

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

Reserved on: 8th July, 2011

% Date of decision: 26th August, 2011

+ **FAO(OS) 674/2010, CM 21169/2010 & CM 1141/2011**

DELHI METRO RAIL CORPORATION LIMITED Appellant

Through: Mr. Ankur Gupta, Advocate and
Mr. Tarun Johri, Advocate.

-versus-

SIMPLEX INFRASTRUCTURES LIMITED Respondent

Through: Mr. Naresh Markanda, Senior
Advocate with Mr. V.K. Sharma,
Advocate.

with

FAO(OS) 33/2011, CM 1147/2011 & CM 4369/2011

DELHI METRO RAIL CORPORATION LIMITED Appellant

Through: Mr. Ankur Gupta, Advocate and
Mr. Tarun Johri, Advocate.

-versus-

GAMMON RIZZANI (JV) Respondent

Through: Mr. George Thomas, Advocate and
Mr. Amit George, Advocate.

and

FAO(OS) 34/2011 & CM 1150/2011

DELHI METRO RAIL CORPORATION LIMITED Appellant

Through: Mr. Ankur Gupta, Advocate and
Mr. Tarun Johri, Advocate.

-versus-

GAMMON RIZZANI (JV) Respondent

Through: Mr. George Thomas, Advocate and
Mr. Amit George, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIKRAMAJIT SEN

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

SIDDHARTH MRIDUL, J.

1. The present three Appeals raise a common issue and are, consequently, being disposed of by this common order.

2. The brief facts giving rise to FAO(OS) No.674/2010 are as follows:-

- (a) A contract was entered into between the parties on 28th December, 2000 for construction of a depot and workshop at Shastri Park, Delhi.

- (b) The salient features of the said contract dated 28th December, 2000 prescribed ₹61,87,53,692/- as the total contract price for execution and completion of the work and for remedying the defects therein. The stipulated date for completion of the work was 1st November, 2002.
- (c) Thereafter the work was finally completed by the Respondent/Claimant on 29th January, 2006.
- (d) Subsequently, disputes arose between the parties for the reason that at the time of making the final payment to the Respondent/Claimant an amount of ₹57,19,257/- was deducted by the Appellant/Delhi Metro Rail Corporation (DMRC) towards labour cess and an amount to the tune of ₹4,08,074/- was accordingly withheld.
- (e) In response to the protest by the Respondent/Claimant against the deductions, the Appellant/DMRC vide letter dated 28th August, 2007 conveyed to the Respondent/Claimant that the deductions were made in view of the statutory provisions of the Building and Other Construction

Workers' Welfare Cess Act, 1996 (hereinafter referred to as the 'Cess Act') read with the Building and Other Construction Workers' Welfare Cess Rules, 1998 (hereinafter referred to as the 'Cess Rules') and the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996 (hereinafter referred to as the 'BOCW Act'), which provide for deduction to be made at 1% of the gross amount of work done.

- (f) The Arbitral Tribunal ruled in favour of the Respondent/Claimant holding that the Appellant/DMRC was wrong in deducting a sum of ₹57,19,257/- towards labour cess from the final bill payment to be made to the Respondent/Claimant.
- (g) The Appellant challenged the Award before the Single Judge under Section 34 of the Arbitration and Conciliation Act, 1996(hereinafter referred to as the 'A&C Act'). The learned Single Judge upheld the Award of the Arbitral Tribunal stating that the Award had been correctly passed based on the decision of the Division Bench Judgment of this

Court in ***Builders Association of India –vs- Union of India***, (2007) 139 DLT 578.

3. The facts as are relevant for the disposal of FAO(OS) No.33/2011 and FAO(OS) No.34/2011 are as follows:-

- (a) An agreement was entered into between the parties on 28th April, 2001 for construction of Elevated Structure (Viaduct) excluding stations on Tri Nagar – Kohat Enclave Section of Rail Corridor for the Delhi Metro Rail Transport Service Project of RC2B – Lot 1, issued by the PCI – PBI – JARTS – TONICHI – RITES.
- (b) The salient features of the subject contract dated 28th April, 2001 provided ₹72,32,43,172.80 as the total contract price for execution and completion of the work and for remedying the defects therein. The stipulated date for completion of the work was agreed to be 14th January, 2003.
- (c) Thereafter the work on the said project was finally completed by the Respondent/Claimant on 31st December, 2003. The final draft bill was submitted

by the Respondent/Claimant on 5th November, 2004, pursuant to which a completion certificate was issued by the Appellant/DMRC on 29th March, 2006.

