

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

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OMP No. 399/2003

6th October, 2015

CENTRAL GOVT. EMPLOYEES' WELFARE
HOUSING ORGANISATION

..... Petitioner

Through: Mr. H.K. Gangwani, Advocate with
Mr. R.C. Agarwal, Director (Finance).

Versus

M/S. LANCO INFRASTRUCTURE LTD.

..... Respondent

Through: Mr. Ashish Mohan, Advocate with
Mr. Dhruv Madan, Advocate and
Mr. Vivek Bishnoi, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. By this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'), petitioner herein; the respondent in the arbitration proceedings; impugns the Award of the Arbitrator dated 23.7.2003 by which the respondent herein; the claimant in the arbitration proceedings; was held entitled to an amount of Rs.27,30,600/- alongwith interest at 9% per annum simple on account of reimbursement of tax paid by the respondent under the Maharashtra Sales Tax on the Transfer of Property in Goods (= cement) involved in the

Execution of Works Contracts (Re-enacted) Act, 1989 (hereinafter referred to as 'the Maharashtra Act, 1989'), inasmuch as such tax (hereinafter 'works contract tax/sales tax') was to be paid by the petitioner as per Clause 12 of the contract but the petitioner had failed to pay the same.

2. The facts of the case are that petitioner engaged the respondent-contractor for construction of 554 dwelling units at Kharghar, Navi Mumbai (Maharashtra). Parties entered into an Agreement dated 29.3.1996 in this regard. The subject dispute arose under this contract.

3. Arbitrator by the impugned Award has held that the cement which was supplied by the petitioner to the respondent at a fixed price of Rs. 2,800/- per metric tons, for incorporation in the subject works contract, amounted to a sale of cement by the petitioner to the respondent in view of the judgment of the Supreme Court in the case of *M/s N.M. Goel and Co. Vs. Sales Tax Officer, Rajnandgaon and Another, AIR 1989 SC 285*, and once there was a sale of cement by the petitioner to the respondent, respondent under the Maharashtra Act, 1989 was liable to pay tax to the Sales Tax Authority of Maharashtra inasmuch as petitioner who had to pay such tax as per the contract had not paid the same under the Bombay Sales Tax, 1959 resulting consequently of the liability of the respondent under the

Maharashtra Act, 1989. Arbitrator has also by the Award held that respondent is not estopped from claiming amount against the petitioner although the respondent had issued a No Claim Certificate(NOC) and received payment as per the final bill inasmuch as respondent only later was issued notice by the taxing authority. Arbitrator has held that it was the petitioner which was under Clause 12 of the Contract liable to pay all taxes and levies on the cement supplied by the petitioner to the respondent under the contract and thus since the petitioner had not paid sales tax under the Bombay Sales Tax Act, consequently the respondent is held assessable and liable to pay the works contract tax under the Maharashtra Act, 1989. Essentially, the Arbitrator holds that the petitioner has sold the cement to the respondent under the contract with the representation that with respect to such sale, sales tax was duly paid by the petitioner but actually it was not paid as required/stated in Clause 12 of the Contract and whereby the respondent had to pay works contract tax and which amount paid by the respondent was therefore recoverable by the respondent from the petitioner.

4. Before this Court, counsel for the petitioner has very vehemently argued the following aspects:-

(i) There is no sale of cement by the petitioner to the respondent. As per Clause 12 of the Contract, cement which was supplied by the petitioner to the respondent at a fixed rate under the contract was for incorporating the same in the work/project owned by the petitioner itself and therefore, there cannot be sale of cement to one's own self by the petitioner and that in such circumstances it cannot be that there was sale of cement to the respondent.

(ii) If the respondent has rightly or wrongly paid the works contract tax under the Maharashtra Act, 1989 to the taxing authority, even then the respondent cannot claim the tax from the petitioner in view of Article 69.1 of the General Conditions of Contract (GCC) read with Clause 25 of the Special Conditions of Contract (SCC).

