(2018) 10 CHH CK 0063

In the Chhattisgarh High Court

Case No : Writ Appeal No. 129 of 2017

Managing Director @APPELLANT@Hash State Of Chhattisgarh

Date of Decision : 29-10-2018

Acts Referred:

Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 — Section 2(1)(d), 2(d), 3, 4, 5, 5(2), 8, 9, 10
Factories Act, 1948 — Section 2(m), 6, 7

Citation : (2018) 10 CHH CK 0063

Hon'ble Judges : Ajay Kumar Tripathi, CJ;Parth Prateem Sahu, J

Bench : Division Bench

Advocate : Pradeep Saksena, Prasoon Bhaduri

Final Decision : Dismissed

Judgement

Ajay Kumar Tripathi , CJ

1. Appeal has been preferred against an order dated 18.11.2016 passed by the learned Single Judge in a batch of writ applications.

2. The issue raised before the writ court was whether the petitioner who is appellant before this Court fell within the ambit and scope of the Building

and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 or the Building and Other Construction Workers'

Cess Act, 1996.

3. After having heard learned counsel for the parties, learned Single Judge took note of a decision of the Hon'ble Apex Court in Lanco Anpara Power

Limited Vs State of Uttar Pradesh and others reported in (2016) 10 SCC 329.

4. The learned Single Judge had the following to say:-

4. This issue is no longer res integra. The Apex Court in Lanco Anpara Power Limited. v. State of Uttar Pradesh (Civil Appeal No.6223 of 2016)

and other connected matters, has dealt with this contention in detail. The issues raised by learned counsel for the Factory owners before the Apex

Court are as follows:

i) In the first instance, it is argued that BOCW Act does not apply to those undertakings which are registered under the Factories Act. To support this

submission, emphasis was laid on the definition of â??building or other construction workâ? as contained in Section 2(1) (d) of BOCW Act, which

reads as under:

â??Section 2(1)(d) :â??building or other construction workâ? means the construction, alternation, 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, aquaducts, 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. (emphasis added)â??

(ii) Second submission, which in fact flows from first submission noted above, was that the approach of the High Court in dealing with the matter was

contrary to law. In this behalf, it was pointed out that the High Court has rejected the case of the appellants herein on the ground that even if the

appellants had obtained a licence under the Factories Act for registration to work a factory, the appellants were still not excluded from the provisions

of Welfare Cess Act as no manufacturing process or factory operation had started by the appellants and, therefore, appellants did not answer the

description of 'factory' within the meaning of Factories Act. As per the High Court, since the appellants had only undertaken the process of

construction of premises which are to be ultimately used as factories, and since such power project has not started and there was no operation for

which the licence was obtained under the Factories Act till the production commences, it could not be said that â??factoryâ? has come into existence and, therefore, the appellants were not entitled to take advantage of mere registration under the Factories Act. Dubbing the aforesaid approach as

erroneous, it was the argument of the appellants that the High Court ignored the pertinent aspect that even when the building was under construction,

the establishments which were covered by the Factories Act stood excluded by virtue of definition contained in Section 2(d) of BOCW Act which

pertained to construction of building and therefore, specifically covered the stage of construction itself. It was argued that matter should have been

seen from that angle. Advancing this argument further, it was also submitted that the Legislature is alive to the fact that the factory is not running at

the stage when building or other construction work is going on. However, it still chose to exclude those buildings or other construction work to which

the provisions of Factories Act apply.

5. After noting the contentions of learned counsel and the provisions of the Factories Act and the BOCW Act and the various authorities cited, the

Apex Court dealing with the scope and ambit of Section 2(d) of the BOCW Act held as follows:

17. Keeping in view the aforesaid objective of the respective Acts, we now deal with the scope and ambit of Section 2(d) of BOCW Act. As noticed

above, one of the submissions of the appellants is that literal interpretation needs to be given to the said provision as it categorically excludes those

building or construction work to which Factories Act apply. In this very hue, it is argued that as the benefit under the Factories Act are already given

to the construction workers who are involved in the construction work, there is no need for covering the construction workers who are engaged in

building or construction work of the appellants under BOCW Act or Welfare Cess Act.

21. On the conjoint reading of the aforesaid provisions, it becomes clear that â?? factoryâ? is that establishment where manufacturing process is

carried on with or without the aid of power. Carrying on this manufacturing process or manufacturing activity is thus a prerequisite. It is equally

pertinent to note that it covers only those workers who are engaged in the said manufacturing process. Insofar as these appellants are concerned,

construction of building is not their business activity or manufacturing process. In fact, the building is being constructed for carrying out the particular manufacturing process, which, in most of these appeals, is generation, transmission and distribution of power. Obviously, the workers who are engaged

in construction of the building also do not fall within the definition of 'worker' under the Factories Act. On these two aspects there is no cleavage and

both parties are at ad idem. What follows is that these construction workers are not covered by the provisions of the Factories Act.

