

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 239 OF 2018

(Under Article 32 of the Constitution of India)

Mohd. Younus & Ors.

... Petitioner (s)

Versus

Union of India & Ors.

... Respondent (s)

COUNTER AFFIDAVIT FILED ON BEHALF OF THE TWENTY FOURTH

RESPONDENT, THE UNION TERRITORY OF PUDUCHERRY

I, Dr. S. Sundaravadivelu, I.A.S, son of Thiru. Subramanian, Hindu, aged about 57 years and having my office at the Chief Secretariat Complex, Goubert Avenue, Puducherry, do hereby solemnly affirm and sincerely state as follows:-

2. I am the Secretary to Government (Labour), Puducherry and in such capacity, I am well acquainted with the facts of this case and I am filing this counter affidavit on behalf of the twenty fourth respondent namely, the Union territory of Puducherry, as per the directions of this Hon'ble Court.

3. I am filing this counter affidavit in compliance of the Order, dated 14.08.2018 of this Hon'ble Court in this Writ Petition.

4. I respectfully submit that in order to regulate the employment and conditions of service of building and other construction workers and to provide for the levy and collection of cess on the cost of construction incurred by employers with a view to augmenting the resources of the Building and Other Construction Workers Welfare Boards, the Government of India has framed the Building and other Construction Workers (Regulation of Employment and Condition of Service) Act, 1996 (No.27 of 1996) and the Building

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and other Construction Workers Welfare Cess Act, 1996 (No.28 of 1996) which are Central Acts and the Building and other Construction Workers Welfare Cess Rules, 1998.

5. I further respectfully submit that the Government of Puducherry with a view to enforce the provisions of the Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (No.27 of 1996) has notified the rules namely the Puducherry Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2001 was notified vide G.O.Ms.No.25/2001/Lab/AIL/G, dated 28<sup>th</sup> August, 2001 and published vide Part-II of the extra-ordinary Official Gazette No.14, dated 29.08.2001 and accordingly constituted the Puducherry Building and Other Construction Workers Welfare Board vide G.O.Ms.No.44/Lab/AIL/G/2002, dated 23.12.2002 of the Labour Department and published vide Official Gazette No.2, dated 14.01.2003.

6. I further respectfully submit that, no separate Cess Rules were framed in the Union territory of Puducherry and the Building and other Construction Workers Welfare Cess Rules, 1998 being the Central Rules was adopted by this U.T. of Puducherry. However, the guidelines was issued vide G.O.Ms.No.5/Lab/AIL/G/2015, dated 17.03.2015 in respect of Building and other Construction Workers Welfare Cess Act, 1996.

7. I further respectfully submit that as per section 2(1) (d) of the Central Act i.e. the Building and other Construction Workers (RECS) Act, 1996, "building and other construction work" means construction, alteration, repairs, maintenance or demolition, of or, in relation to, buildings, streets, roads, railways, tramways, airfields, irrigation, drainage, embankment and navigation works, flood control works including storm water drainage works, generation, transmission and distribution of power, water works including channels for distribution of water, oil and gas installation, electric lines, wireless, radio, television, telephone, telegraph and overseas communication, dams, canals, reservoirs, watercourses, tunnels,

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bridges, viaducts, aqueducts, pipelines, towers, cooling towers, transmission towers and such other work as may be specified in this behalf by the appropriate Government, by notification but does not include any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948) or the Mines Act, 1952 (35 of 1952), apply.

8. I further respectfully submit that as per section 2(1)(j) of the Central Act, "establishment" means any establishment belonging to, or under the control of, Government, anybody 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.

9. I further respectfully submit that as per section 2(1) (i) of the Central Act, "employer" means 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.

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10. I further respectfully submit that the section 3 of the Building and other Construction Workers Welfare Cess Act, 1996 provides for mandatory levy and collection of cess on the "building and other construction work" and the Government of India vide notification issued S.O. 2899 dated 26.09.1996 has provided that the cess shall be levied @ 1% of the cost of "building and other construction work" incurred by an employer.

11. I further respectfully submit that the sub-section (2) of Section 3 of the Cess Act, 1996 provides that the cess 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.

12. I further respectfully submit that as per the provisions of Section 9 of the Building and other Construction Workers Welfare Cess Act, 1996 readwith Rule 12 of the Building and other Construction Workers Welfare Cess Rules, 1998 provides for imposing penalty for non-payment of cess by the employer within the specified time as prescribed.

13. I further respectfully submit that the application of the said Act to the eligible employer and the exemption thereunder are within the ambit of section 2(i) of the Building and other Construction Workers (RECS) Act, 1996 readwith sub-rule (1) of Rule 9 of the Building and other Construction Workers Welfare Cess Rules, 1998. The levy of cess is done as per sub-section (1) of Section 3 of the cess Act and the rules made thereunder from the date of issue of notification in the Official Gazette and no cess is collected retrospectively.

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14. I further respectfully submit that for enforcement of the Act and collection of Cess, the Government has appointed Inspectors vide G.O.Ms.No.32/2001/LAB/G, dated 13<sup>th</sup> December, 2001 of the Labour Department, Government of Puducherry. The Labour Officer (Enforcement), Puducherry and the Labour Officer, Karaikal were appointed as the Registering Officers vide G.O.Ms.No.33/2001/LAB/G, dated 13<sup>th</sup> December, 2001 of the Labour Department, Government of Puducherry and the Deputy Labour Commissioner, Puducherry was nominated as the Appellate Officer vide G.O.Ms.No.34/2001/Lab/G, dated 13.12.2001 for the purpose of the said Act. The Labour Officer (Enforcement), Puducherry and the Labour Officer, Karaikal were appointed as the Cess Collectors vide G.O.Ms.No.8/2002/LAB/G, dated 05.03.2002.

