(2016) 06 KL CK 0106

In the High Court Of Kerala

Case No : W.A. Nos. 1802 of 2009 and 1060 of 2013 in W.P.(C) No. 21257 of 2004

The District Labour Officer APPELLANT

Vs

K.K. Raji RESPONDENT

Date of Decision : 30-06-2016

Acts Referred:

Building and Other Construction Workers (Regulation of Employment and Conditions of Services) Act, 1996 — Section 2(1)(i), 2(1)(j)
Building and Other Construction Workers Welfare Cess Act, 1996 — Section 3

Citation : (2016) 3 ILRKerala 1003 : (2016) 4 KLT 6

Hon'ble Judges : Mr. P.R. Ramachandra Menon and Mr. Anil K. Narendran, JJ.

Bench : Division Bench

Advocate : Sri. V.K. Rafeeque, Government Pleader, for the Petitioner; Sri. Ashik K. Mohamed Ali, SC, KB and OCWWB, for the Respondent No. 2; Sri. K. K. Babu, Advocate, for the Respondents

Final Decision : Dismissed

Judgement

Mr. P.R. Ramachandra Menon, J.—There is a common issue involved in both these appeals, though arising in respect of different cause of action and hence they are heard together. The basic issue is whether the amount due under Section 3 of the Building and Other Construction Workers Welfare Cess Act, 1996 (''Cess Act'' in short) can be collected from the subsequent purchaser of a building, giving an extended definition to the term ?employer? (as defined under the relevant statute), who is liable to effect the contribution under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act?

2. Coming to W.A.No.1802/2009 which has been preferred by the State/ Department, challenge is against the verdict dated 9.6.2008 passed by the learned Single Judge, virtually allowing the writ petition and setting aside the relevant orders/demand notices, which were under challenge; holding that the liability cannot be shifted to the shoulders of the subsequent purchaser of the

building who had actually not engaged any worker to effect the construction. The factual position revealed is that, an extent of nearly 28 cents and a building situated therein was purchased by the writ petitioner for a total sale consideration of Rs. 3,25,000/- as revealed from Ext.P1 sale deed dated 30th of March, 2000. When the writ petitioner was enjoying the property as above, Ext.P2 assessment order dated 18.12.2003 came to be served upon the writ petitioner fixing the liability of a sum of Rs. 37,800/- as the ''cess'' payable under the Building and Other Construction Workers Welfare Cess Act, 1996 and raising a demand to satisfy the same with interest. On receipt of the same, Ext.P3 explanation dated 1.1.2004 was submitted by the writ petitioner, pointing out that she had not effected any construction in the property and had never employed any worker to have been assessed under the relevant provisions of the said Act. It was also brought to the notice of the concerned authority that she had in fact, purchased the property ''along with the building'' which was a running establishment in the name and style as ''Enkeys Tourist Home''; in turn seeking to drop all further proceedings. This however did not yield any positive result and the Departmental authorities issued Ext.P4, alerting the writ petitioner to satisfy the due amount; failing which further steps would be pursued for realisation of the same. This made the owner of the building to approach this Court by filing W.P.(C) No.21257/2004 challenging Exts.P2 and P4.

3. A detailed counter affidavit has been filed by the 2nd respondent referring to the relevant provisions of law and the circumstances under which the proceedings came to be finalised. It is stated that, notice of assessment was issued to the party concerned, which however came to be returned as ''unclaimed''. After several postings, the matter came to be finalised and an order was passed on 19.9.2003; followed by a demand notice. Despite serving the final assessment order, the amount was not satisfied; under which circumstance, another notice dated 18.12.2003 was served upon the writ petitioner. Admittedly, the amount was not satisfied and it was sought to be challenged before this Court by filing the Writ Petition. After hearing both the sides, a learned Judge of this Court, as per judgment dated 9.6.2008, intercepted the proceedings; holding that the subsequent purchaser of the building cannot be treated as the ''employer'', as defined under the Act and hence that, no liability could be shifted to the shoulders of the subsequent purchaser. It was accordingly, that Exts.P2 and P4 were quashed, thus allowing the Writ Petition, which in turn is under challenge in this appeal.

4. The learned Government Pleader submits that, by virtue of the relevant provisions of law, the finding and reasoning given by the learned Single Judge are liable to be interfered. It is pointed out that, a contrary view, which is the correct view based on the relevant provisions of law, has been taken by the very same learned Judge, as borne by the verdict was passed on 16.1.2013 in W.P.(C)No.11697/2008 (reported in Suresh Babu v. Assessment Officer & others (2013 (2) KHC 169); which however has been subjected to challenge by the aggrieved party, the owner of the building, in W.A.No.1060/2013.

5. The liability to satisfy ''cess'' is under Section 3 of the ''Cess Act'' and the extent of liability is to be not less than 1% of the total cost of construction incurred by the employer. Then the question is, who the ''employer'' is? It is true that the term ''employer'' has not been defined under the ''Cess Act''. But Section 2(d) of the said Act stipulates that, if the relevant term has not been defined in the ''Cess Act'', but has been defined under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, such term shall have the same meaning as defined in the aforesaid Act. Section 2(1)(i) of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act defines the term ''employer'' as follows;

(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.