- (d) Subsequently, disputes arose between the parties for the reason that at the time of clearing the final payment of the Respondent/Claimant an amount of ₹74,02,966/- was deducted by the Appellant/DMRC towards labour cess.
- (e) In response to the protest by the Respondent/Claimant against the deductions, the Appellant/DMRC vide letter dated 14th January, 2009 conveyed to the Respondent/Claimant that the deductions were made in accordance with the statutory guidelines provided by the Cess Act read with the Cess Rules and the BOCW Act which provide for deduction to be made at 1% of the gross amount of work done.
- (f) The Arbitral Tribunal unanimously ruled in favour of the Respondent/Claimant holding that the Appellant/DMRC was wrong in deducting a sum of

₹74,02,966/- towards labour cess from the final bill payment to be made to the Respondent/Claimant.

- (g) The Appellant challenged the Award before the learned Single Judge under Section 34 of the A&C Act.
- (h) Learned Single Judge upheld the Award of the Arbitral Tribunal stating that the Award has been correctly passed on the basis of the decision of the Division Bench in ***Builders Association of India (supra)***. Learned Single Judge further refused to interfere with the Award pointing out that the question in issue has already been dealt with by the learned Single Judge in great detail while passing the Judgment dated 7th September, 2011 in *Delhi Metro Rail Corporation Limited -vs- Simplex Infrastructures Limited*, OMP No. 29/2010 (resulting in FAO (OS) 674/2010).

4. On behalf of the Appellant it has been argued that the Cess Act and the Cess Rules were already in force in the whole of India since 1996 and thus the labour cess was charged by the DMRC on account of the provisions contained therein. The next

contention urged on behalf of Counsel for the Appellant was that the definition of the 'employer' provided in the BOCW Act was wide enough and included the contractor (in the instant case the Respondent).

5. On the other hand, it was argued on behalf of the Respondent in FAO(OS) No.674/2010 that in view of the decision of Division Bench in ***Builders Association of India (supra)*** Circular of DMRC was upheld and, consequently, date of the operation of the Cess Act and the Cess Rules in Delhi was 1st January 2002 and consequently the subject contract was not subject to the Cess Act and the Cess Rules.

6. On behalf of the Respondent in FAO(OS) No.33/2011 and FAO(OS) No.34/2011, it was, *inter alia*, argued that there was no illegality in the Award and that the 'contractor' referred to in Section 2(1)(g) of the BOCW Act referred to a 'contractor' in singular and in the present case since there was a number of contractors therefore only the owner of the project (in this case DMRC) was the employer and, consequently, responsible for the payment of the labour cess under the subject contract.

7. Before considering the relative merits of the rival contentions, it would be necessary to consider the relevant provisions of the Cess Act, BOCW Act and the Cess Rules.

(a) The relevant Sections of the Cess Act read as follows:-

1. Short title, extent and commencement.– (1)

This Act may be called the Building and Other Construction Workers' Welfare Act, 1996.

(2) It extends to the whole of India.

(3) It shall be deemed to have come into force on the 3rd day of November, 1995.

2. Definitions.– In this Act, unless the context otherwise requires,–

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.....

(d) words and expressions used herein but not defined and defined in the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 shall have the meanings respectively assigned to them in that Act.

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 matter 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.

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14. Power to make rules.– (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

- (a) the manner in which and the time within which the cess shall be collected under sub-section (2) of section 3;
- (b) the rate or rates of advance cess leviable under sub-section (4) of section 3;
- (c) the particulars of the returns to be furnished, the officer or authority to whom or to which such returns shall be furnished

- and the matter and time of furnishing such returns under sub-section(1) of section 4;
- (d) the powers which may be exercised by the officer or authority under section 7;
 - (e) the authority which may impose penalty under section 9;
 - (f) the authority to which an appeal may be filed under sub-section (1) of section 11 and the time within which and the form and manner in which such appeal may be filed;
 - (g) the fees which shall accompany an appeal under sub-section(2) of section 11; and
 - (h) any other matter which has to be, or may be, prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

(b) The relevant Sections of BOCW Act read as follows:

1. Short title, extent, commencement and application. – (1) This Act may be called the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996.