(iii) Respondent is also estopped from claiming any amount from the petitioner for two reasons. Firstly, the respondent was all along aware that the cement in question which was supplied by the petitioner to the respondent was partly sourced locally within Maharashtra by paying local sales tax and partly purchased from outside Maharashtra where only Central Sales Tax was paid and respondent having acted in accordance with such knowledge, respondent hence is estopped from claiming any tax paid by the respondent to the authority under the Maharashtra Act, 1989, and secondly,

the respondent was estopped because respondent had issued the No Claim Certificate after submitting the final bill and received the full and final payment under the subject contract.

5. Counsel for the respondent per contra has argued as under:-

(i) That in a case where petitioner/owner gives cement at a fixed rate for incorporating in the project/works of the petitioner itself, yet, such a transaction is a transaction of sale because this is clearly so held by the Supreme Court in the case of *M/s N.M. Goel and Co. (supra)* and paras 3 and 11 of the said judgment are more or less on identical facts thereby holding that it cannot be held that in facts such as the present that there is no sale of cement for consideration by the petitioner to the respondent. The judgment in the case of *M/s N.M. Goel and Co. (supra)* is followed in subsequent judgments of the Supreme Court in the cases of *Rashtriya Ispat Nigam Ltd. Vs. State of A.P. (1998) 8 SCC 439* and *Cooch-Bihar Contractors' Association and Others Vs. State of W.B. and Others (1996) 10 SCC 380*.

(ii) Clause 12 of the Contract in clear terms held out a representation to the respondent by the petitioner that the cement which was supplied by the petitioner to the respondent under the contract was at a price which was

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inclusive of all taxes and levies which were already paid by the petitioner, and therefore, respondent tendered for the contract in terms of Clause 12 that whatever cement is supplied by the petitioner to the respondent under the contract for incorporation under the contract was tax paid, and once this fact turned out to be untrue and the respondent was thus forced to pay tax under the Maharashtra Act, 1989, respondent was entitled under Clause 12 of the contract for refund of such amount from the petitioner especially in view of Section 64A of the Sale of Goods Act, 1930.

(iii) Article 69.1 of the GCC and Clause 25 of the SCC have to be harmoniously construed with Clause 12 of the Contract, inasmuch, as the operation of Article 69.1 and Clause 25 will come in only with respect to those taxes to which otherwise there was no representation in the contract that the same was already paid by the petitioner and hence not payable by the respondent. Putting it in other words, what is argued by the respondent is that the respondent will be liable to pay any tax imposed upon it by any tax authority provided the same did not fall under Clause 12 of the Contract as having already been paid by the petitioner and therefore Clauses 12 and 25 and Article 69.1 when read together do not exempt the petitioner

from liability of reimbursement to the respondent for the tax paid by the respondent to the taxing authority under the Maharashtra Act, 1989.

6. Before advertng to the arguments raised in the present case, it requires to be noted that powers of this Court acting under Section 34 of the Act for setting aside the award are limited. It is settled law that this court does not sit as an appellate court to re-apprise the findings and conclusions contained in the award and this Court will not interfere with the award merely because two views are possible when the arbitrator has taken one possible and plausible view. This court can only interfere if the award is against the contractual provisions [Section 28(3) of the Act], or the award is against the law [Section 28(1)(a) of the Act] or the same is perverse because it arrives at a finding which no reasonable man could arrive at. This is the ratio of the judgments of the Supreme Court in the cases of *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.*, (2003) 5 SCC 705 and *Oil & Natural Gas Corporation Ltd. Vs. Western Geco International Ltd.*, AIR 2015 SC 363. In the light of this position of law, let me consider the respective arguments.

7. Before turning to the respective arguments urged on behalf of the parties, let me reproduce Clauses 12 and 25 and Article 69.1 of the Contract and these clauses read as under:-

“Clause-12 Employer’s Supply of Materials

The Employer shall supply cement and reinforcement steel for the works executed at site only as under:

- a) Cement – Rs.2,800/- per ton delivered at site.
- b) High strength deformed bars for reinforcement works only Rs.15,000/- per ton delivered at site.

The above prices are inclusive of all central, state and local levies like sales tax, octroi etc. and the cost of transportation from Railway Station/Stockyard/Stockists to the site of work. The rates quoted by the Tenderer for relevant items shall take into account the above prices.

