

SUPREME COURT OF INDIA

A.Prabhakara Reddy & Co .

Vs.

State of M.P. & Ors.

C.A.No.375 of 2006

(Vikramajit Sen and Shiva Kirti Singh,JJ.,)

24.08.2015

JUDGMENT

Shiva Kirti Singh,J.,

1. The questions of law in these appeals are same and arise out of similar factual matrix. Hence, they have been heard together and shall be governed by this common judgment.

2. The appellants are engaged in the business of construction of buildings etc. In the present matters their grievance is against demand of cess under The Building and Other Construction Workers' Welfare Cess Act, 1996 (Act 28/96) (hereinafter referred to as 'the Cess Act') in the following factual premise. Their agreements or contracts for construction of projects belonging to departments and instrumentalities of Government of Madhya Pradesh were finalized and work orders were issued to contractors (the appellants) between December 2002 to March 2003. Since the Madhya Pradesh Building and Other Construction Workers' Welfare Board (hereinafter referred to as 'the Board') came to be constituted only on 9.4.2003 followed by gazette publication on 10.4.2003, there could be no provision in the contracts as to who shall bear the burden of paying cess under the Cess Act. On that as well as several other grounds the appellants, being aggrieved with the demand of cess made upon them, challenged such demand by preferring writ petitions which have been dismissed by the impugned common judgment dated 21.6.2004 of the Division Bench following an earlier judgment dated 17.3.2004 in LPA no. 169 of 2003.

3. The impugned judgment exhibits more than one ground to assail the demand of cess but before us the appellants have given up the other grounds and have confined their challenge on the ground that the Assistant Labour Commissioner (ALC) in his letter to the Chief Engineer of the concerned project at Jabalpur had communicated that cess is to be recovered w.e.f. 1.4.2003. He also reminded the Chief Engineer that it was expected of him that he will "definitely stipulate the condition of payment of 1% cess in each tender with effect from above date." On the basis of above, the submission on behalf of appellants is that no cess could be levied for the tenders, contracts and work orders for construction that came into existence before the Board was constituted on 9/10.4.2003. As per submissions of Mr. Sunil

Gupta, learned Senior Advocate for the appellants, the cost of construction triggers the charging of cess under Section 3 of the Cess Act. Such cost stands ascertained and determined when contract is executed and work order issued. This cost cannot be split up into two components, one for the pre-Board and the other for the later period for levying cess on the cost incurred in the latter period only. It is also the case of the appellants that if demand of cess is made on construction works undertaken or even contemplated on account of issue of work order before the constitution of the Board, then such demand would amount to making the Cess Act operate retrospectively and that would be unwarranted, illegal and unjust.

4. In view of such limited issues, it is not necessary for us to consider at length the factual details. Only some relevant dates and facts have to be noted to support our reasons for not agreeing with the aforesaid contentions advanced on behalf of the appellants.

5. The Union of India was evidently concerned with the sad plight of construction workers belonging to unorganized sector. With a view to regulate employment and conditions of service of Building and other construction workers and to reduce their exploitation by providing for welfare measures related to their safety, health etc, the Central Government promulgated The Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Ordinance 1995 on 3.11.1995. It was succeeded by other Ordinances bearing nos. 3/96, 15/96 and 25/96. The last Ordinance dated 20.6.1996 was followed by the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996 (Act 27/96) (hereinafter referred to as 'the BOCW Act'). It was published in the gazette on 19.8.1996 but as provided by Section 1(3), it was effective from 1.3.1996. For its effective working, a cess or fee was necessary. For that the Parliament enacted the Cess Act (Act 28/96).

6. The Cess Act was published in the gazette on 19.8.1996. Under Section 1(3) it was enforced from still an earlier date, i.e, 3.11.1995. Under this Act, the Central Government framed The Building and Other Construction Workers' Welfare Cess Rules, 1998 (hereinafter referred to as 'the Rules') which came into force on publication in the official gazette dated 26.3.1998. As noted earlier the Madhya Pradesh Government constituted the Board after considerable delay by a notification dated 9.4.2003 published in the official gazette dated 10.4.2003.

7. It is relevant to note that the constitutionality of the Cess Act and Rules framed thereunder was challenged before the High Court of Delhi which upheld it. The matter came to this Court and by judgment in the case of *Dewan Chand Builders and Contractors vs. Union of India & Ors. reported in'* this Court also dismissed the challenge and held that the levy is in fact a "fee" and not a "tax".

8. The appellants have based their contention noted earlier on the premise that the cess chargeable under the Cess Act is a fee and therefore it cannot be levied from a retrospective date when there was no Board to render any service. Mr. Sunil Gupta, learned senior advocate for the appellants placed reliance upon judgments of this Court in the case

of *Khazan Chand & Ors. vs. State of Jammu and Kashmir & Ors.*², *M/s Ujagar Prints & Ors. (II) vs. Union of India & Ors.*³, and *Union of India & Ors. vs. Bombay Tyre International Ltd. & Ors.*⁴, to highlight that a statute for compulsory levy or tax is required to have provisions for charging of the levy/tax, for the machinery to make the assessment and lastly, provisions for collection or recovery.

