

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 30.08.2010

% **Judgment delivered on: 07.09.2010**

+ **O.M.P. 29/2010**

DELHI METRO RAIL CORPORATION LIMITED Petitioner
Through: Mr. Ankur Gupta, Advocate

versus

M/S SIMPLEX INFRASTRUCTURE LTD. Respondent
Through: Mr. Naresh Markanda, Senior
Advocate with Mr. V.K. Sharma,
Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? : No
2. To be referred to Reporter or not? : No
3. Whether the judgment should be reported in the Digest? : No

J U D G M E N T

VIPIN SANGHI, J.

1. The petitioner DMRC has preferred the present petition under Section 34 of the Arbitration & Conciliation Act, 1996 (the Act) to seek the setting aside of the arbitral award dated 07.10.2009 made by the arbitral tribunal consisting of three learned arbitrators. The arbitral award is a majority award rendered by two learned arbitrators, namely, Sh. S.P. Mehta, presiding arbitrator and Sh. Kanwarjit Singh, arbitrator. A dissenting opinion has been rendered by Sh. S.M. Mittal, arbitrator.

2. The brief facts may first be noted. A contract was entered into between the parties on 28.12.2000 for construction of depot and workshop at Shastri Park including ancillary items mentioned therein which constitute the “works” under the contract. The contract price, for execution and completion of the work and for remedying the defects therein, was fixed at ₹ 61,87,53,692/-. The stipulated date of completion was 02.11.2000.

3. Disputes arose between the parties, since at the time of making final payment of the respondent contractor, the petitioner showed a deduction of an amount of ₹ 57,19,257/- towards labour cess and an amount of ₹ 4,08,074/- towards withheld amount. The respondent protested against the deductions made towards the labour cess. After protracted correspondence the petitioner stated, vide letter dated 25.08.2007, that the deductions of 1% of the gross amount of work done after 01.01.2002 was towards labour cess and was in consonance with The Building and Other Construction Worker’s Welfare Cess Act, 1996 (for Short “Cess Act”) and there was no question of reimbursement of any amount. Since the agreement contained an arbitration clause, the arbitral tribunal, as aforesaid, was constituted. By the impugned majority award, an amount of ₹ 57,19,257/- towards the wrongful deduction of labour cess has been awarded in favour of the respondent/claimant. The tribunal also allowed the claim of interest @ 10% per annum from the date of the award till payment.

4. The substantive claim of the respondent claimant for reimbursement was for ₹ 57,19,257/- deducted by the petitioner by resort to the Building and Other Construction Worker's Act (Regulation of Employment and Conditions of Services) Act, 1996 (for short "BOCW Act") and the Cess Act from running bill Nos.15 to 35 of the claimant. According to the respondent claimant, upon implementation of the aforesaid acts, cess @ 1% of the contract price levied on the cost of construction had to be borne by the petitioner herein. For this purpose, the respondent placed reliance on clause 18A of the agreement which reads as follows:

"18A. Changes in Cost due to Legislation.

18A.1 If after the due date for submission of tenders for the works, there occurs any change due to any Central or State Law or any regulation or bye-laws of any Local or duly constituted Authority, or any enactment is passed by a competent legislature, relating to Excise Duty and/or Sales Tax on Works Contract, which causes additional or reduced cost to the Contractor in the execution of the Works, other than due price variation as per Clause 66.0 and Clause 67.0 of General Conditions of Contract, such additional or reduced cost shall be certified by the Engineer after examining records provided by the Contractor and shall be paid by or credited to the Employer."

5. According to the respondent claimant, the imposition of cess under the Cess Act and the BOCW Act constituted a change in a central or state law which caused additional cost to the contractor in the execution of the works, and consequently the said additional cost was liable to be borne by the employer i.e. the DMRC.

6. On the other hand, the case of the petitioner was that the Cess Act had been enacted on 19.08.1996 and was deemed to have come into force on 03.11.1995. The rules framed under the Cess Act, namely, The Building and Other Construction Worker's Welfare Cess Rules, 1998 (for Short "Cess Rules") had been notified on 26.03.1998. According to the petitioner, the cess was imposed by the Cess Act and the Rules framed thereunder, and not by the BOCW Act and the rules framed thereunder. According to the petitioner, the BOCW Act had also been enacted on 19.08.1996 and it was deemed to have come into force 01.03.1996. Even the rules under the BOCW Act, namely, The Building and Other Construction Worker's (Regulation of Employment and Conditions of Services) Central Rules, 1998 (for Short "BOCW rules") had been notified on 19.11.1998. Learned counsel for the petitioner submits that the statutory framework for levy and collection of cess was in place even before the parties entered into the aforesaid contract on 28.12.2000. The respondent was, therefore, well aware of the fact that the contract would attract levy of cess under the Cess Act and the BOCW Act. The respondent was required to make its bid inclusive of all applicable rates and taxes as existing on the date of bid and the cess levied and collected under the Cess Act and BOCW Act and rules made under these legislations could not be considered as changes accruing due to any central or state law or any regulation or bye-law of any local or duly constituted authority.

