

Applicability of the Building and other Construction Workers (RE & CS) Act to Factories

SV Ramachandra Rao
Resource Inputs Limited
svrr@resourceinputs.com

In our country construction and infrastructure industry is one of the major sector employing over 9 million workers in the construction activity and this sector plays a pivotal role in the development and progress of the nation and its economy. The workers in this sector are mostly migrant in nature and vulnerable unorganised labour. The nature of work is also characterized by inherent risk to the life and limb of the workers. The work is casual nature and has a very temporary employer employee relationship for short durations. In most of cases, they work through contractors and sub-contractors and they do not have any direct relationship with the principal employer or owner of the project. The project construction works are normally associated with uncertain working hours, lack of basic amenities and inadequacy of welfare facilities. Keeping in view these conditions, the BOCW Act and BOCW Welfare Cess Act have been brought into place by the legislature.

The BOCWA has defined building or other construction work as the construction, alternation, 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 installations, electric lines,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.

In view of the exclusion of construction work to which the provisions of the Factories Act, 1948 is applicable, the green field factories which are under construction have claimed that the BOCWA and Cess Act will not be applicable to them as the Factory Building plans are approved by the Director of Factories and the construction work is undertaken in accordance with the said approvals by the Director of Factories. Though the factory is under construction it has submitted itself to the control and supervision of the Director of Factories.

These contentions were reached the Supreme Court and finally it is now a settled law that the factories during the period of construction are not qualified to be termed as 'Factory' and they are covered under BOCWA and Cess Act.

Let us look at the rationale behind this decision. The Factories Act has defined a Factory as any premises including precincts thereof where ten or more workers are working with the aid of power in any part of which a manufacturing process is being carried on. The key issue in the definition is that there should be 'manufacturing process'.

The factories act has defined manufacturing process as any process for making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal...

The construction of the factory is not falling within the definition of 'manufacturing process'.

In addition to the requirement of carrying manufacturing process, to qualify as a factory, there is a requirement of number of workers and operations with the aid of power. The Act defined worker as a person employed in any manufacturing process or in cleaning any part of the machinery or premises used for a manufacturing process or in any other kind of work incidental to or connected with the manufacturing process.

When there is no manufacturing process, there can be no worker covered under the Factories Act during the period of construction of a factory.

The new factories during the period of construction do not have any 'manufacturing process' and also do not have any worker in accordance with the provisions of the factories act and hence the factory during the period of construction is not covered under Factories Act and it is not a factory till it commences 'manufacturing process'.

In view of the above, all the factories during the period of construction are required to be registered and BOCWA and also remit cess in accordance with the provisions of the BOCW Welfare Cess act.

Now the question remind unanswered is whether cess is payable on the total cost of the project that is including the cost of the machinery in addition to cost of civil construction cost. The authorities implementing the BOCW WelfareCess act are insisting payment on the total project cost of the factory including the cost of the machinery etc.,

In common parlance, installation of machinery is known as erection and commissioning and not construction. Now the future litigation is likely to be on these aspects with regard to the assessment of cess liability.

In a matter relating to the welfare cess, the Supreme Court expressed its anguish with regard to collection of over Rs. 27,000 crores as cess and not utilising the same for the purpose for which it is collected under act. It also expressed its view that the money, which should have been spent on the welfare of the labourers, was being spent on administration and advertisements, while the workers are condemned to live miserable life. The bench noted that it was extremely disturbed to find that the poorer people are not getting any benefits from the welfare measure.

The schemes implemented by A.P.Building & Other Construction Workers Welfare Board are: (i) Personal Accidental Death Relief, (ii) Permanent Disability Relief, (iii) Natural Death Relief, (iv) Maternity Benefit, (v) Temporary disability Relief (hospitalisation charges), (vi) Funeral Expenses, (vii) Marriage Gift, (viii) Reimbursement of training in safety and skill development expenses, (ix) Matching contribution towards Pension Scheme. (x) Vocational training to dependents. In its scheme the Welfare Board has extended support to unregistered workers also in case of accidental death and permanent disability.

While the observations made by the apex court are very true, the establishments engaged in construction activity should take up the responsibility of registering the beneficiaries that is the construction workers and assist them to claim the benefits provided under different schemes by the Government under the BOCW Act.