9. He also relied upon judgment in the case of *Shyam Sunder & Ors. vs. Ram Kumar & Anr.*⁵, to buttress the well established proposition of law that retrospective operation is not to be given to a statute when the effect is to adversely affect existing right or obligation, (matters of procedure being an exception) unless retrospective operation cannot be avoided on account of express language or necessary intendment flowing from the enactment.

10. Counsel for the State of Madhya Pradesh and other respondents pointed out that after the Union of India through a notification bearing Sl. No. 2899 dated 26.9.1996 specified the rate of cess as 1% of cost of construction, the liability of concerned employers under the Cess Act became fully ascertainable on the basis of Section 3 of the Cess Act which provides 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.”

11. He highlighted the provisions in the Cess Act and Rules framed thereunder such as Rules 3, 4, 5 & 7 providing for levy of cess; time and manner of collection; transfer of the proceeds of the cess to the Board; and assessment of the cess, to support his contention that there is no basis under the law to support the plea of the appellants that the contracts or work orders

finalized before constitution of Board must be made immune from levy of cess on the ground that cost of construction must always be treated as a single entity and therefore incapable of two divisions, one pertaining to pre-Board period and the other relating to after the constitution of the Board. He supported the views of the High Court that there can be no estoppel against statute and hence, even if a contract or work order does not provide for payment of recovery of cess by the contractor or the principal, the statute providing for cess cannot become ineffective. It is also the stand of the respondents that had the cess been a tax, the liability to pay the same would be coterminous with the entire cost, if construction was after coming into force of the Cess Act but since it has been held to be a fee, the respondents have acted reasonably and effected its levy by raising demands only to cover such cost of construction which coincides with and begins from the constitution of the Board.

12. Although learned senior counsel for the appellants had taken us through the entire scheme of the Main Act as well as the Cess Act and also the Rules framed thereunder, but nothing helps the appellants' case and in view of limited issues arising from determination, we do not feel persuaded to go into details of the Cess Act and the Rules unnecessarily. We are of the considered view that after the Cess Act and the Rules came into effect and the Board was constituted, with the notification specifying the rate of cess to be levied upon the cost of construction incurred by the employer already in place, the respondents were duty bound to collect the cess by raising the demands in respect of the on going construction works if the workers in such construction activities were eligible for benefits under the BOCW Act. The fact that the task of registering the workers and providing them the benefit may take sometime, would not affect the liability to pay the levy as per the Cess Act. Any other interpretation would defeat the rights of the workers whose protection is the principal aim or primary concern and objective of the BOCW Act as well as the Cess Act. The Cess is a fee for service and hence, its calculation, as per settled law is not to be strictly in accordance with quid pro quo rule and does not require any mathematical exactitude. The scheme of the BOCW Act, the Cess Act and the Rules warrant that the lawfully imposable cess should be imposed, collected and put in the statutory welfare fund without delay so that the benefits may flow to the eligible workers at the earliest. The scheme of the BOCW Act or the Cess Act does not warrant that unless all the workers are already registered or the welfare fund is duly credited or the welfare measures are made available, no cess can be levied. In other words the service to the workers is not required to be a condition precedent for the levy of the cess. The rendering of welfare services can reasonably be undertaken only after the cess is levied, collected and credited to the welfare fund.

13. We also find no merit in other submission advanced on behalf of the appellants that there is legal impediment in charging levy on the cost of construction incurred by the employer from a particular period on account of constitution of Board from a particular date or for any other reason. This argument is fallacious. Such beneficial measures for the welfare of workers are applicable even to the construction activity which may have commenced before coming into force of the BOCW Act and the Cess Act, if they are subsequently covered by the provisions of these Acts. There can be no legal obstacle in ignoring the construction cost incurred before the cess became leviable by distinguishing it from the cost of construction incurred later, from a date when the Board is available to render service to the Building and

other construction workers. Levy of cess in these facts and circumstances cannot be faulted for any reason. Demand of cess in the given facts cannot amount to retrospective application of the Cess Act. Hence the appeals must fail.

14. Before parting with the judgment, it is made clear that the appellants did not press their contention that if cess is found leviable, its liability should be borne by the principal, i.e, Government of Madhya Pradesh. They have sought liberty that they be permitted to raise such contention in an appropriate proceeding, in accordance with law. This liberty is granted.

15. The appeals are dismissed but without costs. If any dues of cess payable by the appellants to the respondents has remained unpaid on account of interim orders, all such lawful dues should be paid by the appellants as per law at the earliest and in any case within eight weeks.

Judgment Referred.

¹(2012) 1 SCC 0101

²(1984) 2 SCC 0456

³(1989) 3 SCC 0488

⁴(1984) 1 SCC 0467

⁵(2001) 8 SCC 0024