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(2012) 03 SHI CK 0216

In the High Court Of Himachal Pradesh

Case No : cwp No. 1274 of 2011

P.L. Sharma APPELLANT

Vs

State of Himachal Pradesh and Others RESPONDENT

Date of Decision : 06-03-2012

Acts Referred:

Building and Other Construction Workers Welfare Cess Act, 1996 — Section 1(4), 10, 12, 2, 2(i)(iii)
Constitution of India, 1950 — Article 21

Citation : (2012) 2 ShimLC 903

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : Ajay Sharma, for the Appellant; Rajinder Dogra, Addl. A.G. with Mr. Vikas Rathore Dy. AG., for the Respondent

Final Decision : Dismissed

Judgement

Justice Rajiv Sharma, Judge.

1. Respondent-Department invited tenders for the construction of Administrative Block of Panchayati Raj Institute, Baijnath, District Kangra. Petitioner participated in the tendering process. The approval to accept the lowest tender of the petitioner amounting to ` 3,67,39,405/-, which was 54.19% above the amount put to tender, i.e 2,38,27,349/- was accorded on 24.11.2009 by the Chief Engineer. Thereafter, petitioner was informed to complete all the codal formalities by the Executive Engineer on 14.12.2009. Petitioner completed all the codal formalities and agreement was also entered between the parties. Petitioner started the construction of building. However, a sum of ` 31,580.23 was deducted from the running bill of the petitioner, vide Annexure A-3. Mr. Ajay Sharma has strenuously argued that the action of the respondents to deduct a sum of ` 31,580.23 from the running bill of the petitioner is illegal. According to him, the petitioner is not bound to pay cess leviable under the Building and Other Construction Workers'' Welfare Cess Act, 1996 and the Rules framed thereunder

as per the concluded contract entered into between the parties. He then argued that the parties are bound by the terms and conditions contained in the agreement and the same cannot be altered or modified unilaterally.

2. Mr. Rajinder Dogra, learned Additional Advocate General, 1% cess is to be deducted from all the works with effect from 4.12.2008 when the provisions of the Building and Other Construction Workers'' Welfare Cess Act, 1996 and the Rules framed thereunder came into force with effect from 4.12.2008 in the State.

3. I have heard the learned counsel for the parties and have perused the pleading carefully.

4. In the instant case, the petitioner has quoted his rates on 5.10.2009, which were accepted by the Chief Engineer and thereafter the codal formalities were directed to be completed by the Executive Engineer on 14.12.2009. It is, thus, evident that the agreement has been entered into between the parties only after 14.12.2009. The Chief Engineer had issued instructions to his subordinates to deduct 1% cess after coming into force the Building and Other Construction Workers'' Welfare Cess Act, 1996 (hereinafter referred to as the ''Act'' for brevity sake) and the Rules framed thereunder with effect from 14.12.2009 from the bills of the contractor being mandatory provisions. This decision has been taken by the Chief Engineer on the basis of letter addressed by the Labour Commissioner to all the Head of Departments of the respondent-State on 30.1.2009.

5.It will be apt this stage to take note of salient features of the Act. According to the preamble, Act has been made to provide for the levy and collection of a cess on the cost of construction incurred by the 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. Section 3 of the Act provides that there shall be levied and collected a cess for the purpose 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 the employer, as the Central Government may, by notification in the official gazette, from time to time specify. The cess is to 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. The proceeds of the cess collected are to 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. The Central Government vide notification dated 26.9.1996 has prescribed cess @ 1% of the cost of construction incurred by the employer, which is to be levied and collected. Every employer, as per section 4 of the Act, is required to furnish such return to

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such officer or authority in such manner and at such time as may be prescribed. There is a provision for imposition of interest on delayed payment of cess and also for penalty for non-payment of cess within the specified time. State Government has framed the rules under the Act whereby appropriate officers have been appointed as cess Collectors and Assessing Officers in their respective jurisdiction under the Act.

6. Their Lordships of the Hon''ble Supreme Court in Dewan Chand Builders and Contractors Vs. Union of India (UOI) and Others, have held that object of BOCW Cess Act and Rules is to regulate employment and conditions of service of building and other construction workers, traditionally exploited sections of society and to provide for their safety, health and other welfare measures. Their Lordships have further held that the Acts break new ground, as liability to pay cess falls not only on owner of a building or establishment, but extends liability on to the contractor. Their Lordships have held as under:

4. A fairly long preamble to the BOCW Act is again indicative of its purpose. It reads thus: "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 matters connected therewith or incidental thereto.

5. Further, Section 1(4) of the BOCW Act makes it clear that it:

1. (4) ......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.

6. Some of the definitions u/s 2 of the BOCW Act, relevant for these appeals are:

2 (1) (b) "beneficiary" means a building worker registered u/s 12;

(c) "Board" means a Building and Other Construction Workers'' Welfare Board constituted under sub-section (1) of Section 18;

(d) ... ...

(e) "building worker" means a person who is employed to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, in connection with any building or other construction work but does not include any such person-

(i) who is employed mainly in a managerial or administrative capacity; or

(ii) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature;

(f) ... ...

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(g) "contractor" means a person who undertakes to produce a given result for any establishment, other than a mere supply of goods or articles of manufacture, by the employment of building workers or who supplies building workers for any work of the establishment; and includes a sub-contractor;

(h) ... ...