15. I further respectfully submit that in the Union Territory of Puducherry the cess amount is calculated and collected as per the recommendation of guidelines enumerated vide G.O.Ms.No.32/Lab/AIL/G/2013, dated 16.09.2013. (**Annexure -I**)

16. I further respectfully submit that the Cess Collector is required to collect the cess as per sub-rule(1) of rule 4 of the Cess Rules, 1998 within 30 days of completion of the construction project or within 30 days of the date on which assessment of cess payable is finalized, whichever is earlier.

17. I further respectfully submit that in the Union territory of Puducherry, all building activities are being regulated by the Planning Authorities constituted under the Puducherry Town and Country Planning Act, 1969. Therefore, whenever private parties and public bodies approach the Planning Authorities seeking for plan approval, the Cess amount payable is being assessed, levied and collected.

18. I further respectfully submit that as per the directions of the Government of India, Ministry of Labour and Employment, New Delhi issued vide Lr.No.Z-20011/05/2010-BL, dated 27.02.2014 under section 60 of the Building and other Construction Workers

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(Regulation of Employment and Conditions of Service) Act, 1996, 47 numbers of Additional Cess Collectors were appointed vide G.O.Ms.No.25/Lab/AIL/G/2015, dated 27.03.2015 (**Annexure-II**) for the purpose of collection of cess from the employer under the Building and other Construction Workers Welfare Cess Act, 1996 (Central Act 28 of 2006).

19. I further respectfully submit that, if any individual employs workers in any building or any other construction activity for his own residence and in case the total cost of construction does not exceed Rs.10 lakhs the said individual establishment is not covered under the Act. Further, cess is being collected from all the commercial buildings such as schools, parks, colleges, bridges, offices, malls, Government buildings, Government undertaking buildings, hospitals and private buildings etc.,

20. I further respectfully submit that the Building and other Construction Workers Welfare Cess Act, 1996 was enforced w.e.f. 01.03.1996 and the Rules thereunder was enforced w.e.f. 19.11.1998. The recovery of cess was effected from the date when the Central Act was enforced and no cess was collected retrospectively.

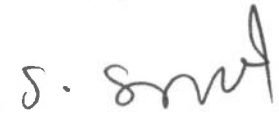
21. I further respectfully submit that the Assessment of cess is done by the Authority as prescribed under the Act. The Government of Puducherry has appointed the Assessing Officers for assessment of cess under the Cess Act vide G.O.Ms.No.23/LAB/AIL/G/2013, dated 26.06.2013 (**Annexure-III**) and appointed the Appellate Authority for making any appeal against the assessment order vide G.O.Ms.No.22/LAB/AIL/G/2013, dated 26.06.2013 (**Annexure-IV**).

22. I further respectfully submit that the provisions of the Act elucidates that a construction worker is eligible for registration in the board, if he/she has worked for 90 days during the preceding year. The Building and other Construction Workers (RECS) Act provides for regulation of employment and conditions of service of building and other construction workers and to provide safety, health and welfare measures for them. Minimum period of working as construction

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worker has been prescribed so as to prevent misutilization of registration facilities by persons who are not actually working as construction workers. Therefore, the contention of the petitioner stating that the Act impugned is untenable is without any basis.

23. I further respectfully submit that the amount so collected as cess from the employer are being spent for providing various welfare benefits such as Maternity Benefit, Medical Assistance, Marriage Assistance, Educational Assistance, Funeral Assistance, Death Benefit, Gift amount and insurance coverage etc. to the eligible enrolled construction workers. Collection of cess is done as per the provisions of the Cess Act. Therefore, comparison of eligibility criteria for enrolment as beneficiaries in the board with collection of cess is not appropriate.

24. I further respectfully submit that as per the directions of this Hon'ble Court, the amount collected from time to time was also deposited in the Nationalised Banks as Fixed Deposits to earn added interest for the benefit of workers.

25. I further respectfully submit that the wages paid to the building and other construction workers for the work done to the employer cannot be calculated on par with the cess amount to be paid for the building work.


26. I further respectfully submit that as per section 2(j) of the Building and other Construction Workers (RECS) Act, 1996, in case of individual residential building, the 1% cess shall be collected only when the estimated total cost of construction work exceeds Rs.10 lakhs.

27. I further respectfully submit that the cess levied as per sub-section(4) of section 3 of the Cess Act,1996 which includes payment of cess in advance and is subject to final assessment on the basis of the quantum of the building or other construction work involved. Further, the assessment is done as per Rule 7 of the

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Building and other Construction Workers Welfare Cess Rules, 1998. If the assessee is aggrieved by the order of the assessment may prefer appeal against such order within 3 months of the receipt of the order under Rule 14 of the Cess Rules, 1998.

28. I further respectfully submit that as per section 5 of the Cess Act, 1996 the Assessment Officer is required to make inquiry of information furnished by the employers and on being satisfied about the correctness of the particulars so furnished, shall make an order of assessment indicating the amount of cess payable by the employer. Therefore the Act impugned is valid in law and the challenge to it deserves to be rejected.

29. I, therefore most respectfully submit that the Government of Puducherry would abide by any further order, directions which may be passed by this Hon'ble Court in this regard from time to time.

Solemnly affirmed at Puducherry  
on this the <sup>16<sup>th</sup></sup> day of September, 2018  
and signed his name in my presence.

*S. Sundaravivelu*

DEPONENT

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PUDUCHERRY.**

BEFORE ME

*V. Govindaradjou*

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