The Employer, entirely at their own discretion may decide to supply some other materials also. In such a case the rates of items of work affected due to such supply shall be suitably varied as per analysis of rates as directed by Engineer. No claim on this aspect from the Contractor shall be entertaining.

i) Supply of Steel

Tor Steel reinforcement will be supplied by the Employer at his stores area at work site during working hours. It will be the responsibility of the Contractor to carry these items to the work site at his own cost.

ii) Supply of Cement

Cement will be supplied by the Employer at site on receipt of the consignment. The contractor shall have to provide his own shed at the site for the storage of cement supplied to him. All extra cement remaining with the Contractor will be returned to the Employer in good condition.

Cement bags shall be stored in separate godowns to be constructed by the Contractor at his own cost with weather proof roofs and walls. Each godown shall be provided with a single door with two locks. The keys of one lock shall remain with the Employer and that of the other lock with the authorized agent of the Contractor at site of work, so that the cement is removed from the godown according to the daily requirement with the knowledge of both the parties and day-to-day account maintained as directed by Employer.

The Employer shall supply cement for any work of permanent nature which will be executed at site for this project, such as main construction work, casting cement blocks, as approved by owner for manufacturing at site.

iii) **Recovery of Cement and Steel**

Cost of all materials issued by Employer shall be recovered in full from the Contractor's dues under this contract in the final bill, however, from R.A. bill only actual consumed material cost will be recovered.

All the cement/steel issued by the Employer shall be strictly accounted for, by the Contractor. In case of cement, permissible wastage shall be total 3% and in case of steel reinforcements, allowable wastages/scrap generated shall be total 3% (i.e 0.5% unaccountable and 2.5% accountable).

The quoted rates shall include all the wastage/cutting allowances/scraps etc. When reconciliation of materials is done, the same shall be suitably segregated accordingly to issue rates, indicated as above. The Contractor will have submitted their design mix for approval and on this basis; the theoretical consumption of cement shall be binding upon the Contractor for reconciliation of cement issued by the Employer. For any excess/under consumption based on the coefficients, the Contractor shall be suitably penalized, though, however a variation (+) / (-) 3% shall be considered, while effecting penal recovery. For other than concrete item, the coefficients for consumption of cement shall be adopted as per CPWD practice. However, the above variation mentioned shall be applicable for these items also.

Any unused quantity of cement and steel not returned wastage/loss/ consumption beyond specified/agreed limits shall be charged at penal rates, which will be two times the issue rates.

iv) **Scrap & Serviceable Material**

For the purpose of accounting of reinforcing steel issued by the Employer, all cut pieces issued by the Employer, all cut pieces measuring in length of 2m and above when returned to Employer's storage points, shall be treated as serviceable material and will be given full credit by the Employer at issue rates. All pieces measuring less than 2m will be treated as wastage/scrap.

The Contractor shall return all scrap/unserviceable unused materials to Employer's storage point and the Contractor shall be given credit of only Rs.2000/- per M. Ton for the scrap, by the Employer and weighing arrangements for scrap shall be arranged by the Contractor.

Excess cement, when returned to Employer's storage/issue points in good condition as certified by Employer/Engineer will be given full credit at issue rates.

Any unused/serviceable/salvageable quantity of materials not returned and wastage beyond the above specified limits shall be recovered at penal rates, which will be twice the issue rates, as decided Engineer's Representative/ Engineer. All empty cement bags will be the property of Contractor.

Clause-25 Contract Rates

The Contract prices and variation rates shall be firm and invariable and shall be deemed to include all labour, materials, use of plant tools, temporary works and buildings, etc. insurance, sales tax, local taxes and duties establishment charges, overhead, profit, supervision, transport, sampling, testing, shop drawing and other charges and every expense incurred in the proper and due execution, completion and maintenance of the works, including provision for escalation and shall be in full satisfaction and discharge of every obligation and imposed upon him by the contract and nothing extra shall be payable unless so specifically stated in this contract.

