

(2017) 02 AHC CK 0058
In the Allahabad High Court
Case No : Misc. Bench No. 2517 of 2017

Idea Cellular Ltd.

APPELLANT

Vs

U.O.I.

RESPONDENT

Date of Decision : 13-02-2017

Acts Referred:

Citation : (2017) 3 ADJ 444

Hon'ble Judges : Amreshwar Pratap Sahi and Sanjay Harkauli, JJ.

Bench : Division Bench

Advocate : Manju Lata Mishra and Ashish Mishra, Jaideep Narain Mathur, Advocates, for the Petitioner in Misc. Bench No. 2517 of 2017.; M.K. Mishra, C.S.C, A.S.G, for the Respondent in Misc. Bench No. 2517 of 2017.; Manju Lata Mishra and Ashish Mishra, Jaideep Narain Mathur, Advocates, for the Petitioner in Misc. Bench No. 1907 of 2017.; C.S.C, A.S.G, for the Respondent in Misc. Bench No. 1907 of 2017.

Final Decision : Allowed

Judgement

1. Heard Sri Jaideep Narain Mathur, learned Senior Counsel for petitioner and Sri Ashish Mishra in the connected writ petition.
2. These two writ petitions have been filed questioning the authority of the Additional Labour Commissioner Lucknow region to proceed to saddle the petitioners with the liability of payment of Cess under the Building and Other Construction Workers Welfare Cess Act, 1996 and the regulations framed thereunder.
3. The contention of the learned counsel for the petitioner is that these proceedings have been initiated without considering the extent of liability of the employer vis-a-vis the contractors who have carried out the actual work and that too even by a authority who did not have the territorial jurisdiction for the entire State of Uttar Pradesh.
4. It is also the submission of the petitioners that there is no provision for any

provisional assessment and any realization of Cess on that count and hence the impugned orders passed are contrary to the aforesaid provisions that deserves to be set aside.

5. The prayer made in the first writ petition is for quashing the order dated 22.11.2016, Annexure 1 to the said writ petition and in the second writ petition, the prayer is to quash the order dated 26.12.2016, both passed by the Additional Labour Commissioner, Lucknow Region, Lucknow.

6. We had adjourned the matter and had framed the issues raised by our order dated 06.02.2017 extracted herein under:

"Heard Sri Jaideep Narain Mathur, learned Senior Counsel and Sri S. D. Singh, learned Senior Counsel in both the petitions. Sri Mahendra Kumar Mishra has appeared for respondent no.1 and the learned Standing Counsel.

The petitioners are engaged in the execution of laying down of Optical Fibre Cables throughout the State of U.P.

These two petitions have been filed questioning the authority of the respondent-Cess Collection Officer/Additional Labour Commissioner, Lucknow Region, Lucknow in proceeding to realize Cess from the petitioners and the challenge raised is on three grounds namely that -

(a) the said proceedings have been captioned as provisional for which there is no procedure prescribed either under the Building and Other Construction Workers Welfare Cess Act, 1996 or 1998 Rules framed thereunder.

(b) the authority at Lucknow did not have the jurisdiction to make any assessment in respect of the areas beyond its territorial jurisdiction, whereas the assessment has been made in respect of the entire State of U.P.

(c) the liability of Cess cannot be imposed on the petitioner inasmuch as they are getting the work executed through contractors and therefore, the collection has to be made from them and not from the petitioners, inasmuch as the workers are being engaged and are extending their services to the contractors and not to the petitioners.

They have also urged that unless there is a final assessment after consideration of these issues, no further steps can be taken as has been pointed by the Division Bench in the judgment dated 23.09.2016; writ petition No.16981 (MB) of 2016 (Bharat Sanchar Nigam Limited v. Union of India and others).

Learned Additional Chief Standing Counsel, however, contends that the petitioners have a right of appeal against the assessment order.

We have considered the said submissions, what we find prima facie that there does not appear to be any procedure prescribed, either under the 1996 Act, or 1998 Rules to carryout any provisional assessment or pass a provisional assessment order and then to resort to recovery in pursuance thereof.