(2) **It extend to the whole of India.**

(3) **It shall be deemed to have come into force on the 1st day of March, 1996.**

(4) It applies to every establishment which employs, or had employed on any day of the preceding twelve months, ten or more building workers in any building or other construction work.

Explanation.– For the purposes of this sub-section, the building workers employed in different relays in a day either by the employer or the contractor shall be taken into account in computing the number of building workers employed in the establishment.

2. Definitions.– (1) In this Act, unless the context otherwise requires, –

(a) "appropriate Government" means,–

(i) in relation to an establishment (which employs building workers either directly or through a contractor) in respect of which the appropriate Government under the Industrial Disputes Act, 1947 (14 of 1947), is the Central Government, the Central Government;

- (ii) in relation to any such establishment, being a public sector undertaking, as the Central Government may by notification specify which employs building workers either directly or through a contractor, the Central Government;

Explanation.— For the purpose of sub-clause (ii), "public sector undertaking" means any corporation established by or under any Central, State or Provincial Act or a Government Company as defined in section 617 of the Companies Act, 1956 (1 of 1956), which is owned, controlled or managed by the Central Government;

- (iii) in relation to any other establishment which employs building workers either directly or through a contractor, the Government of the State in which that other establishment is situate;

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- (g) "contractor" means a person who undertakes to produce a given result for any establishment, other than a mere supply of goods or articles of manufacture, by the employment of building workers or who supplies building workers for any work of the establishment; and includes a sub-contractor;

.....

- (i) "employer", 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;**

18. Constitution of State Welfare Boards.– (1)

Every State Government shall, with effect from such date as it may, by notification, appoint, constitute a Board to be known as the(name of the State) Building and other Construction Workers' Welfare Board to exercise the powers conferred on, and perform the functions assigned to it, under this Act.

(2) The Board shall be a body corporate by the name aforesaid, having perpetual succession and a common seal and shall by the said name sue and be sued.

(3) The Board shall consist of a Chairperson, a person to be nominated by the Central Government and such number of other members, not exceeding fifteen, as may be appointed to it by the State Government:

Provided that the Board shall include an equal number of members representing the State Government, the employers and the building workers and that at least one member of the Board shall be a woman.

(4) The terms and conditions of appointment and the salaries and other allowances payable to the chairperson and the other members of the Board, and the manner of filling of casual vacancies of the members of the Board, shall be such as may be prescribed.

24. Building and Other Construction Workers' Welfare Fund and its application.– (1) There shall be constituted by a Board a fund to be called the Building and Other Construction Workers' Welfare Fund and there shall be credited thereto-

- (a) any grants and loans made to the Board by the Central Government under section 23;
 - (b) all contributions made by the beneficiaries;
 - (c) all sums received by the Board from such other sources as may be decided by the Central Government.
- (2) The Fund shall be applied for meeting–
- (a) expenses of the Board in the discharge of its functions under Section 22; and

- (b) salaries, allowances and other remuneration of the members, officers and other employees of the Board;
- (c) expenses on objects and for purposes authorised by this Act.

(3) No Board shall, in any financial year, incur expenses towards salaries, allowances and other remuneration to its members, officers and other employees and for meeting the other administrative expenses five per cent of its total expenses during that financial year.

(c) The relevant Rules under the Cess Rules read as follows:

1. Short title and commencement.– (1) These rules may be called the Building and Other Construction Workers' Welfare Cess Rules, 1998.

(2) They shall come into force on the date of their publication in the Official Gazette.

1. *Vide* G.S.R. 149(E), dated 26th March, 1998, published in the Gazette of India, Extra., Pt. II, Sec. 3 (i), dated 26th march, 1998.

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4. Time and manner of collection.– (1) The cess levied under sub-section(1) of section 3 of the Act shall be paid by an employer, within thirty days

of completion of the construction project or within thirty days of the date on which assessment of cess payable is finalized, whichever is earlier, to the cess collector.

(2) Notwithstanding the provisions of sub-rule (1), where the duration of the project or construction work exceeds one year, cess shall be paid within thirty days of completion of one year from the date of commencement of work and every year thereafter at the notified rates on the cost of construction incurred during the relevant period.

