(2023) 12 JH CK 0010

In the Jharkhand High Court

Case No : Writ Petition (C) No. 241 Of 2023

M/S Genus Power Infrastructures Ltd — APPELLANT

Vs

State Of Jharkhand And Another — RESPONDENT

Date of Decision : 04-12-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Building And Other Construction Workers (Regulation Of Employment And Conditions Of Service) Act, 1996 — Section 2(d), 3

Citation : (2023) 12 JH CK 0010

Hon'ble Judges : Gautam Kumar Choudhary, J

Bench : Single Bench

Advocate : M.S. Mittal, Sachin Kumar, Vivek Aditya

Final Decision : Allowed

Judgement

Gautam Kumar Choudhary, J

1. Instant writ petition has been filed under Article 226 of the Constitution of India for issuance of an order/direction in the nature of mandamus directing the respondent to refund the deductions of Labour Cess of supply of materials under Building and Other Construction Workers' Welfare Cess Act, 1996, made by respondent no.4 and to refrain from further deduction of such labour cess.

2. Petitioner was awarded contract for supply, installation, operation and FMS of AMI System (Advanced Metering Infrastructure or 'Smart Meters") in electric supply circle of Ranchi. In pursuant to the contract, the work was executed and the bills for supply of materials and for installation service, were separately raised.

3. The main grievance of the petitioner is that at the time of making payment for the bills, the labour cess @ 1% of the gross bill amount was levied on the bills issued for installation service and also for supply of materials.

4. Following questions arise for consideration:-

I. Whether the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) (BOCW Act, 1996) is attracted only when the work involved is in the nature of 'building or other construction work' that entails engaging of labours/workers for civil

II. Whether definition of the expression 'building or other construction work' under the BOCW Act applies only to "construction, alteration, repairs, maintenance or demolition".

5. It is submitted by the learned counsel on behalf of petitioner that unless and until construction work is undertaken by the Contractor concerned, he cannot be saddled with the liability of cess for supply of material and its installation. In the present case, the contract involves supply of smart meters and its installation for which cess has been levied under both heads which is impermissible in view of the law laid down in U.P. Power Transmission Corpn. Ltd. v. CG Power & Industrial Solutions Ltd., (2021) 6 SCC 15

"53. Cess under the Cess Act read with the BOCW Act is leviable in respect of building and other construction works. The condition precedent for imposition of cess under the Cess Act is the construction, repair, demolition or maintenance of and/or in relation to a building or any other work of construction, transmission towers, in relation inter alia to generation, transmission and distribution of power, electric lines, pipelines, etc. Mere installation and/or erection of pipelines, equipments for generation or transmission or distribution of power, electric wires, transmission towers, etc. which do not involve construction work are not amenable to cess under the Cess Act. Accordingly no intimation or information was given or any return filed with the assessing officer under the Cess Act or the Inspector under the BOCW Act in respect of the first and second contracts, either by UPPTCL or by Respondent 1."

6. It is submitted by learned counsel on behalf of respondent no.4-JBVNL that the facts of the case are not in dispute. Section 3 of the Building & Other Construction Workers Cess Act, 1996 states the following:

"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) (BOCW Act, 1996), as such rate not exceeding two percent but not less than one percent 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. The same is also confirmed by the letter no.234 dated 19.05.2023 of JBOCWW. Hence, the levying of Labour Cess on supply of material is reasonable and not arbitrary."

Section 2(d) of BOCW Act, 1996

(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 communications, dams, canals, reservoirs, water courses, tunnels, breezes, 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 Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), apply;

7. Ratio as laid down by the Hon'ble Supreme Court in above judgment will not apply in the present case, as the facts are different from the authority relied upon. In the present case, it is a composite contract wherein separately cess for services and supply is not contemplated.

8. Further reference is made to the nature and scope of work in the work order dated 08.03.2022 (Annexure-2). In view of nature of contract awarded, it is argued that such disputed question regarding nature of contract, cannot normally be adjudicated in a Writ Court.

9. There cannot be a dispute whatsoever that cess cannot be levied on supply contract under BOCW Act, 1996 and Cess Act, 1996. The State of Jharkhand through the Secretary, Department of Labour, Employment & Training Versus M/s Flowmore Limited, L.P.A. No.511 of 2022 wherein it has been held:-

"7. From the aforesaid definition of "building or other construction work" it is quite clear that in relation to any building, streets or even transmission or distribution of power, the "building or other construction" will mean and convene to any construction, alteration, repairs, maintenance or demolition of or in relation to the said structures. It is quite clear from the conjoint reading of Section 2(d) and Section 3 of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, that no cess can be levied on supply or consultancy component. It can only be levied on construction, alteration, repair, maintenance or demolition work. Extending the said levy on consultancy or supply will be a clear deviation from the provisions of the Act. Further, the Hon'ble Supreme Court has decided an exactly similar issue in the case of Uttar Pradesh Power Transmission Corporation Ltd. (supra) and has held that the Act excludes a supply contract from within its ambit. Learned Single Judge has also considered the said judgment on the facts of this case, which is also similar with the facts dealt with by the Hon'ble Supreme Court."

10. In view of the above settled position of law, imposition of cess for supply and installation of 'smart meters' is impermissible because this is not part of the building or construction work and is unrelated to it. The prerequisite for application of labour cess is that it should be related to construction work.

11. Present case basically involves supply and installation of smart meters. Nature of the work does not entail construction, alteration, repair, maintenance

or demolition work. It cannot be said to be allied in any way to construction activity. Annexure-2 is the work order issued on 08-03-2022 to the Petitioner-Company. Scope work is at Clause-2 which refers to supply, installation, testing, commissioning for smart meters. Contract price is quoted at Clause 7. Item wise cost breakup is as under:

Schedules

Amount (INR)

Schedule no.2 : Plant and Equipment

INR 151,28,16,284/- (inclusive of GST)

Schedule No.2: Plant and Equipment

Schedule No.4 : Installation and other services

Schedule 4A: Operations and FMS Services

INR 22,28,31,055/- (inclusive of GST)`

Schedule 4B : Other recurrent charges

NR 41,17,79,558/- (inclusive of GST)

TOTAL

NR 41,17,79,558/- (inclusive of GST)

12. From the above, it is apparent that cost of contract under the heading of cost of equipment and its installation was consolidated. Therefore, levying and deducting labour cess on the supply and installation component was not in accord with the settled principles as discussed above.

Under the circumstance, levying of labour cess is not sustainable and is accordingly set aside. Respondent No.4 is directed to refund the labour cess to the petitioner within eight weeks of the order along with simple interest @ 6% per annum on the said amount.

Writ Petition is accordingly allowed. Interlocutory Application, if any, is disposed of.