
(2022) 11 TEL CK 0087

In the Telangana High Court

Case No : Writ Petition Nos. 10601 Of 2011, 17219, 17235 Of 2022

V.Sambi Reddy

APPELLANT

Vs

South Central Railway Scr 3 Others

RESPONDENT

Date of Decision : 24-11-2022

Acts Referred:

Building and Other Construction Workers Welfare Cess Act, 1996 — Section 1, 2(d), 3(1)

Citation : (2022) 11 TEL CK 0087

Hon'ble Judges : K.Lakshman, J

Bench : Single Bench

Advocate : A Nagendra Rao, Anjali Agarwal

Final Decision : Dismissed

Judgement

1. Heard Mr. A. Nagendra Rao, learned counsel for the petitioners, Mr. R. Mangulal, learned Standing Counsel for Central Government appearing on behalf of respondent Nos.1 to 3 and Mrs. Anjali Agarwal, learned Assistant Government Pleader appearing on behalf of respondent No.4.

2. W.P.No.10601 of 2011 is filed to; a) to call for the records pertaining to the action of the respondents with regard to 1% Labour Cess deducting from the bills of the petitioner under the provisions of the Building and other Construction Workers Welfare Cess Act, 1996, Rules made there-under, the Memo No.W.148/1/9/Vol. IV dated 03.03.2009 issued by the respondent No.2 and set them aside; b) to direct the respondents not to recover 1% Labour Cess from the bills payable to the petitioner either of the works covered under Tender Notice No.44/CR/07 dated 19.09.2007, No.68/S/08 dated 07.07.2008, No.98/S/08 dated 10.12.2008 and No.21/S/09 dated 23.03.2009 or any other works; and c) to award costs by holding the action of the respondents herein as illegal.

3. W.P. Nos.17219 and 17235 of 2022 are filed seeking the very same relief.

4. Since lis involved in the aforesaid three writ petitions is one and the same,

they were heard together and decided by way of this common order.

5. In all the aforesaid three writ petitions, the petitioners are Contractors. They have been executing contracts of South Central Railway at various places. All the petitioners have participated in the Tenders issued by the South Central Railway and they became successful bidders in respect of the subject tenders. Thereafter, South Central Railway has allotted the aforesaid subject works to the petitioners. They have also entered into agreements on the specific terms and conditions agreed thereon.

6. Respondent No.4 has issued notices to the petitioners to remit building and other construction workers welfare cess @ 1% on the cost of construction/ estimated cost w.e.f. 26.06.2007 onwards as per the Building and Other Construction Workers Welfare Cess Act, 1996 (hereinafter referred as 'Cess Act, 1996' for brevity), and decided to recover the amounts from the bills payable to the petitioners.

7. The petitioners have filed the aforesaid three writ petitions contending as follows:

i. There is no mention of payment of 1% Labour Cess to be paid by the petitioners in the Tender Notifications or in the Schedules or in the Agreements mentioned;

ii. There is also no mention about the liability of the petitioners with regard to the payment of the aforesaid 1% Labour Cess. Without mentioning the same, the respondents cannot claim the said amount from the petitioners;

iii. The respondent authorities cannot shift the said liability on the petitioners. Therefore, the petitioners are not liable to pay the said amount @ 1% of the contract towards labour cess as per the Cess Act, 1996;

iv. The respondents have not even issued any notice seeking explanation demanding the aforesaid amount and, thus, the action of the respondents is unilateral and arbitrary;

v. The petitioners are no way related to the building activities as provided under the Act 28 of 1996 and, therefore, the provisions of the said Cess Act, 1996 are inapplicable to the petitioner for the purpose of deducting 1% labour cess from the bills payable to them;

vi. Respondent No.4 has no authority or jurisdiction to deduct 1% labour cess from 26.06.2007 onwards on the existing bills payable to the petitioners herein;

vii. The respondents without making any assessment of cess, as required under the Cess Act, 1996 and the Rules made thereunder and without fixing liability on the petitioners, cannot direct the respondent authorities to deduct 1% labour cess from the bills of the petitioners. The said action of the respondents is arbitrary and illegal;

viii. The component of expenditure upon the labour is only 30% out of the total cost of the works which should be the basis for the calculation of 1% labour cess, but not on the total cost of the contract as the basis for the purpose of calculation and deduction of 1% labour cess from the works executed by the petitioners; and

ix. The petitioners have contended that the respondents have withheld the aforesaid 1% labour cess from the bills and, therefore, they sought a direction to the respondents to release the same with interest @ 24% per annum for the delay in payment.

With the aforesaid submissions, all the petitioners sought to declare the aforesaid action of the respondents in calculating 1% labour cess from the petitioners' bills as illegal.