(3) Notwithstanding the provisions of sub-rule (1) and sub-rule (2), where the levy of cess pertains to building and other construction work of a Government or of a Public Sector Undertaking, such Government or the Public Sector Undertaking shall deduct or cause to be deducted the cess payable at the notified rates from the bills paid for such works.

(4) Notwithstanding the provisions of sub-rule (1) and sub-rule (20), where the approval of a construction work by a local authority is required, every application for such approval shall be accompanied by a crossed demand draft in favour of the Board and payable at the station at which the Board is located for an amount of cess payable at the notified rates on the estimated cost of construction:

Provided that if the duration of the project is likely to exceed one year, the demand draft may be for the amount of cess payable on cost of construction estimated to be incurred during one year from the date of commencement and further payments of cess due shall be made as per the provisions of sub-rule (2).

(5) An employer may pay in advance an amount of cess calculated on the basis of the estimated cost of construction along with the notice of commencement of work under section 46 of the Main Act by a crossed demand draft in favour of the Board and payable at the station at which the Board is located:

Provided that if the duration of the project is likely to exceed one year, the demand draft may be for the amount of cess payable on cost of construction estimated to be during one year from the date of such commencement and further payment of cess due shall be made as per the provisions of sub-rule (2).

(6) Advance cess paid under sub-rules (3), (4) and (5), shall be adjusted in the final assessment made by the Assessing Officer.

8. On a plain reading of the provisions extracted above the following emerges:

- (a) Simultaneous with the enactment of the BOCW Act, the Parliament enacted the Cess Act as the means of

generating revenues for making the welfare provisions contained in the former effective.

(b) The Cess Act came into force throughout the country on the 3rd day of November, 1995. The Cess Act provided for the levy of a cess for the purposes of the BOCW Act at a rate not exceeding 2% but not less than 1% of the cost of construction incurred by the employer, as the Central Government by notification in the Official Gazette may specify. Vide Notification dated 26th September, 1996 of the Ministry of Labour the cess under the Cess Act was specified @ 1%. The Notification dated 26th September, 1996 of the Ministry of Labour reads as follows:

“NOTIFICATION

New Delhi, the 26th September, 1996

S.O.2899 – In exercise of powers conferred by sub-section (1) of section 3 of the Building and Other Construction Workers’ Welfare Cess Act, 1996 (28 of 1996) and in supersession of the notification of the Government of India in the Ministry of Labour No. S.O. 1767 dated the 17th May, 1996 the Central Government specifies a cess for the purposes of the Building and Other Construction Workers (Regulation of Employment and Other Conditions of Service) Act, 1996 (27 of 1996) at the rate of 1 per cent, of the cost of construction incurred by an employer.”

(c) It is further stipulated that the cess levied would be collected from every employer including deductions at source in relation to a building or other construction work of a Government or of a public sector undertaking. The Act permitted the Central Government to make rules for carrying out provisions of the Cess Act.

(d) The BOCW Act was an Act to regulate the employment and conditions of service of building and other construction workers and to provide for the safety, health and welfare measures and for other matters connected therewith or incidental thereto. The BOCW Act came into force throughout India on the 1st day of March, 1996. Under this Act a contractor was defined as a person who *inter alia* undertook the employment of building workers or supplied building workers for any work and included a sub-contractor. The Act further defined an employer as including the contractor 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 Act further provided that every State Government may by notification

appoint and constitute a board known as the Welfare Board to exercise the powers conferred on it. The Board was in turn to constitute a fund to be called the Building and Other Construction Workers Welfare Fund which was to receive *inter alia* all sums from such other sources as may be decided by the Central Government.

(e) The Cess Rules under the Cess Act came into force vide their publication in the Official Gazette on the 26th March, 1998. The Cess Rules provided that where the levy of cess pertains to building and other construction works of a Government or public sector undertaking such Government or public sector undertaking shall deduct the cess payable at the notified rate from the bills paid for such work.