7. The arbitral tribunal, by majority, rejected the aforesaid

submission of the petitioner and accepted the submission of the respondent, after analyzing the provisions of the two enactments and the rules made thereunder and by placing heavy reliance upon the observation made by a Division Bench of this Court in its judgment rendered in a batch of writ petitions titled *Builders Association of India & Ors. etc. v. Union of India of India & Ors. etc.* 139 (2007) DLT 578.

8. The arbitral tribunal, by placing reliance on the aforesaid decision, held that the Cess Act and the BOCW Act became operative with effect from January 2002 in the National Capital Territory of Delhi (NCT of Delhi) upon issuance of the Notification No.DLC/CLA/BCW/01/19 dated 10.01.2002, whereby the Delhi Building and Other Construction Workers (RE&CS) Rules, 2002 were notified and the Delhi Building and Other Construction Workers Welfare Board was constituted vide Notification No.DLC/CLA/BCW/02/596 dated 02.09.2002.

9. Before me, the submission of learned counsel for the petitioner is that the liability to bear the cess is created by the provisions of the Cess Act. Section 3 of the Cess Act, inter alia, states that there shall be levied and collected a cess for the purposes of the BOCW Act, which is computed as a percentage of the cost of construction incurred by the employer. It also provides that the cess levied shall be collected from every employer, or be deducted at source in relation to a building or construction work of a Government or of a Public Sector Undertaking. Section 3(3) of the Cess Act provides

that the proceeds of the cess collected shall be paid by the local authority or the State Government collecting the cess to the “Board” after deducting the cost of collection. The “Board” has been defined under section 2(a) of the Cess Act to mean the “Building and Other Construction Worker’s Welfare Board” constituted by the State Government under section 18(1) of the BOCW Act.

10. Learned counsel for the petitioner therefore submits that mere delay in the constitution of the Board by the Government of NCT of Delhi (which was constituted in the year 2002) could not lead to the conclusion that the Cess Act and the BOCW Act had not become operative in the NCT of Delhi in the year 1998, by when both these enactments had been passed and enforced. He submits that the contract in question was executed only in the year 2000. Consequently, the respondent contractor was obliged to take into account of taxes and levies as existing on the date of execution of the contract, and the invocation of clause 18A by the respondent was not justified in the facts of the case. Learned counsel, therefore, submits that the impugned award is contrary to the contractual terms, the law of the land, and therefore opposed to Public Policy of India.

11. The further submission of learned counsel for the petitioner is that the observations made by the Division Bench with regard to the date of applicability of the Cess Act cannot be considered as the ratio of the said decision. He submits that the Division Bench was merely pronouncing upon the constitutional validity of the two enactments,

and the issue with regard to the date on which the two enactments became effective and operative did not arise for consideration before the Division Bench. The observations of the Division Bench relied upon by the arbitral tribunal were merely obiter dicta and did not constitute the ratio decidendi of the said judgment.

12. On the other hand, learned counsel for the respondent has placed strong reliance on the observations made by the Division Bench in the aforesaid judgment. He submits that even though the two enactments had been enacted prior to the execution of the contract in question, as a matter of fact, they were not made operative before the execution of the contract inasmuch, as, the Government of the NCT of Delhi had not constituted the Board, and the statutory authorities under the Cess Act has also not been notified as required by the Cess Rules. He further submits that the petitioner itself had not levied any cess in respect of running Bill Nos.1 to 14 raised by the respondent for the works in question. He also point out that the statutory authorities under the two enactments had also not issued any show cause notice or demand notice for collection of cess for the period prior to January, 2002. It is argued that if the submission of the petitioner were correct, that the cess in question was leviable right from day one, there was no justification for not levying the same in respect of the works covered by Bill Nos.1 to 14. He submits that the petitioner also did not make any counter claim before the arbitral tribunal in respect of the cess computed @ 1% on the works covered by Bill Nos.1 to 14. Learned

counsel for the respondent submits that these factors have also been considered by the arbitral tribunal while passing the impugned award.

