

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

MONDAY, THE 12TH DAY OF JANUARY 2015/22ND POUSHA, 1936

WP(C).No. 19440 of 2005 (L)

PETITIONER(S) :

**NANDAKUMAR, AGED 50 YEARS,
S/O.G.P.NANOO, NANDHA BHAVANAM THAMARAKKULAM, KOLLAM,
PROPRIETOR, M/S.SASTHA ENTERPRISES, THAMARAKKULAM,
KOLLAM.**

BY ADV. SRI.C.RAJENDRAN

RESPONDENT(S) :

- 1. UNION OF INDIA REPRESENTED BY
SECRETARY TO GOVERNMENT OF INDIA,
MINISTRY OF FINANCE, NEW DELHI.**
- 2. STATE OF KERALA, REPRESENTED BY
CHIEF SECRETARY, SECRETARIAT, THIRUVANANTHAPURAM.**
- 3. THE DISTRICT LABOUR OFFICER,
OFFICE OF THE DISTRICT LABOUR OFFICER, COLLECTORATE,
KOLLAM.**
- 4. THE ASSESSING OFFICER,
(THE AUTHORITY UNDER THE BUILDING AND OTHER
CONSTRUCTION WORKERS ACT) (THE ASSISTANT LABOUR
OFFICER, GRADE I, KOLLAM).**

*** ADDITIONAL R5 IMPEADED**

- 5. THE BUILDING AND OTHER CONSTRUCTION WORKERS
WELFARE FUND BOARD, THIRUVANANTHAPURAM,
REPRESENTED BY THE SECRETARY.**

*** IS IMPEADED AS PER ORDER DATED 12.01.2015 IN I.A.NO.9906/2005.**

**R1 BY ADV. SRI.N.NAGARESH, A.S.G.
R2 TO R4 BY GOVERNMENT PLEADER SRI.T.J.MICHAEL
ADDL.R5 BY ADV. SRI.C.R.SYAMKUMAR, S.C**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 12-01-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

Msd.

APPENDIX

PETITIONER(S)' EXHIBITS

- EXHIBIT P1: TRUE PHOTOCOPY OF THE ASSESSMENT ORDER
NO.C1/KT 1221/2437/04FAO DATED 28.02.2005 PASSED BY
THE 4TH RESPONDENT.**
- EXHIBIT P2: TRUE PHOTOCOPY OF THE MEMORANDUM OF APPEAL
DATED 16.06.2005 FILED BEFORE THE 2ND RESPONDENT.**
- EXHIBIT P3: TRUE PHOTOCOPY OF THE PETITION SUPPORTED BY AN AFFIDAVIT
FILED BY THE PETITIONER BEFORE THE SECOND RESPONDENT.**
- EXHIBIT P4: TRUE PHOTOCOPY OF THE SECTION 11 OF BUILDING AND OTHER
CONSTRUCTION WORKERS WELFARE CESS ACT 1996.**
- EXHIBIT P5: TRUE PHOTOCOPY OF THE RULE 14(1) AND (2) (A) TO (E) OF
THE BUILDING AND OTHER CONSTRUCTION WORKERS WELFARE
CESS RULE, 1998.**
- EXHIBIT P6: TRUE PHOTOCOPY OF THE JUDGMENT PASSED BY THIS HON'BLE
COURT IN W.P.(C).NO.5125/2005 DATED 14.02.2005.**

RESPONDENT(S)' EXHIBITS

NIL

//TRUE COPY//

P.S.TO JUDGE.

Msd.

K.Vinod Chandran, J.

W.P.(C).No.19440 of 2005-L

Dated this the 12th day of January, 2015

JUDGMENT

The petitioner challenges the condition imposed under Rule 14(2)(b) of the Building and Other Construction Workers Welfare Cess Rules, 1998 [for brevity “Cess Rules”] as *ultra vires*.

2. Rule 14(2)(b) of the Cess Rules is extracted hereunder:

“14. Appeal.- (1) An employer aggrieved by an order of the assessment made under rule 7 or by an order imposing penalty made under rule 12 may appeal against such order, within three months of the receipt of such order, to the Appellate Authority.

(2) The appeal shall be accompanied with -

xxx

xxx

xxx

(b) a certificate from the cess collector to the effect that the amount of cess or penalty or both, as the case may be, relating to such appeal has been deposited;

xxx

xxx

xxx”.

As per the above provision, when an appeal is filed by the employer, against an order of assessment made under rule 7 or an order imposing penalty under rule 12, the appeal would be maintainable

only if the conditions under sub-rule (2) are satisfied. One of the conditions indicated in sub-rule (2) is the pre-deposit of the entire amount of cess or penalty imposed.

3. The learned counsel for the petitioner submits that the said visits the employer with harsh consequences, insofar as the entire amounts are directed to be paid to maintain an appeal and that would, in fact, render the appellate remedy itself nugatory. The learned counsel for the petitioner relies on the decision in ***Merdia Chemicals v. Union of India* [2004 (2) KLT 273 (SC)]** to contend, that, following the above principle this Court has to declare Rule 14 (2)(b) to be *ultra vires* the Constitution.

4. The reasoning in setting aside a condition of pre-deposit in ***Merdia Chemicals* (supra)** is clear from paragraph 64:

“64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet (iii) the secured assets or its management with transferable interest is already taken over and under control of the secured creditor (iv) no special reason for double security in respect of an amount yet to be determined and settled (v) 75% of the amount claimed by no means would be a meager amount (vi) it will leave the borrower in a position

where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution”.

The Hon'ble Supreme Court in the aforesaid case was concerned with an adjudication at the first instance and not an appeal as in the present case. In fact, the reasoning above extracted would clearly indicate that the same is not applicable in the teeth of the provisions in the above case. Herein, it is not the first adjudicating authority and the pre-deposit is mandated only when an appeal is filed from the order of the first adjudicating authority, either making an assessment or imposing penalty. It is also to be noticed that the aforesaid challenge is against a welfare legislation, where the marginalised section of society, employed in the building and other construction works are sought to be protected by an enactment. A levy is imposed on the employer to ensure the welfare of the workers employed in such industry, who are not in the organized sector. An assessment is indicated under the Act and the Rules and a penalty also is contemplated against any employer who fails to comply with the

mandatory provisions of the Act. The first adjudicating authority is required to consider the assessment, after issuing notice and hearing the employer. It is in the first appeal, the pre-deposit is imposed. This Court finds nothing harsh in the above condition and the reasoning in the afore-cited decision would not apply.

The writ petition would stand dismissed. No costs.

Sd/-
K.Vinod Chandran,
Judge.

vku.

(true copy)