(i) "employer", in relation to an establishment, means the owner thereof, and includes,-

(i) in relation to a building or other construction work carried on by or under the authority of any department of the Government, directly without any contractor, the authority specified in this behalf, or where no authority is specified, the head of the department;

(ii) in relation to a building or other construction work carried on by or on behalf of a local authority or other establishment, directly without any contractor, the chief executive officer of that authority or establishment;

(iii) in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor;

(j) ... ...

(k) "Fund" means the Building and Other Construction Workers'' Welfare fund of a Board constituted under sub-section (1) of Section 24.

7. The scheme of the BOCW Act is that it empowers the Central Government and the State Governments to constitute Welfare Boards to provide and monitor social security schemes and welfare measures for the benefit of the building and other construction workers. Section 7 requires every employer in relation to an establishment to which the BOCW Act applies to get such establishment registered. Section 10 makes this requirement mandatory and therefore, without such registration, the employer of an establishment, to which the BOCW Act applies, cannot employ building workers.

10. It is thus, clear from the scheme of the BOCW Act that its sole aim is the welfare of building and construction workers, directly relatable to their constitutionally recognised right to live with basic human dignity, enshrined in Article 21 of the Constitution of India. It envisages a network of authorities at the Central and State levels to ensure that the benefit of the legislation is made available to every building and construction worker, by constituting Welfare Boards and clothing them with sufficient powers to ensure enforcement of the primary purpose of the BOCW Act. The means of generating revenues for making effective the welfare provisions of the BOCW Act is through the Cess Act, which is questioned in these appeals as unconstitutional.

11. The Statement of Objects and Reasons to the BOCW Act explained that it had been considered "necessary to levy a Cess on the cost of construction incurred

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by the employers on the building and other construction works for ensuring sufficient funds for the Welfare Boards to undertake the social security Schemes and welfare measures." Simultaneously with the enactment of the BOCW Act, the Parliament enacted the Cess Act. The Statement of Objects and Reasons to the Cess Act noted that the intention was to "provide for the levy and collection of a Cess on the cost of construction incurred by the employers for augmenting the resources of the Building and Other Construction Workers'' Welfare Boards constituted by the State Governments under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Ordinance, 1995."

16. Rule 4 of the Cess Rules makes it mandatory for deduction of Cess payable at the notified rates from the bills paid for the building and other construction work of a Government or a Public Sector Undertaking. Rule 5 prescribes the manner in which the proceeds of Cess collected under Rule 4 shall be transferred by such Government office, Public Sector Undertakings, local authority, or Cess collector, to the Board. The powers of the Assessing Officer and the Board of Assessment are enumerated in Rules 7 to 14 of the Cess Rules.

17. It is manifest from the overarching schemes of the BOCW Act, the Cess Act and the Rules made thereunder that their sole object is to regulate the employment and conditions of service of building and other construction workers, traditionally exploited sections in the society and to provide for their safety, health and other welfare measures. The BOCW Act and the Cess Act break new ground in that, the liability to pay Cess falls not only on the owner of a building or establishment, but u/s 2(i)(iii) of the BOCW Act "in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor." The extension of the liability on to the contractor is with a view to ensure that, if for any reason it is not possible to collect Cess from the owner of the building at a stage subsequent to the completion of the construction, it can be recovered from the contractor. The Cess Act and the Cess Rules ensure that the Cess is collected at source from the bills of the contractors to whom payments are made by the owner. In short, the burden of Cess is passed on from the owner to the contractor.

7. Now, the Court will advert to clause 10-E of the agreement. It is stipulated therein that the tender rates are inclusive of all taxes and levies payable under the respective structures. The date, on which the agreement was entered into between the parties, the Act had come into force and the employer, i.e. petitioner is liable to pay the cess.

8. According to Mr. Ajay Sharma, clause 10-E will apply only if any further tax or levy is imposed after the receipt of tender. In the instant case, the Act had come into force and section 3 will apply ipso facto. There is no merit in the contention of Mr. Ajay Sharma also that there was a concluded contract between the parties and thus cess could not be levied on the basis of letter dated 4.12.2009. The tax is leviable by sheer operation of the Act and it was not required to be specifically mentioned in the agreement. Even if the imposition of cess is not specifically

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provided, it would be deemed to have been incorporated by necessary implication in the agreement. There cannot be any clause in the agreement, which is against the public policy. The Building and Other Construction Workers'' Welfare Cess Act, 1996 is welfare legislation and the provisions have to be liberally construed in favour of the workmen. The purpose of enactment will be defeated in case the mandatory provisions of section 3 are not applied rigoursly. The petitioner is still liable to pay the cess even if there is omission to mention about the cess in the agreement.

9. The petitioner had sought opportunity to approach the Superintending Engineer on 7.4.2011 and the order passed by this Court on 7.4.2011 reads thus:

In view of the reply, the petitioner seeks opportunity to approach the Superintending Engineer, in which event the Superintending Engineer will process the request of the petitioner and take appropriate action with in another three weeks. Post on 26.5.2011

10. Thereafter, the Superintending Engineer has rejected the plea of the petitioner vide order dated 24.5.2011 by a speaking order. Accordingly, in view of the observations and discussions made hereinabove, there is no merit in the writ petition and the same is dismissed. There shall, however, be no order as to costs.

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