13. Having heard learned counsels for the parties, and perused the impugned award as well as the judgment of the Division Bench in the case of *Builders Association of India* (supra), and taken into account the other relevant circumstances, I am of the view that there is no error in the majority award passed by the arbitral tribunal.

14. The arbitral tribunal has gone by the observations of the Division Bench in the aforesaid judgment. It was not for the arbitral tribunal to have disregarded the observations made by the Division Bench of this Court in the said decision. Even in these proceedings, it is not for me to return a finding contrary to those returned by the Division Bench. The view taken by the arbitral tribunal, which is based on the observations of the Division Bench is a possible view, and merely because a different view may also be possible, is no reason to interfere with the arbitral award.

15. The examination of the judgment of the Division Bench by the arbitral tribunal is exhaustive. It would be apposite to set out the extract of the discussion found in the majority award, which reads as follows:

“5.3.9.2 The AT notes that the interpretation of Laws made by Parliament can only be done by Courts & no one can go beyond what they interpret. We do find that the High Court has gone into very meticulous details in understanding the two Acts & the notifications. In fact

pages 36 to 44 deal with in great detail the background, statement of reasons of the Acts, various sections of both the Acts and important definitions, before dealing with the Circular of State Govt. dated 16.8.05 & DMRC letter of 9.1.06 in para 8, relevant extract of which is reproduced below.

Para 8

“ ----- . The order issued on 16.8.2005 by the office of Labour Commissioner, GNCTD states as under:

“The Government of NCT of Delhi vide Notification No.DLC/CLA/BCW/01/19 dated 10.1.2002 notified the Delhi Building and Other Construction Workers (RE&CS), Rules, 2002 and accordingly has constituted the Delhi Building and Other Construction Workers Welfare Board vide Notification No.DLC/CLA/BCW/02/596 dated 2nd September, 2002. Accordingly, the Building and Other Construction Workers Welfare Cess Act, 1996 (hereinafter referred as the Cess Act) and Building and Other Construction Workers Welfare Cess Rules, 1998 (hereinafter referred as the Cess Rules) have become operative w.e.f. January, 2002 in the whole of NCT of Delhi. -----”

The circular clearly states that the Cess Act and Cess Rules 98 have become operative from January 02 consequent to issue of notification for Delhi BOCW Rules and constitution of Welfare Boards.

Further para 13 and 44 are reproduced below:-

“13. In the connected writ petitions, the additional challenge is to validity of the Circular dated 9.1.2006 issued by the DMRC and the quashing of various show cause notices issued under the Cess Act and the Rules there under. Some of the petitions seek the quashing of the Circular dated 7.2.2006 issued by the DDA which is on the same lines as the Circular dated 9.1.2006 issued by DMRC. Likewise, the petitions challenge the Circular dated 12.12.2005 issued by the Superintendent Engineer, CPWD, the Circular dated 13.9.2006 issued by the Delhi Jal Board (DJB), the notice dated 23.2.2006 issued by the Married Accommodation project (MAP). The connected appeals are, as already noticed, against an order of the learned Single Judge vacating the interim stay of demand that was earlier granted.”

“44. Accordingly, these writ petitions and appeals are dismissed and it is held as under:

- (1) The BOCW Act, the Cess Act, 1998 Central Rules, the Cess Rules and the 2002 Delhi Rules are constitutional and valid and the challenge to their constitutional validity is hereby negated.
- (2) The impugned order dated 9.1.2006 issued by DMRC, Order dated 16.8.2005 by the office of labour commissioner, GNCTD, 12.12.2005 issued by the Superintending Engineer, Circular dated 13.9.2006 issued by the Delhi Jal Board, notice dated 23.2.2006 issued by the Married Accommodation Project and any other similar circular are upheld and the challenge to the same is hereby negated.
- (3) The challenge to various show cause notices issued to various contractors seeking levy of cess under the cess Act is hereby rejected."

The above paras clearly state that in various writ petitions, challenging the validity of the two Acts & the Rules, the additional challenge was also to the validity of the DMRC circular of 9.1.06, Circular of Labour Commissioner GNCTD dated 16.8.2005 & quashing of the various show cause notices issued under the Cess Act & the rules there under.

Thus we do not accept the oral submission of the Respondent to the effect that the issue before the Court was only in regard to the constitutional validity of the Acts & Rules.