6. A mere reading of the said provision, is enough to discern that, it can have application only in so far as it relates to an ''establishment''. Now the question is, what is an ''establishment''? The term ''establishment'' has been defined under Section 2(1)(j) of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, which reads as follows;

"(j) "establishment" means any establishment belonging to, or under the control of, Government, any body corporate or firm, an individual or association or other body of individuals which or who employs building workers in any building or other construction work; and includes an establishment belonging to a contractor, but does not include an individual who employs such workers in any building or construction work in relation to his own residence the total cost of such construction not being more than Rupees ten lakhs."

On reading the above two provisions together, it is quite clear that the said provisions of the Act will be applicable to fix the contribution and the liability even upon an individual, in respect of the employees engaged for construction of the building; however drawing an exception in the case of an employee, if the building constructed is for ''residential purpose'' and the total cost of construction is not more than Rs. 10,00,000/-.

7. In the given set of facts and circumstances, it is evident that the total sale

consideration paid by the writ petitioner for purchasing the land and the building together, as revealed from Ext.P1 sale deed, is only Rs. 3,25,000/-; which is well within the limit of Rs. 10,00,000/- as mentioned in Section 2(1)(j) of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act. But an additional requirement is also to be satisfied, if at all any exemption is to be given, i.e., the building should be for ''residential purpose'' of the employer. On going through the contents of Ext.P3 representation dated 1.1.2004 submitted by the writ petitioner before the concerned authorities, it is conceded by her that the building concerned, which was purchased by her, was a ''Tourist Home'' (Enkeys Tourist Home). The factual position in this regard is conceded in paragraph 2 of the writ petition as well. This being the position, it is very much evident that, it was never a ''residential building'' so as to have claimed any exemption in relation to the definition of the terms ''establishment'' and ''employer'' as defined under Sections 2(1)(j) and 2(1)(i) respectively of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act.

8. It is to be noted in this context that, both the aforesaid Acts [the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) and the Cess Act] are Central Acts. Validity of the Cess Act had come up for consideration before the High Court of Delhi, where the validity was upheld. The said verdict of the High Court of Delhi was affirmed by the Supreme Court as per the decision in Dewan Chand Builders & Contractors v. Union of India and others (2012 (1) SCC 101). The Apex Court had occasion to consider the scope of the provisions again and as per the verdict reported in A. Prabhakara Reddy v. State of Madhya Pradesh & others (AIR 2015 SC 3293) the position has been answered in favour of the revenue.

9. The authority of the respondents to demand ''cess'' in terms of the ''Cess Act'' is not under challenge. Who is the actual person to be mulcted with the liability alone is the dispute; i.e., whether it is the ''original owner'' who effected the construction or could it be extended to the shoulders of the subsequent purchaser, if the liability is still to be satisfied.

10. On going through the scheme of the Act, various requirements are to be satisfied by way of registration, filing of return, etc., by the ''employer''. There are provisions for taking remedial measures, if at all any violation is involved. The building concerned was transferred by the person who had actually effected the construction, without satisfying the liability under the ''Cess Act''. By virtue of the meaning of the term ''employer'', which makes a reference to the owner, it is quite possible to proceed against the owner of the building pursuant to the determination of the liability under the ''Cess Act''.

11. In view of the factual position disclosed from the pleadings, it is seen that the proceedings were finalised in compliance with the relevant provisions of law and without infringement of any principles of natural justice. This Court finds that interference made by the learned Single Judge in the said circumstance is not

liable to be sustained. We also find that the very same learned Judge had occasion to consider the matter again, after a few years and it was accordingly, that the verdict reported in Suresh Babu v. Assessment Officer & others (2013 (2) KHC 169) was passed on 16.1.2013 holding that, if the ''cess'' was not paid, the owner of the building at the time when notice is issued, would be liable to pay the ''cess'' under the ''Cess Act'', notwithstanding the fact that the owner had not constructed the building.

12. Coming to W.A.No.1060/2013, it is also a case involving purchase of property with the building. We do not find it necessary to ascertain the factual particulars as to whether the said building is a ''residential building'' or a ''commercial building''; in so far as the total sale consideration paid by the appellant/writ petitioner who purchased the same was Rs. 75,00,000/- as given in Ext.P1 sale deed. No case was put up by the writ petitioner/appellant to the effect that the cost of construction was not more than Rs. 10,00,000/-. As such, the petitioner/ appellant is not liable to have any exemption with reference to definition of the term ''employer'' and ''establishment'' as defined under Sections 2(1)(i) and 2(1)(j) of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, respectively. It is revealed from Ext.P1 sale deed that the building concerned is a "3-storied building", with 24 rooms with furniture, well, compound wall, kitchen, generator room, water pump, etc. This being the position, it is not a ''residential building'' of the owner, to provide any instance of exemption to the owner, in terms of Section 2(j) of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, defining the term ''establishment''.

13. In the light of the above discussion, this Court finds that the challenge raised by the State/Department against the verdict dated 9.6.2008 in W.P.(C)No.21257/2004 is to be sustained and the challenge raised by the appellant in W.A. No.1060/2013 against the verdict dated 16.1.2013 in W.P.(C)No.11697/2008 is to be repelled. It is ordered accordingly.

14. W.A. No.1802/2009 stands allowed and the judgment passed by the learned Single Judge in W.P.(C)No.21257 of 2004 is set aside. W.A. No.1060/2013 stands dismissed.

15. No cost.

