

(2015) 04 AHC CK 0211

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (Tax) No. 772 of 2011

Lanco Anpara Power Ltd., Anpara, Sonbhadra

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 28-04-2015

Acts Referred:

Building and Other Construction Workers (Regulation of Employment and Conditions of Services) Act, 1996 — Section 1(4), 2(d)
Factories Act, 1948 — Section 1(d), 6

Citation : (2015) 5 ADJ 603

Hon'ble Judges : Arun Tandon, J; Satish Chandra, J

Bench : Division Bench

Advocate : V.K. Upadhyay, Ritvik Upadhyay and Arvind Kumar, for the Appellant

Final Decision : Dismissed

Judgement

1. Lanco Anpara Power Limited through its authorized signatory has filed the present writ petition for quashing of the notices dated 14.3.2011. and 2.4.2011 to the writ petition respectively. They have also prayed for a writ of Mandamus being issued against respondent No. 2 to not to assess the cess on the basis of cost of project of the petitioner and to refund the sum of Rs. 4,04,42,130/-, which had been paid by the petitioner as cess. The petitioner is a Company incorporated under the provisions of the Companies Act, 1956. At the relevant time it was setting up 2x600 MW capacity Coal based Thermal Power Project namely Anpara "C" in District Sonbhadra, Uttar Pradesh pursuant to Tariff Based Competitive Bidding initiated by Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited.

2. The petitioner is in the process of construction of civil works for the project undertaken by the petitioner's company i.e. civil works, water system building and pump houses, non plant building, road and drains etc.

3. It is the case of the petitioner that the factory license had been issued in favour of the Thermal Power Project.

4. The Parliament had enacted the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (hereinafter referred to as the Act 1996). The Government also enforced Buildings and Other Construction Workers Welfare Cess Act 1996 (hereinafter referred to as Cess Act 1996). Both the aforesaid Acts are social welfare legislation enacted for the purposes of improving the conditions of employment and conditions of service of Building and Construction Workers and in order to promote for their safety, health and welfare. It is for this purpose that the cess was to be collected and ultimately utilized.

5. The petitioner has been issued a notice dated 14.3.2011, wherein it is stated that since the construction of the factory (power plant) was still in progress, therefore, the petitioner did not answer the description of a factory within the meaning of Factories Act, 1948. It was liable to be registered under the Act of 1996 and as well as for payment of cess under the Cess Act. The Registering Authority namely Deputy Labour Commissioner, Mirzapur Region, Mirzapur called upon the petitioner to get itself registered under Section 7 of the Construction Workers Act, failing which the cess shall be determined and recovery proceedings shall be initiated.

6. The petitioner responded to the said notice and claimed that since he was constructing a Power Plant, which would ultimately be covered by the Factories Act, 1948, it stood exempted from the Provisions of the Act of 1996 and was not liable to pay the cess under the 1996 Act.

7. This objection of the petitioner has been turned down by the Assessing Officer/ Deputy Labour Commissioner, Mirzapur Region, Mirzapur vide order dated 2.4.2011. It has been recorded that required information has not been supplied by the petitioner. Therefore, assessment is being made in accordance with Rule 10 of the Uttar Pradesh Building and other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2009. Accordingly, the petitioner was called upon to submit the requisite documents for the purposes of assessment of the cess payable by 15th April, 2011 in the office of the Deputy Labour Commissioner, Mirzapur Region, Mirzapur, failing which suitable legal action shall be taken.

8. The petitioner has challenged the said notice and the order calling upon the petitioner to visit the office of undersigned for the purpose of assessment of the cess.

9. Before us the notices are challenged on one short ground that in view of Section 1(4) read with Section 2(d) of the Act of 1996, the petitioner stands excluded from the applicability of the Act 1996 as well as the Cess Act.

10. In order to appreciate the controversy raised on behalf of the petitioner, it would be worthwhile to reproduce Section 1(4) and Section 2(d), which has been so heavily relied on by the counsel for the petitioner:

"....1 (4) It applies to every establishment which employs, or had employed on any day of the preceding twelve months, ten or more building workers in any building or other construction work.

.....2 (d) building or other construction work" means the construction, alteration, repairs, maintenance or demolition of or, in relation to, buildings, streets, roads, railways, tramways, airfields, irrigation, drainage, embankment and navigation works, flood control works (including storm water drainage works), generation, transmission and distribution of power, water works (including channels for distribution of water), oil and gas installations, electric lines, wireless, radio; television, telephone, telegraph and overseas communication dams, canals, reservoirs, watercourses, tunnels, bridges, viaducts, aqueducts, pipelines, towers, cooling towers, transmission towers and such other work as may be specified in this behalf by the appropriate Government, by notification but does not include any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), apply."