5.3.9.3. The Hon'ble High Court, no doubt, has dealt with the constitutional validity of the two Acts & the two Rules framed therein & upheld their validity. However, they have, simultaneously also dealt with the challenge to the circular dated 16.8.05 issued by the Labour Commissioner as also DMRC letter dated 9.1.06 as is clear from above observations & have concluded that the challenge to these circulars must also fail. In this connection para 36, is quite relevant & reproduced below:-

*"36. The challenge to the 1998 Central Rules, the Cess Rules and the circulars of the State Agencies and DMRC must also fail. As already noticed, the Rules only carry forward the objectives of the statutes. As far as the Government agencies and PSUs are concerned, they are simply performing their statutory duty and can not be faulted with for issuing directions concerning deduction of cess at source. **Also the circulars have***

correctly understood the law and are consistent with the Rules. This is not a case of excessive delegation to a state agency or the DMRC. The argument that -----“

5.3.9.4. The AT notes that the Delhi High Court was fully aware of the existence of the two Acts since 1996 & the notification of Cess Rules in 98 & still they upheld the circular of State Govt of 16.8.05 where in the circular states as under:-

“The Government of NCT of Delhi vide Notification No. DLC/CLA/BCW/01/19 dated 10.1.2002 notified the Delhi Building and Other Construction Workers (RE&CS), Rules, 2002 and accordingly has constituted the Delhi Building and Other Construction Workers Welfare Board vide Notification No.DLC/CLA/BCW/02/596 dated 2nd September, 2002. Accordingly, the Building and Other Construction workers Welfare Act, 1996 (hereinafter referred as the Cess Act) and Building and Other Construction workers Welfare Cess Rules (hereinafter referred as the Cess Rules) have become operative w.e.f. January, 2002 in the whole of NCT of Delhi.”

Further under para 36, they have held as under

“The circulars have correctly understood the law & and are consistent with the Rules.”

This is a clear confirmation of the validity of the circular in all respects which also includes the date of application as January 2002. Although as pointed out by Respondent, the date of applicability was not specifically challenged in the Court, but the date of applicability is a very important part of the circular which does get the legal approval when the circular has been stated to be consistent with the rules. Infact while discussing the circular of DMRC dated 9.1.06, in para 10, they have observed as under

“..... It is further mandated that under section 4 of the Cess Act, 1% of the cost of construction shall be deducted in each running account and final bill and deducted amount shall be remitted to the Welfare Board. It also states itself certain guidelines for assessment of cess from 1.1.2002....”

Clearly, the date of applicability did not escape the scrutiny of Court.

The Hon'ble High Court have expressed serious concern in their judgment regarding delay in issue of notification of the BOCW Act & the Cess Act till 2002 in para 40 & 41 reproduced below:-

Para "40. It is a matter of concern that although the BOCW Act and the Cess Act have been on the statute book since 1996, **they were not notified for application in the NCT of Delhi till 2002.** The reasons for this are not available despite the Court asking the learned counsel for the Govt. of NCT of Delhi to explain the inexcusable delay on the part of the Government in enforcing these labour welfare legislation. What adds to the concern is the apparent loss of revenue -----"

Para "41. Even after the Act was notified in 2002, it was not until August 2005, the Government of NCT Delhi issued an order, which has been referred to earlier in this judgment, reminding the Government departments that such a law exists. There was a further 3 years delay in making known to the various State agencies their statutory responsibilities under the BOCW and Cess Acts. This further delay is inexcusable. Significantly, it was only in January 2006 when the DMRC issued a Circular that most of the Construction Contractors rushed to this Court for interim orders. Till then they never bothered about their statutory obligation to pay cess."

From the reading of the opening sentence of para 40, it becomes clear that **Acts get applied only when they are notified & not when they come on the statute Book.** This perception is again confirmed from the reading of the opening four lines of para 8 reproduced below:-

"Although the statutes were enacted in 1996, for reasons which are not very clear, they were notified by the Government of National Capital Territory of Delhi (GNCTD) much later when the Delhi Rules 2002 were framed. There is no explanation available for the delay. --
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The Hon'ble High Court was concerned that statutes enacted in 1996 were notified much later in 2002. If the liability of contractors was to accrue from 96, the delay in notification of the Act could not have been so important. The AT notes that the instructions for implementing the Cess Act were issued on 16.08.2005 by Delhi Govt. with retrospective effect from January 2002. Surely the Court could have applied these instructions from a further back date say from 96 when the statutes were enacted or from

1998 when the BOCW Act was notified by General Govt. Instead they upheld the circular of Labour Commissioner GNCTD dated 16.8.05 specifying the date of applicability as January 02, when the gazette notification for the Delhi BOCW Rules was issued. Again in para 43 extract reproduced below:

“_____ to undertake an enquiry into the reasons for the delayed notification of the BOCW Act & the Cess Act in Delhi till the year 2002 & further delay in implementing till 2005.”