9. From a conspectus of the above, it is clear that the Cess Act was made effective from the 3rd day of November, 1995. It is further clear that the BOCW Act became effective and operational from the 1st day of March, 1996 throughout the territory of India and that the Cess Rules became effective from the 26th day of March, 1998 in the said territories. In this behalf,

it is observed that it is consequently crystal clear that the liability to levy cess under the Cess Act, which was a Central Act in force throughout territory of India, was not dependent on the constitution of the Welfare Boards contemplated therein. This view is supported by the decision of Single Judge of the Madras High Court in Writ Petition No.6174/2010 decided on 30th March, 2010 reported as ***M.E.S. Builders' Association of India –vs- Union of India***, wherein the learned Single Judge concluded that “*merely because the State Government has not constituted a board will not make the petitioner builders not to pay cess as per the notified enactment*”, since the Cess Act was brought into force with effect from 3rd November, 1995 and the Act mandated under Section 3 for levy and collection of cess. It is further clear that the cess was leviable on the cost of construction incurred by the employer and that it was deductible at source in the case of contractors from the bills paid for building and construction works.

10. In view of the above, it is observed that it became incumbent upon the Appellant to deduct the cess from the bills of the Respondents @2% right from the day the said Act came

into force, that is 3rd November, 1995 and @1% from 26th September, 1996 under the Notification extracted hereinabove. In this view of the matter, both the Arbitral Tribunal and the learned Single Judge fell into error in coming to the conclusion that the Act came into force in Delhi in the year 2002, after the contract entered into between the Appellant and the Respondents in the year 2000 and 2001 respectively.

11. Before proceeding further, it shall be necessary to extract the relevant portions of the decision of the Division Bench in ***Builders Association of India (supra)***, for disposal of the present Appeals. In ***Builders Association of India (supra)*** the Division Bench observed:

“**17.** The principal contentions on behalf of the petitioners were as follows:

a) The definition of the word "employer" in the BOCW Act is too wide and can lead to confusion since it mentions both the owner as well as the contractor. There is no certainty whether it is owner or the contractor who is required to pay the cess in a particular situation. This needlessly leaves it to the Assessing Officer to pick and choose depending on

who he wants to proceed against. Therefore, the BOCW Act is bad for vagueness.

(b) The impost levied by the Cess Act is a compulsory and involuntary exaction, made for a public purpose without reference to any special benefit for the payer of the cess. Therefore, it is in effect a tax. In this context, reliance is placed on the decisions in *Kewal Kishan Puri v. State of Punjab*, (1979) 3 SCR 1217 (Paras 7, 8 and 23), *Om Prakash Aggarwal v. Giri Raj Kishori* (1987) 164 ITR 376(SC) and *State of Uttar Pradesh v. Vam Organic Chemicals Limited*, AIR 2003 SC 4650.

(c) The Cess Act in fact provides for the levy of a tax although it is termed as cess. No taxation is permissible, in terms of Article 265 of the Constitution, without the authority of law. In other words, the power to make a legislation imposing a tax has to be traced with reference to a specific entry in the Lists in the Seventh Schedule to the Constitution. The subject matter of the present statute is fully covered by the Entry 49 in List II (State list) pertaining to "taxes on lands and buildings" and Therefore, the Parliament lacks legislative competence to impose a tax on lands and buildings.

(d) Consequently, recourse cannot be had to the residual Entry 97 of List I to justify the legislative

competence of Parliament since the subject matter of the Cess Act is fully covered by any entry in the State List (List II). Reliance is placed on the judgments of the Hon'ble Supreme Court in *Union of India v. H.S. Dhillon*, (1972) 83 ITR 582(SC), *Kunnathat Thathunni Moopil Nair v. State of Kerala*, (1961) 3 SCR 77, *Goodricke Group Limited v. State of West Bengal*, 1995 (50) ECC 138 and *State of West Bengal v. Kesoram Industries*, (2004) 266 ITR 721(SC) .

(e) The stand of the Union of India in its counter affidavit that the subject matter of the BOCW Act is covered by Entries 23 and 24 in List III (concurrent list) is untenable. Those entries per se cannot save the invalidity of statute since there is no corresponding taxation entry in List III.

(f) The Circular 9.1.2006 issued by the DMRC is invalid since even within the definition of the BOCW Act it is the DMRC, as a principal employer which is liable to pay the cess. DMRC has no authority in law to pass on that liability to the contractor. Even under Section 3(2), which requires deduction of 1% cess at source from the bills signifying the cost of construction, it is the DMRC which has to bear the liability.

(g) Even in the context of Section 2(d) of the Cess Act which states that unless the context otherwise requires the definitions of the BOCW Act would

apply, the definition of cost of construction can only mean the cost of construction to the employer since that is the context in which the Cess Act has been made. So interpreted, the word "employer" can only mean the employer who owns the establishment and any other interpretation other than the context would lead to absurdity. Reliance is placed on (1994) 1 SCR 682, 1998 Cri LJ 2012 and (1981)131 ITR 597(SC).