11. On simple reading of the aforesaid two clauses, it would be apparent that construction activity in relation to generation, transmission and distribution of power is included within the purview of the Act, 1996. Exemption is provided to building or other construction work to which the provisions of the Factories Act 1948 or the Mines Act 1952 applies.

12. In the facts of the case, it is claimed that since the petitioner has been granted a license under Section 6 of the Factories Act, 1948, he stands excluded from the purview of the Act of 1996 as well as the Cess Act.

13. Factory has been defined under the Factories Act, 1948 under clause 2(m), and reads as follows:

"... (m) "factory" means any premises including the precincts thereof-

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,--

but does not include a mine subject to the operation of *[the Mines Act, 1952 (35 of 1952),] or *[a mobile unit belonging to the armed forces of the Union, a railway running shed or a hotel, restaurant or eating place].

*[Explanation. *[I]--For computing the number of workers for the purposes of this clause all the workers in *[different groups and relays] in a day shall be taken into account;]

*[Explanation. II.--For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or

part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof;]..."

14. It is apparently clear from the simple reading of the said section that for answering the description of a Factory within the meaning of Factories Act, 1948, the minimum number of workmen working in preceding 12 months or part thereof in which manufacturing process is being carried out with the aid of the power is a condition precedent. Meaning thereby that there cannot be a Factory within the meaning of Factory Act 1948, unless there is employment worker and manufacturing activity is being carried out.

15. Merely, because the petitioner has obtained a license under Section 6 of the Factories Act, 1948 for registration to work a factory (Page 44), it does not mean that the petitioner answers the description of the factory within the meaning of the Factories Act, 1948, so as to stand excluded from the Cess Act 1996. It may be recorded that purpose of excluding construction activities to be taken in the factory covered by the Factories Act, 1948, from the purview of Cess Act 1996 is more than obvious. The Factories Act itself contains the requisite measures for the safety of the workers of the factory, their wages, security and other essential safeguards. In our opinion unless the petitioner falls within the four corners of the definition of factory under the Factories Act, so as to be bound by the provisions of the Factories Act. In the matter of wages and other welfare measures to be taken for the workers employed therein neither it cannot avoid the applicability of the Cess Act, 1996 nor it can avoid the payment of Cess.

16. From the records of the present writ petition, it is an admitted position that the petitioner has only entered into a contract for construction of the Power Plant after being the successful competitive bidder with reference to the bidding proceeding initiated by Uttar Pradesh Rajya Vidhuyt Utpadan Nigam Limited on behalf of the Uttar Pradesh Power Corporation Limited.

17. Petitioner as on date does not answering the description of a factory. He is only in the process of construction of a premises to be ultimately used as a Factory. Before the stage when the construction of the power project is completed, it can be said that any factory has come into an existence so as to be recovered by the Factories Act.

18. To understand the implications we may by way of example notice that in a given case a person after starting the construction of a factory may give up the project are the result would be that workmen of such project will be denied the benefits of the Act 1996 as well as the Factories Act. The Registering Authority appears to be more than correct in recording that since the construction of the Project is still to be completed, the petitioner cannot be said to be covered by Clause 2(m) of the Factories Act, 1948 to be treated as Factory itself.

19. We may record that the construction activity, which has been exempted under Section 1(d) pertains to the construction work"s to which the provisions of the Factories Act, 1948 apply namely the constructions which are made in a

premises which a factory on the date of construction covered by Factories Act, 1948.

20. In our opinion the provisions of the Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and Cess Act 1996 being beneficial legislation made for improving the employment and other condition of service of building and other construction workers and to provide for the safety and health welfare measure must be given widest interpretation so as to cover all such construction activities unless specifically excluded under the Provisions of the Act 1996 itself. The exclusion under Clause 2(d) in respect of the construction work to which the Factories Act, 1948 apply would necessarily mean the construction which are to be have done in a factory covered by the Factories Act 1948. The exclusion may not be applicable where the factory is still to be constructed and infact does not answer the description of factory within the meaning of the Factories Act, 1948 on the relevant date.

21. In view of the aforesaid reasons, we do not find any illegality in the notice, which had been issued to the petitioner. The present writ petition is devoid of merit, hence dismissed. Interim order, if any, stands discharged.