8. On the other hand, learned Standing Counsel for Railways appearing on behalf of respondent Nos.1 to 3, on instructions, would submit that it is a Statute and it came into force from 26.06.2007 and, therefore, the petitioners have to pay the said amount. There is no need to mention about 1% labour cess to be paid in the agreements/notifications. It is a statutory obligation on the part of the petitioners/contractors to comply with the statutory obligation. He has also placed reliance on the principle laid down in catena of decisions to the said effect.

9. Learned Assistant Government Pleader for Labour appearing on behalf of respondent No.4 also supported the contentions of the learned Standing Counsel for Railways and he has placed reliance on the judgments of this Court and the Hon'ble Supreme Court.

10. The petitioner in W.P. No.10601 of 2011 has filed copy of agreement dated 19.09.2007 entered between him and the respondent Railway. In the said agreement, the nature of work is mentioned as under:

"SC-KZJ-Section - SWI - Repairs to ballast retaining walls on ADEN/North Sub Division - SW-II - Proposed Raising of ballast retainers, Repairs to Pitching of banks, steps etc. for bridges (Total 90 Bridges)."

Cost, date of commencement, date of completion and maintenance etc., are also specifically mentioned. The value of the work is Rs.26,34,321/-. Like-wise, he has also filed agreement dated 07.07.2008, wherein also, the nature of work is mentioned as "construction of boundary wall to prevent encroachment in ADEN/MDR". The value of the work is Rs.45,54,678/-. He has also filed another agreement dated 10.12.2008, wherein the nature of work is mentioned as "repairs to compound wall of staff quarters between WL-GLA in ADEN/S/KZJ sub division at WL,MABD,NKD." The value of the work is mentioned as Rs.23,56,388/-. In another agreement, dated 23.03.2009, the nature of work is mentioned as "Repairs to front verandah for Type-I quarters between WL-GLA section on ADEN/S/KZJ sub division at WL, NKD, KDM & MABD." The value of the work is mentioned as Rs.51,45,208/-. In other two writ petitions, the petitioners

have not filed copies of the agreements / work orders. Despite granting opportunity by this Court, they have not filed copies of the said agreements.

11. It is relevant to note that in all the three writ petitions, the Chief Engineer (Works), respondent No.2, had issued proceedings, dated 03.03.2009 stating that respondent No.4 i.e., the Commissioner of Labour, Government of A.P., had served a notice dated 20.11.2007 to remit the Building and other Construction Workers Welfare Cess @ 1% on the cost of construction /estimated cost of construction from 26.06.2007 onwards as per the provisions of the Cess Act, 1996. The Railway Board vide letter dated 09.07.2008 had advised to incorporate necessary clause in the tender documents of all future tenders so as to comply with statutory provision of recovering of building cess from the Contractors' bills, indicating that cost of material shall be outside the purview of cess when supplied under a separate schedule item.

12. In view of the above, the Railways have decided for recovery of building and other construction workers welfare cess at 1% from 26.06.2007 onwards. They have decided the cases into two (2) categories i.e., (i) agreements entered with the contractors for the tenders called for July, 2008; and (ii) agreements entered with the contracts prior to July, 2008 which are in force after 26.06.2007 but without specific clause of building cess. In respect of category No.(i), the cess will be recovered as per the specific clause incorporated in the contract agreement. With regard to category No.(ii), they have referred the judgment of the combined High Court of Andhra Pradesh at Hyderabad in M/s. Cormandel Prestcrete Private Limited v. State of Andhra Pradesh, rep. by Principal Secretary to Government, Irrigation and CAD Department 2011 (6) ALT 703, wherein it was held that cess can be recovered based on the following points:

(a) Welfare Board was constituted by the Andhra Pradesh Government and G.O.Ms.No.57 was issued on 26.06.2007 directing all the Officers of Central Government and State Government to recover the building cess. This Court in the aforesaid judgment categorically held that no notice is required to be issued for recovery of cess from the Contractor's bills;

(b) The date i.e., 26.06.2007 was also upheld by the Court stating that the implementation was already delayed which was supposed to be from 26.09.1996 i.e., date of notification by Central Government; and

(c) This Court has considered Clause - 69 of the agreements executed by the State Government establishments which provide for compliance with labour regulations. But, in Railways contract agreements, there is no such direct clause. The clause provided cover Minimum Wages Act, Contract Labour (Regulations and Abolition) Act etc., but the High Court mentioned that mere absence of clause relating to levy of 1% cess in the contract agreement does not preclude the department from levying the same.

Therefore, the building cess has to be recovered invariably even though the specific clause is not available in the tender.