(h) The cost of construction on which the 1% cess is levied, invariably would include the profit element. There cannot be a tax on profits in the garb of imposition of a cess. That would render the impugned statutes vulnerable to invalidation on account of their being 'colourable' pieces of legislation.

(i) Independent of the above grounds of attack, the demand for cess is attacked on the ground that there can never be a demand and collection of tax without a prior assessment preceded by a show cause notice and a quasi judicial inquiry. Reliance on this issue is *Bharti Kala Bhandar Limited v. Municipal Committee, Dhaman Gaon*, (1966) 59 ITR 73(SC) and *Municipal Council, Khurai v. Kamal Kumar*, (1965) 2 SCR 653.

(j) Since the very nature of most employment in the construction industry is casual and temporary, and since the regulatory mechanism envisaged is wholly

inadequate to make it workable, the BOCW Act is a bad law. It is pointed out that, in the context of migrant labour, there is no centralized system of registration whereby a labourer could carry his or her registration irrespective of the State in which he or she seeks employment. Further, given that the cess sought to be collected is meant for the benefit of workers, there must be a machinery to ensure that such benefit reaches the workers. At present there is no such machinery. It is further suggested that since the Act itself is unworkable little purpose would be served in collecting cess at this stage.

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Summary of conclusions

38. (i) The subject matter of the Cess Act is the activity of building and construction, the object is to augment the Welfare Fund under the BOCW Act and the essential purpose is to benefit the building and construction worker. The 'ultimate or incidental results or consequences' might be that contractors have to part with 1% of the bill amount towards the cess. However, that does not detract from either the 'primary object' of the Cess Act or its 'essential purpose.' Applying the Hingir Rampur tests, it has to be held that the Cess Act cannot be construed to be a tax at all.

(ii) It is accordingly held that the petitioners have failed to show that the subject matter of the Cess Act falls under any entry in List II or List III. Therefore the subject matter of the Cess Act is within the legislative competence of Parliament with reference to Entry 97 of List I. This part of the discussion is concluded by negating the challenge by the petitioners to the validity of the Cess Act on the ground of lack of legislative competence.

(iii) The main object of the present statute being the augmentation of revenues for the welfare of construction workers, there is nothing arbitrary or unreasonable in such a classification of construction activities and the requirement of deduction of cess at source towards settlement of bills of contractors working for government departments and state agencies. The submission is that classification is discriminatory or arbitrary is without basis and is rejected as such.

(iv) The fact that there is deduction of cess at source without a prior assessment cannot render it illegal so long as it remains adjustable against any final liability that may be determined at the end of the assessment.

(v) The circulars have correctly understood the law and are consistent with the Rules. This is not a case

of excessive delegation to the state agency or the DMRC.

(vi) While the criticism of the absence of an effective centralized mechanism to reach the benefits of the cess collected to the building and construction worker may be justified, that does not impinge on the validity of the levy of the cess itself.”

12. The above decision, which was canvassed strongly on behalf of the Respondent and was the basis for the decision of the Arbitral Tribunal as well as the learned Single Judge, decided the constitutional validity of the BOCW Act, the Cess Act, the Cess Rules as well as the Delhi Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2002 (in short ‘Delhi Rules’). The challenge in this decision to the statute was by the contractors, who had entered into construction contracts with public sector undertakings. From a conspectus of the submissions made on behalf of the contractors and the summary of conclusions in that case, it is abundantly clear that issue regarding the coming into operation of the Cess Act, the BOCW Act and the Cess Rules did not come up for consideration and was not determined in the

said decision. The mention by the Division Bench of the BOCW Act and the Cess Act not being notified for application in Delhi till 2002 was in relation to the concern expressed by the Bench in that decision at the delayed implementation of the welfare enactments. This allusion to the BOCW Act and the Cess Act was in the context of the Rules under Section 62 of the BOCW Act having been brought into force in Delhi only on 10th January, 2002, and the consequential delay in setting up the infrastructure and machinery and constituting the Board under the Act and setting up the Welfare Fund as was mandated under the said BOCW Act. Further, contrary to what was urged on behalf of the Respondents, in its summary of conclusions, the Division Bench came to conclusion that *“the ‘ultimate or incidental results or consequences’ might be that contractor have to part with 1% of the bill amount towards the cess”*. It further concluded that *“there is nothing arbitrary or unreasonable in such a classification of construction activities and the requirement of deduction of cess at source towards settlement of bills of contractors working for government departments and state agencies”*. Thus, this Judgment reiterates that the contractors in relation to a building or other

construction works of a Government or public sector undertaking would be liable to have the cess deducted at the notified rates from their bills paid for such works, and inferring that the contractors, which included sub-contractors, fell squarely within the definition of employer in relation to such building or other construction works carried on by them.

