare measures are made available, no cess can be levied. In other words the service to the workers is not required to be a condition precedent for the levy of the cess. The rendering of welfare services can reasonably be undertaken only after the cess is

levied, collected and credited to the welfare fund.

14. We also find no merit in other submission advanced on behalf of the appellants that there is legal impediment in charging levy on the cost of construction incurred by the employer from a particular period on account of constitution of Board from a particular date or for any other reason. This argument is fallacious. Such beneficial measures for the welfare of workers are applicable even to the construction activity which may have commenced before coming into force of the BOCW Act and the Cess Act, if they are subsequently covered by the provisions of these Acts. There can be no legal obstacle in ignoring the construction cost incurred before the cess became leviable by distinguishing it from the cost of construction incurred later, from a date when the Board is available to render service to the Building and other construction workers. Levy of cess in these facts and circumstances cannot be faulted for any reason. Demand of cess in the given facts cannot amount to retrospective application of the Cess Act. Hence the appeals must fail."

21. Learned counsel for the petitioner has miserably failed to demonstrate that the State Government has got no authority whereas under the scheme of the Act and Rules framed thereunder it is the State that has got full authority to make such arrangement, in view of this, the challenge made on the said score is unsustainable. Once the notification in question is valid and the assessment in question has been made, then against the said assessment in question there is statutory remedy of appeal provided for under Rule 14 of the Building and Other Construction Workers Welfare Cess Rules, 1998 and the appellate forum has all wide powers to decide the appeal in question, in accordance with law.

22. Writ petition is dismissed, accordingly, on the ground of alternative remedy.