13. A similar view was taken by the Delhi High Court in its judgment dated 28.02.2007. In view of the same, respondent No.2 directed all the divisions to work out the cess to be collected from contractors from the agreements in force on or after 26.06.2007 and also from the agreements in which work is completed but final bills are yet to be drawn as on date and take immediately necessary action to recover the amounts from the contractors' bills and an advise may be given to the contractors regarding the said recovery.

14. In W.P Nos.17219 of 2022 and 17235 of 2022, the petitioners have submitted representations, dated 11.01.2021 and 22.01.2021 respectively requesting respondent No.3, the Senior Divisional Financial Manager, South Central Railway, Secunderabad, informing that FDRs are pending which has been given as surety for recovery of building cess. The work has been completed and amounts released except certain amounts. Thus, they have requested respondent No.3 to release the payments which are specifically mentioned therein.

15. In view of the aforesaid submissions, it is relevant to note that a learned Judge of the combined High Court of Andhra Pradesh at Hyderabad in M/s. Cormandel Prestcrete Private Limited¹, has extensively considered the scheme of the aforesaid two Acts i.e., Cess Act, 1996 and the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996 ('the Workers' Act' for brevity) as well as its objects and, ultimately, the following seven (07) issues were framed.

1. Whether before implementing the provisions of a statute (Cess Act) and issuance of orders in the impugned Memo, which seeks to implement the provisions of the statute, by way of collection of 1% labour cess from the bills of the petitioners, the Government is under an obligation to issue notice to the petitioners, and whether non-issuance of prior notice, violated the principles of natural justice?

2. Whether the Government by issuance of orders in a Memo, is entitled to collect 1% labour cess from the bills of the petitioners w.e.f. 26.06.2007, i.e. a date much prior to its issuance and after constitution of the Welfare Boards as provided under the statute?

3. Whether non-mentioning of the levy and collection of 1% labour cess in the agreements/contracts entered into by the petitioners with the respondents, gives the petitioners any legitimate expectation that 1% labour cess in terms of the Cess Act, would not be collected by the respondents from them?

4. Whether absence of the clause relating to levy and collection of 1% labour cess in the agreements/contracts, disentitles the respondents from deducting the said 1% labour cess from the bills of the petitioners, which in fact, is sought to be collected in giving effect to the Cess Act?

5. Whether by allowing the respondents to collect the said 1% labour cess on the

basis of the impugned Memo issued by the Government, amounts to permitting the respondents to alter the terms and conditions of the agreements/contracts, entered into by the petitioners with the respondents?

6. Whether the respondents are entitled to collect 1% labour cess only after following the procedure contemplated under the Cess Act, in that after filing of returns by the petitioners, making of assessment by the authority, determination of liability of the petitioners, and after issuance of show cause notice as to collection of such determined liability?

7. Whether the respondents, while collecting 1% labour cess from the bills of the petitioners in terms of the Cess Act, should collect the same only taking into consideration the cost of the construction, but not the entire value of the work, and whether the element of profit should be excluded while deducting the 1% labour cess?

16. On considering the submissions made by both sides, the learned Judge held as under:

"The respondents do not dispute the fact that in some of the agreements/contracts entered into by them with the petitioners prior to 26.06.2007, there is no clause incorporated for levy and collection of 1% labour cess from the bills payable to them, and that levy and collection of 1% labour cess, was not included in the estimates submitted. However, the absence of such a clause relating to levy and collection of 1% labour cess in the agreements/contracts and non-inclusion of the same in the estimates, by itself do not preclude the respondents from levying and collecting the 1% labour cess, which in fact, is sought to be levied and collected by giving effect to the provisions of a statute, which was in force as on the date of the respondents entering into agreements/contracts with the petitioners. No doubt, in the agreements/contracts entered into by the respondents with the petitioners prior to 26.06.2007, the clause relating to levy and collection of cess is absent, but the fact remains, at the time when the petitioners entered into agreements/contracts with the respondents, the Workers Act and the Cess Act, which came into force on w.e.f. 01.03.1996 and 03.11.1996 respectively, were very much in force, and in fact, the petitioners in Clauses No.69 of the agreements/contracts entered into by them with the respondents, have agreed to comply with all the labour regulations."

"....In that view of the matter, it has to be held that the contention of the petitioners that the respondents are not entitled to collect 1% labour cess unless they follow the procedure contemplated under the Cess Act, namely after filing of returns by the petitioners, followed by assessment by the authority, determination of liability of the petitioners, and calling upon them to show cause as to why the amount determined should not be collected, is bereft of any merit."

"....Thus, it is clear that the labour cess sought to be collected is not on the entire value of the work, but only on the cost of construction, which is as provided in Section 3 of the Cess Act and Rule 3 of the Rules made thereunder, as also the

notification dated 26.09.1996, issued by the Central Government. Therefore, it has to be held that the respondents while levying and collecting the labour cess, have to collect the same on the cost of the construction incurred by an employer and not the entire value of the work. Accordingly, this question is answered.”