Thus, this implies that implementation starts only after notification and not after enactment of Acts.”

16. The arbitral tribunal also placed reliance on the judgment of the Supreme Court in *S.K. Shukla v. State of Uttar Pradesh*, (2006) 1 SCC 314, wherein the Supreme Court had held that the Act comes into force when the assent of the Governor or the President, as the case may be, is published in the official gazette. Therefore, the publication in the gazette is essential, as it affects the rights of the public.

17. The Government of NCT of Delhi notified the rules under the BOCW Act on 10.01.2002, namely, Delhi Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2002 (hereinafter referred to as the Delhi BOCW Act). These Rules applied to Building and Other Construction Workers of any establishment in relation to which, appropriate government is the Lt. Governor of NCT of Delhi. They come into effect on the date of publication of the notification in the Delhi Gazette, i.e. on 10.01.2002.

18. The arbitral tribunal has returned a finding that the appropriate government for the petitioner, DMRC is the Delhi State

Government. For this purpose, the tribunal has relied on the definition contained in the BOCW Rules and the fact that the petitioner DMRC is owned by the Central Government and by the State Government in the ratio 50:50, and it is controlled and managed by both the Governments and therefore, comes within the purview of the Delhi Government as per section 2(1)(a)(iii) of the BOCW Act. This finding returned by the arbitral tribunal is not even assailed before me. The arbitral tribunal noticed that the Cess Rules though notified by the Central Government in 1996, the State Government, i.e. the Government of NCT of Delhi, did not issue any notification thereunder.

19. The arbitral tribunal, after concluding that the BOCW Act comes into force, vis-a-vis, the petitioner, DMRC (for whom the appropriate Government is Government of NCT of Delhi) with effect from January 2002, considered the issue whether the Cess Rules notified by the Central Government in the year 1998 itself could be applied from 1998 or from the year 2002. For this purpose, the arbitral tribunal relied upon the Circular issued by the Labour Commissioner on 16.08.2005, and observed as follows:

"The answer is also given in the circular of Labour Commissioner of Delhi dated 16.8.05, wherein it has been categorically stated as under:

"The Government of NCT of Delhi vide Notification No.DLC/CLA/BCW/01/19 dated 10.1.2002 notified the Delhi Building and Other Construction Workers (RE&CS), Rules 2002 and accordingly has constituted the Delhi Building and Other Construction Workers Welfare Board vide Notification No.DLC/CLA/BCW/02/596 dated 2nd September, 2002. Accordingly, the Building and Other Construction Workers

Welfare Cess Act, 1996 (hereinafter referred as the Cess Act) and Building and Other Construction Workers Welfare Cess Rules, 1998 (hereinafter referred as the Cess Rules) have become operative w.e.f. January, 2002 in the whole of NCT of Delhi". Clearly, the word "accordingly" used in the above expression implies that the Cess Act and Cess Rules have come into force only after the Main Act is notified and not in 1996 or in 1998".

20. On an interpretation of clause 18A, the arbitral tribunal concluded that the aforesaid notifications issued by the Government of NCT of Delhi, which led to the application of the Cess Act and the Cess Rules in the NCT of Delhi, constituted change occurring due to a change in Central or State law.

21. From the conduct of the parties also it is evident that it was not in the contemplation of either of the parties, including the petitioner, that cess was leviable under the Cess Act and the BOCW Act at the time when the respondent had been awarded the contract. Had that been the position, the petitioner would have made deductions of cess from the year 2000 onwards, beginning from running bill No.1, when the contract was entered into between the parties and deposited the same with the statutory authorities. However, that was not done, and it was only after the issuance of notification by the State Government that the petitioner started to deduct cess from the fifteenth running bill. It was, therefore, not in the contemplation of either of the parties that cess constitutes a component of the costs or the contract price. Admittedly, no show cause notice or demand notice has been issued by any authority to claim the cess from either of the

parties for the works covered by running bill Nos.1 to 14. Therefore, the cess which was levied from January 2002 onwards squarely fell within the ambit of clause 18A of the contract.

22. For the aforesaid reasons, I reject the submission of the petitioner that the majority award is contrary to the contractual terms or contrary to the laws of India. I hold that the same cannot be said to be opposed to Public Policy of India. The arbitral award is well reasoned and the view taken by the tribunal is a plausible view, in keeping with the understanding of the parties, as evidenced by their conduct.

Petition is, accordingly, dismissed.

(VIPIN SANGHI)
JUDGE

SEPTEMBER 07, 2010
rsk/sr