This has been hinted at in the judgment in the case BSNL (supra).

Apart from this, unless there is a final assessment order, a liability cannot be fixed and that too even has to be done after carrying out the assessment in terms of the 1996 Act and 1998 Rules provided the area of assessment falls within the jurisdiction of the authority concerned. It is only thereafter that an appeal can be filed. This is coupled with the issue of liability keeping in view the nature of the objections taken by the petitioners that the work is being carried out by the contractors and not by the petitioners.

Learned Additional Chief Standing Counsel prays that he may be granted some time to seek instructions on the aforesaid legal issues that have been advanced.

Put up on 13.02.2017 as agreed between the parties along-with the writ petition No.1907 (MB) of 2017.

Copy of the order today."

7. Learned Additional Chief Standing Counsel Sri H.P. Srivastava has obtained the para-wise comments to the writ petition and on the strength thereof has urged that the Cess liabilities are on the petitioners and secondly the Additional Labour Commissioner was within his authority to proceed with the matter. The objections raised by the petitioners stand disposed off under the orders under challenge and also by the order dated 21.02.2015 relating to the applicability of the Act on the petitioners.

8. Learned counsel for the parties agree that the matter be finally disposed off at this stage as in view of the facts that emerge and the legal issues involved, the matter can be disposed off finally at this state itself with waiting for any affidavits.

9. The first issue is with regard to the jurisdiction of the Additional Labour Commissioner, Lucknow Region, Lucknow to impose the liability in respect of the Cess allegedly leviable on the petitioners.

10. Learned counsel for the petitioner has invited the attention of the court to the notification dated 15.09.2010, Annexure 10 to the writ petition. The said notification has been issued under 1998 Cess Rules and at serial no.15 of the said notification, the description of the territorial jurisdiction of the Additional Commissioner/Deputy Labour Commissioner/Assistant Labour Commissioner has been clearly defined as their geographical and territorial limits.

11. In order to specify their limits of territorial jurisdiction defined by geographical limits, the learned Additional Chief Standing Counsel has produced the notification dated 12.12.2016 under the payment of Wages Act, 1936 and at serial no.5, the jurisdiction and the area of the Lucknow Region has been defined as including the districts of Lucknow, Sitapur, Rae Bareilly, Hardoi, Kheri and Unnao.

12. The respondent no.4 is the Additional Labour Commissioner, Lucknow Region,

Lucknow. In such circumstances, he cannot be treated to be an Additional Commissioner attached to the office of the Labour Commissioner at Kanpur and therefore, he will not have the jurisdiction of entire Uttar Pradesh. The impugned orders describe it to have been passed by the Additional Commissioner of Lucknow Region. This therefore, obviously refers to the Region of Lucknow, which would include the districts refer to herein above and not the entire State of U.P. Consequently in the absence of any such power delegated on the Additional Commissioner Lucknow Region for the entire State of Uttar Pradesh, it cannot be said that he has the jurisdiction for the entire State as indicated in the para-wise comments produced by the learned Additional Chief Standing Counsel.

13. The second issue is with regard to the making of an order of provisional assessment. There is no indication in the 1996 Cess Act or in the 1998 Cess Rules of making any provisional assessment.

14. The third issue is with regard to the liability on the principal contractor. This objection can be taken by the petitioners before the authorities that are competent to dispose of the matter in their respective regions.

15. Consequently, for all the aforesaid reasons, we find that the writ petitions deserve to be allowed as the impugned orders are not in conformity with the provisions of 1996 Cess Act read with 1998 Cess Rules framed thereunder.

16. Accordingly, the orders dated 22.11.2016 and 26.12.2016 are hereby quashed.

17. Both the writ petitions are allowed without prejudice to the right and authority of the competent officer under 1996 Act and the Rules framed thereunder to proceed in the matter in respect of their territorial jurisdiction and area after putting the petitioners to notice in accordance with law.