22. Having regard to the above, if the contention of the appellants is accepted, the construction workers engaged in the construction of building

undertaken by the appellants which is to be used ultimately as factory, would stand excluded from the provisions of BOCW Act and Welfare Cess

Act as well. Could this be the intention while providing the definition of 'building and other construction work' in Section 2(d) of BOCW Act ? Clear

answer to this has to be in the negative.

23. We may mention at this stage that High Court is right in observing that merely because the appellants have obtained a licence under Section 6 of

the Factories Act for registration to work a factory, it would not follow therefrom that they answer the description of the â??factoryâ? within the

meaning of the Factories Act. We have reproduced the definition of 'factory' and a bare reading thereof makes it abundantly clear that before this

stage, when construction of the project is completed and the manufacturing process starts, 'factory' within the meaning of Section 2(m) of the

Factories Act does not come into existence so as to be covered by the said Act.

32. In taking the aforesaid view, we also agree with the learned counsel for the respondents that 'superior purpose' contained in BOCW Act and

Welfare Cess Act has to be kept in mind when two enactments â?" the Factories Act on the one hand and BOCW Act/Welfare Cess Act on the

other hand, are involved, both of which are welfare legislations. (See Allahabad Bank v. Canara Bank 18, which has been followed in Pegasus Assets

Reconstruction P. Ltd. v. M/s. Haryana Concast Limited & Anr.19 in the context of Securitization and Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2002 and Companies Act, 1956. Here the concept of 'felt necessity' would get triggered and as per the

Statement of Objects and Reasons contained in BOCW Act, since the purpose of this Act is to take care of a particular necessity i.e. welfare of

unorganised labour class involved in construction activity, that needs to be achieved and not to be discarded. Here the doctrine of Purposive

Interpretation also gets attracted which is explained in recent judgments of this Court in Richa Mishra v. State of Chhattisgarh and Others20 and

Shailesh Dhairyawan v. Mohan Balkrishna Lulla21.

33. We are left to deal with the argument of the appellants that while granting permission under the Factories Act, various conditions are imposed

which the appellants are required to fulfil and these conditions are almost the same which are contained in BOCW Act. We are not convinced with

this submission either. It is already held that provisions of Factories Act are not applicable to these construction workers. Registration under the

Factories Act becomes necessary in view of provisions contained in Section 6 of the said Act as this Section requires taking of approval and

registration of factories even at preparatory stage i.e. at the stage when the premises where factory is to operate has to ensure that construction will

be done in such a manner that it takes care of safety measures etc. which are provided in the Factories Act. This means to ensure that construction is

carried out in such a manner that provisions in the Factories Act to ensure health, safety and provisions relating to hazardous process as well as

welfare measures are taken care of. It is for this reason that even after the building is completed before it is occupied, notice under Section 7 is to be

given by the occupier to the Chief Inspector of Factories so that a necessary inspection is carried out to verify that all such measures are in place.

Therefore, when the permissions for construction of factories is given, the purpose is altogether different.

34. It is stated at the cost of repetition that construction workers are not covered by the Factories Act and, therefore, welfare measures specifically

provided for such workers under the BOCW Act and Welfare Cess Act cannot be denied.

35. We, thus, hold that all these appeals are bereft of any merit. Accordingly,these appeals, along with the writ petitions filed before this Court as also

those which are the subject matter of the transfer petition and transfer cases, are dismissed with cost. We, however, make it clear that insofar as

objection to the calculation of cess as contained in the show cause notices is concerned, it would be open to the appellants to agitate the same before the adjudicating authorities. No costs.

6. In view of the aforesaid pronouncement by the Apex Court, it is not disputed by learned Counsel for the Petitioners that the Petitioners would also

fall within the scope and ambit of BOCW Act as well as the BOCW Cess Act. The concerned employer has to be registered under the BOCW Act.

That registration will now be necessary for all the Petitioners. Some of the Petitioners are registered but some are not. Therefore, a prayer has been

made that since the law was not clear till the judgment was passed by the Apex Court, the Petitioners who are not registered may be given some time

to get themselves registered.