13. In ***Gannon Dunkerley and Co. Ltd. -vs- State of Madhya Pradesh***, reported as 2009 (5) MPHT 258, a Single Judge of the Madhya Pradesh High Court at Jabalpur, dealing with the issue of interpretation of the expression 'employer' in the Cess Act and the Cess Rules, held that "*the intention of the Legislature is, therefore, not only to include the owner of the establishment in the present case the Company but also the Contractors who carries out the work of building or other construction work and is an employer for the purpose of the Construction Workers Act, 1996 and the Cess Act, 1996. Thus, there is no escape for the contractors who have undertaken the building and other construction work in the establishment belonging to the Company*".

14. In view of the above discussion, there is no force in the submissions made on behalf of the Respondents, which found support from the Arbitral Tribunal and the learned Single Judge that the liability to pay cess was of the Appellant and not of the Respondents.

15. It was then argued on behalf of the Respondents that the contractor referred to in Section 2(1)(g) of the BOCW Act was 'contractor' in singular and in the present case since there were number of contractors, therefore only the owner of the project, in this case the Appellant, was responsible for payment of the cess under the subject contract. There is no substance in this submission for the reason that the definition of contractor in the BOCW Act includes a sub contractor. Consequently, all the contractors or their sub contractors, as may be, who employ or supply building workers for any building or other construction work carried on on behalf of the public sector undertakings, are covered within the definition of employer within the meaning as ascribed to it under the BOCW Act.

16. In ***Oil and Natural Gas Corporation Limited –vs- SAW Pipes Limited***, AIR 2003(SC) 2629, the Supreme Court had

occasion to consider whether a Court would have jurisdiction under Section 34 of the A&C Act to set aside an award passed by the Arbitral Tribunal which is patently illegal or in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract. The Supreme Court observed:

“12. The question, therefore, which requires consideration is-- whether the award could be set aside, if the arbitral tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties" Under Sub-section (1)(a) of Section 28 there is a mandate to the arbitral tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would -- whether such award could be set aside? Similarly, under Sub-section (3), arbitral tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the

transaction. If arbitral tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered? Similarly, if the award is non-speaking one and is in violation of Section 31(3), can such award be set aside? IN our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it would be contrary to basic concept of justice. If the arbitral tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.

13. The aforesaid interpretation of the Clause (v) would be in conformity with the settled principle of law that the procedural law cannot fail to provide relief when substantive law gives the right. Principle is -- there cannot be any wrong without a remedy. In *M.V. Elisabeth and others v. Harwan Investment & Trading Pvt. Ltd.*, 1993 Supp(2) SCC 433, this Court observed that where substantive law demands justice for the party aggrieved and the statute has not provided the remedy, it is the duty of the Court to devise procedure by drawing analogy from other systems of law and practice. Similarly, in *Dhanna Lal*

v. *Kalawatibai and others*, (2002) 6 SCC 16, this Court observed that wrong must not be left unredeemed and right not left unenforced.

14. Result is – if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties.

WHAT MEANING COULD BE ASSIGNED TO THE PHRASE 'PUBLIC POLICY OF INDIA'?

15. The next clause which requires interpretation is Clause (ii) of Sub-section 2(b) of Section 34 which inter alia provides that the Court may set aside arbitral award if it is in conflict with the 'Public Policy of India'. The phrase 'Public Policy of India' is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression 'public policy' does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning

in the light and principles underlying the Arbitration Act, Contract Act and Constitutional provisions.