17. In another judgment of a Division Bench of the High Court of Judicature for the States of Telangana and Andhra Pradesh at Hyderabad in Government of Andhra Pradesh v. Lakamsani Samba Siva Rao 2016 (2) ALD 716 (DB), had considered the definition of Section - 2 (d) of the Workers Act and cost of construction as defined under Section - 3(1) of the Cess Act, 1996 and held that the expression “building or other construction work” is neither a heading of Section, nor can that be treated as a marginal note. It is an expression which is defined by Section - 2(d). Therefore, the contention that merely the heading of Section - 2(d) of the Workers Act uses the word ‘building’ does not mean any building, including blast furnace, which is otherwise not included in the definition originally or by issuing notification contemplated under this provision cannot be accepted. The expression “the cost of construction” as employed in Section - 3 (1) of the Cess Act, 1996 would mean the entire cost incurred for construction of a building, such as crane or blast furnace, since its construction and erection cannot be separated. Though two separate agreements were executed between the contractors and companies-principal employer for construction and supply of plant, machinery and equipment, which was a composite contract for construction/erection of crane with material. Therefore, contract for supply of plant and machinery cannot be taken into account for directing the contractors to pay/deduct 1% cess under the provisions of Cess Act, 1996.

18. In view of the aforesaid principle laid down in the aforesaid judgments, the contention of the petitioners is that without including the levy of 1% labour cess in the subject contracts, the respondents cannot claim the same is untenable. As discussed above, as per the provisions of the Statute, it is the statutory obligation on the part of the contractors to comply with the same. Merely because the clause is not incorporated in the agreements, the petitioners cannot now contend that they are not liable to pay the said cess.

19. As discussed above, in W.P. Nos.17219 and 17235 of 2022, the petitioners have not filed copies of the agreements. However, they have mentioned the agreement numbers as Agreement Nos.44/CR/2007, 68/S/2008, 98/S/2008 and 21/S/2009 and 78/N/2007, 44/N/2009 & 88/N/2009 respectively. However, the petitioner in W.P. No.17235 of 2022 has not mentioned the dates of the said agreements, but it appears they relate to the years of 2008 and 2009. As stated above, respondent No.4 had issued Notification dated 26.06.2007 constituting a Board by issuing G.O. Therefore, the petitioners have to pay the aforesaid cess at the aforesaid rate w.e.f. 26.06.2007 itself. The said principle was also laid down by a learned Single Judge of this Court in M/s. Cormandel Prestcrete Private Limited¹. No writ appeal is filed against the said judgment and it attained finality. Thus, both the petitioners in W.P. Nos.17219 and 17235 of 2022 have to

pay the aforesaid cess at the aforesaid rate.

20. In so far as the petitioner in W.P. No.10601 of 2011 is concerned, the name of the work and the value of the work are specifically mentioned in the contract. In all the agreements dated 19.09.2007, 07.07.2008, 10.12.2008 and 23.03.2009, the nature of work, value of the works have been specifically mentioned. All the said works includes the definition of "building or other construction work" as defined under Section - 2 (d) of the Workers Act, 1996. The petitioner in W.P. No.10601 of 2011 is liable to pay cess in terms of Section - 1 of Act 28 of 1996.

21. As discussed above, vide proceedings dated 03.03.2009 i.e. Chief Engineer, Works of South Central Railway has narrated the entire facts and also G.O.Ms.No.57, dated 26.06.2007 issued by respondent No.2 constituting Welfare Board directing all the Officers of Central Government and State Government for recovery the building cess. He has also referred the judgments in M/s. Cormandel Prestcrete Private Limited¹ and the Delhi High Court in its judgment dated 28.02.2007. He has also categorized all the cases into two. Referring to the same, vide proceedings, dated 03.03.2009, respondent No.2 has instructed all the Divisions of South Central Railways to work out the cess to be collected from contractors from the agreements in force on or after 26.06.2007 and also from the agreements in which work is completed but final bills are yet to be drawn as on date and take immediate necessary action to recover the amounts from the contractors' bills. Thus, there is no error in the same. It is a reasoned order/instructions issued by respondent No.2.

22. Viewed from any angle, the petitioners failed to make out any ground to interfere with the aforesaid proceedings and, therefore, the writ petitions fails and the same are liable to be dismissed.

23. All these writ petitions are accordingly dismissed. However, in the circumstances of the case, there shall be no order as to costs.

As a sequel, the miscellaneous petitions, if any, pending in the writ petitions shall stand closed.