7. However, they have some further submissions in this regard and according to the Petitioners, while raising the demand or recovering the amount

under the BOCW Act, the procedure prescribed under the BOCW Cess Act has not been followed. Section 3 of BOCW Cess Act provides for levy

and collection of cess. Since the Petitioners do not dispute that they fall within the ambit and scope of this provision, they are not disputing that in view

of the judgment of the Apex Court in Lanco Anpara Power Limited (Supra), they are liable to pay cess under this Act. It is submitted on their behalf

that the levy and recovery of cess is not in accordance with BOCW Cess Act.

8. In this regard, reference may be made to Sections 3, 4 and 5 of the BOCW Cess Act which read as follows:

3. Levy and collection of cess. (1) There shall be levied and collected a cess for the purposes of the Building and Other Construction Workers

(Regulation of Employment and Conditions of Service) Act, 1996, at such rate not exceeding two per cent but not less than one per cent of the cost of

construction incurred by an employer, as the Central Government may, by notification in the Official Gazette, from time to time specify.

(2) The cess levied under sub-section (1) shall be collected from every employer in such manner and at such time, including deduction at source in

relation to a building or other construction work of a Government or of a public sector undertaking or advance collection through a local authority

where an approval of such building or other construction work by such local authority is required, as may be prescribed.

(3) The proceeds of the cess collected under sub-section (2) shall be paid by the local authority or the State Government collecting the cess to the

Board after deducting the cost of collection of such cess not exceeding one per cent of the amount collected.

(4) Notwithstanding anything contained in sub-section (1) or sub-section (2), the cess leviable under this Act including payment of such cess in

advance may, subject to final assessment to be made, be collected at a uniform rate or rates as may be prescribed on the basis of the quantum of the

building or other construction work involved.

4. Furnishing of returns. (1) Every employer shall furnish such return to such officer or authority, in such manner and at such time as may be

prescribed.

(2) If any person carrying on the building or other construction work, liable to pay the cess under section 3, fails to furnish any return under sub-

section (1), the officer or the authority shall give a notice requiring such person to furnish such return before such date as may be specified in the

notice.

5. Assessment of cess. (1) The officer or authority to whom or to which the return has been furnished under section 4 shall, after making or causing

to be made such inquiry as he or it thinks fit and after satisfying himself or itself that the particulars stated in the return are correct, by order, assess

the amount of cess payable by the employer.

(2) If the return has not been furnished to the officer or authority under sub-section (2) of section 4, be or it shall, after making or causing to be made

such inquiry as he or it thinks fit, by order, assess the amount of cess payable by the employer.

(3) An order of assessment made under sub-section (1) or sub- section (2) shall specify the date within which the cess shall be paid by the employer.

9. A perusal of the aforesaid provisions show that Section 3 deals with levy and collection of cess. Cess cannot be less than 1% but cannot exceed

2%. The cess has to be calculated on the cost of construction incurred by the employer. Some of the contracts which have been entered into are

combined contracts dealing both with construction and works of other nature, such as design etc. There can be no manner of doubt that cess would

only be payable on the construction activity and the construction aspect of the contract. Cess would not be payable on those items which do not fall

under the construction activities. However, this is not to be decided by this Court.

A machinery and procedure has been prescribed under the BOCW

Cess Act itself for doing needful. Section 4 provides that the employer shall file return and in this return, the employer can show which portion of the

contract relates to the construction activity and which does not. The assessment of the return has to be done by the authority under Section 5 of the

BOCW Cess Act. The Assessing Officer will then assess the return and decide which portion of the contract covers construction activities and which

portion does not. It is however clarified that in view of the provisions of Section 5(2) if the return is not filed by the Assessee within the prescribed,

then the Assessing Officer can make his return on the basis of best judgment assessment. After the Assessing Officer passes an assessment order,

then only recovery can be made in terms of provisions of Section 10. Section 8 provides that interest would be levied on the delayed payment of cess

and if in case the cess is not deposited within the time specified under Section 3, the employer shall be liable to pay interest at the rate of 2% per

month. Section 9 provides for penalty for non-payment of cess within the specified time. Section 10 is the recovery provision which mandates that the

arrears of cess, penalty, interest can be recovered as the arrears of land revenue from the employer.

5. We do not find any infirmity with the decision of the learned Single Judge keeping in mind that the law has been well settled by the Hon'ble Apex

Court that the applicability of the provisions of the two legislations in no way gets barred merely because the industry is registered under the Factories

Act.

6. Learned counsel for the appellant submits that the prosecution is being made by the State Government and not by the Central Government.

7. The question of jurisdiction as who is the competent authority to make such prosecution can be raised when such occasion for prosecution arises or

enforcement thereof of the two legislations are made. That cannot be a ground to interfere with the order of the learned Single Judge dated

18.11.2016.

8. Writ appeal is dismissed.