Article 69.1 The prices bid by the contractor shall include all customs duties, import duties, business taxes, income and other taxes that may be levied now or in future in accordance to the laws and regulations on the Contractor's Equipment, Plant, materials and supplies (permanent, temporary and consumable) acquired for the purpose of Contract and on the services performed under the Contract. Nothing in the Contract shall relieve the Contractor from his responsibility to pay any tax that may be levied in India on profits made by him in respect of the Contract."

8. The first argument urged on behalf of the petitioner is that there is no sale under the subject contract of cement by the petitioner to the respondent, however this argument is not only without merit but the argument is an argument which does not fall within the scope of arguments permissible under Section 34 of the Act as the view of the Arbitrator is one possible view. Under the contract such as the present for supply of cement at fixed rate by the petitioner to the respondent the same amounts to a sale becomes clear from paras 3 to 8 and 11 of the judgment of the Supreme Court in the case of *M/s N.M. Goel and Co. (supra)* and which paras read as under:-

“3. The appellant-company is a building contractor at Rajnandgaon in Madhya Pradesh and is registered as a dealer under the Madhya Pradesh General Sales Tax Act. The appellant's tender for construction of foodgrains godown and ancillary buildings at Rajnandgaon was accepted by the Central Public Works Department. It was an item rate tender. In the tender so submitted by the appellant, the prices of the materials to be used for the construction including cost of iron, steel and cement were included. The PWD, however, had agreed to supply from its stores the said iron, steel and cement for the construction work and to deduct the prices of materials so supplied and consumed in the construction from the final bill of the appellant. Clause (10) of the Contract is relevant and was as follows:

“Clause 10.— If the specification or Schedule of terms provides for the use of any special description of materials to be supplied from Engineer-in-charge's Stores, or if it is required that the Contractor shall use certain stores to be provided by the Engineer-in-charge as shown in the Schedule of materials hereto annexed, the contractor shall be bound to procure and shall be supplied such material and stores as are from time to time required to be used by him for the purposes of the contract only, and the value of the full quantity of materials and stores to supply at the rates specified in the said Schedule of materials may be set off or deducted from any sums then due or thereafter to become due to the contractor under the contract or otherwise, or against or from the Security deposit, or the proceeds or sale thereof if the same is held in Government securities, the same or a sufficient portion thereof being in this case sold for the purpose. All materials so supplied to the contractor shall remain the absolute property of Government and shall not be removed on any account from the site of the work, and shall be at all times open to inspection by the Engineer-in-charge. Any such materials remaining unused and in perfectly good condition at the time of the completion or determination of the contract shall be returned to the Engineer-in-charge at a place directed by him, if by a notice in writing under his hand he shall so require; but the contractor shall not be entitled to return any such materials unless with such consent and shall have no claim for compensation on account of any such materials so supplied to him as aforesaid not being used by him or for any wastage in

or damage to any such materials. Provided that the contractor shall in no case be entitled to any compensation or damages on account of any delay in supply or non-supply thereof all or any such materials and stores. Provided further that the contractor shall be bound to execute the entire work if the materials are supplied by the Government within the scheduled time for completion of the work plus 50 per cent thereof (scheduled time plus 6 months if the time of completion of the work exceeds (12 months) but if a part only of the materials has been supplied within the aforesaid period, . then the contractor shall be bound to do so much of the work as may be possible with the materials and stores supplied in the aforesaid period. For the completion of the rest of the work, the contractor shall be entitled to such extension of time as may be determined by the Engineer-in-charge whose decision in this regard shall be final.”

4. As mentioned hereinbefore, under the said clause, all materials supplied to the contractor remained the absolute property of the Government and could not be removed on any account from the site of the work and were at all times open to inspection by the Engineer-in-charge. Any such materials remaining unused and in perfectly good condition at the time of completion or determination of the contract were to be returned to the Engineer-in-charge at a place directed by him by a notice in writing in his hand if he so required but the contractor was not entitled to return any such material unless he was required to do so. There was no dispute that for the construction the appellant was supplied iron, steel and cement by the PWD and it had purchased other materials from the market. The prices of iron, steel and cement supplied to the appellant for the work were deducted from its final bill.