22. The aforesaid submission of the learned senior counsel requires to be accepted. From the judgments discussed above, it can be held that the term 'public policy of India' is required to be interpreted in the context of the jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the Court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under Code of civil Procedure that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or nullity. But in a case where the judgment and decree is challenged before the Appellate Court or the Court exercising revisional jurisdiction, the jurisdiction of such Court would be wider. therefore, in a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term 'public policy of India'. On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the arbitral tribunal could be set aside. If narrow meaning as contended by the learned senior counsel

Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the Arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "arbitral tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that arbitrator shall decide *ex aequo et bono* [according to what is just and good] only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would

be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of 'patent illegality'.

31. Therefore, in our view, the phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in *Renusagar's* case (supra) it is required to be held that the award could be set aside if it is patently illegal. Result would be – award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it

shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.”

17. From the reading of the above decision of the Supreme Court, it is clear that under Sub-section 1(a) of Section 28 of A&C Act there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law in force in India. Consequently, if the award is contrary to substantive provisions of law, it would be patently illegal and could be interfered with under Section 34 of the A&C Act. The Supreme Court after defining the phrase ‘Public Policy of India’, used in Section 34, and requiring it to be of wider meaning, observed that an award which is on the face of it patently in violation of statutory provisions cannot be said to be in public interest and can be set aside on the ground of being patently illegal.

18. The above statement of law was approved and reiterated by the Supreme Court in ***McDermott International Inc. –vs- Burn Standard Co. Ltd.***, (2006) 11 SCC 181; ***Centrotrade Minerals & Metals Inc. –vs- Hindustan Copper Ltd.***, (2006) 11 SCC 245; ***Hindustan Zinc Ltd. –vs- Friends Coal Carbonisation***, (2006) 4 SCC 445; ***Delhi Development***

Authority –vs- ***R.S. Sharma & Company***, (2008) 13 SCC 80; and ***Steel Authority of India Limited*** –vs- ***Gupta Brother Steel Tubes Limited***, (2009) 10 SCC 63.

19. From the above discussion, we observe that the Arbitral Tribunal as well as the learned Single Judge erred in law while allowing the claims of the Respondents and dismissing the Objections respectively filed by the Appellant, and failed to appreciate that the BOCW Act, the Cess Act and the Cess Rules had come into operation on 1st March, 1996, 3rd November, 1995 & 26th March, 1998 respectively. Therefore, the finding of the Arbitral Tribunal as well as the learned Single Judge to the effect that they came into effect on 10th January 2002 in the State of Delhi is contrary to the specific provisions of the above enactments themselves. Consequently, the decision arrived at by the Arbitral Tribunal was patently illegal and contrary to the public policy of India and deserved to be interfered with in the proceedings under Section 34 of the A&C Act. The Arbitral Tribunal as well as the learned Single Judge further failed to appreciate that the above enactments came into force prior to the contracts entered into between the Appellant on the one

hand and Respondents on the other and, therefore, could not have been termed as subsequent legislations. The Arbitral Tribunal as well as the learned Single Judge also fell into error insofar as a finding was reached that the aforesaid Acts were brought into force by the Delhi Rules in 2002, which had no relevance to the statutory levy and collection of the cess under the mandate of the Cess Act. The Cess Act had statutory force and came into effect throughout India on 3rd November, 1995 and any circular or notice issued by any Government or any organization including the Appellant herein with respect to the date of its enforcement would have no meaning, inasmuch as, the Cess Act being a Central Act, the date of its enforceability could not be postponed or determined by any State Government or any other organization. Finally, the Arbitral Awards and the impugned Orders are erroneous for the reason that they failed to take into consideration the aspect that the Appellant was liable to deduct at source cess at the notified rate from the bills for building and other construction works of the Respondent contractors from the date the Cess Act came into force i.e. 3rd November, 1995.

20. For the above reasons, the Appeals are allowed and the impugned Orders dated 7th September, 2010 in OMP No.29/2010 and 23rd November, 2010 in OMP No.693/2010 and OMP No.694/2010 respectively, are set aside. Further, in the circumstances, the respective Arbitral Awards are also set aside and the Registry is directed to refund to the Appellants, the amounts deposited by the Appellant in pursuance to the Orders of this Court dated 26th November, 2010 in FAO(OS) No.674/2010 and 19th January, 2011 in FAO(OS) No.33/2011 and FAO(OS) No.34/2011 respectively, with any interest that may have accrued thereon.

No costs.

All pending applications stand disposed of.

SIDDHARTH MRIDUL, J.

VIKRAMAJIT SEN, J.

AUGUST 26, 2011

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