5. On 22nd September, 1982 the appellant was assessed by the respondent for entry tax for the period 7th June, 1979 to 31st March, 1980 to a tax of Rs. 11,292 including penalty of Rs.2,000 and by an order dated 5th October, 1982 the appellant was assessed for the period from 1st April, 1980 to 31st March, 1981 for the entry tax of Rs. 23,393 including penalty of Rs. 4,500. The appellant was a registered dealer under the Madhya Pradesh General Sales Tax Act and had been assessed to purchase tax under Section 7(1) of the Act

and was as such liable for payment of entry tax for iron, steel and cement, the entry for the same having been effected at the instance of the appellant because it had ultimately used the material for the construction work.

6. The appellant filed revisions before the Deputy Commissioner of Sales Tax who affirmed the assessment orders. The appellant then filed a writ petition challenging the assessment of purchase tax under Section 7(1) of the Madhya Pradesh General Tax Act and assessment of entry tax under Section 3(1) of the Act saying that the entry of the materials so supplied by the PWD was effected by it and not by the appellant and it further contended that as there was no sale of these materials and that as these materials were used for construction of the building, there was no sale as such and so no entry tax could be levied. It was contended that since the appellant had purchased the iron, steel and cement from the PWD and not from the market as per the contract the prices of which had been deducted from its final bill, the entry of material could be presumed to have been made at the instance of the appellant who had ultimately used the materials for the construction work, and since these materials were purchased from the unregistered dealer, i.e. the PWD, the appellant was held liable for payment of purchase tax and entry tax.

7. Section 3 of the Act is the charging section. Under this, entry tax is levied on the entry in the course of business of a dealer of goods in local area specified in Schedule II for consumption, use and sale therein and on the entry of the goods specified in Schedule III for consumption, use of such goods as raw materials or as packing materials or in the execution of work contracts but not for sale therein. Iron and steel are in Schedule II and cement is in Schedule III and these are assessable to entry tax at the rate of 1.5 per cent and 1 per cent respectively. Under Section 6(c) of the Act where a dealer purchases goods specified in Schedule II and Schedule III in a local area from a person or a dealer who is not a registered dealer, it is presumed, unless the contrary is proved by him, that the entry of such goods had been effected by him into such local area before they were purchased by such dealer. It was, in those circumstances, presumed that the appellant had effected the entry of iron, steel and cement which were supplied by the PWD for the construction of work in the local area for consumption, use and sale therein. This position was

conceded on behalf of the appellant before the Full Bench of the High Court. The PWD is not a registered dealer, and therefore, Section 6(c) of the Act applied to the appellant. Under Section 13 of the Act, certain provisions of the M.P. General Sales Tax Act applied mutatis mutandis to a dealer in respect of entry tax payable under the Act. The question, therefore, was whether there was sale of iron, steel and cement by the PWD while supplying those materials for the construction work undertaken by the appellant. If supply of these materials is sale within the meaning of Section 2(n) of the M.P. General Sales Tax Act then the appellant would be liable for payment of entry tax as it has been assessed. The question, therefore, is whether there was sale and whether the property in the goods in question passed to the appellant or continued to remain with the PWD although the PWD had in the final bill debited the prices of the goods so supplied to the appellant under Clause (10) of the contract. The Full Bench found that there was sale and as a result of that the duty was leviable.

8. The question, therefore, is whether there was sale of goods in view of the contract between the parties whereunder the custody and control of the goods remained with the PWD and goods were only used in the construction under the contract. This question has been considered by this Court in *The Government of Andhra Pradesh v. Guntur Tobaccos Ltd.* 16 STC 240: (AIR 1965 SC 1396). There, the majority of the judges in a Bench of three learned Judges, viz., Justice Shah and Justice Sikri held that although in the execution of a contract for work some materials were used and property in the goods so used passed to the other person, the contractor undertaking the work would not necessarily be deemed, on that account, to sell the materials. This Court observed that a contract for work in the execution of which goods were used might take one of the three forms. It was indicated that the contract might be for the work to be done for remuneration and for supply of materials used in the execution of the works for a price, it might be a contract for work in which the use of the materials was necessary and incidental to the execution of the work or it might be a contract for work and use and supply of materials, though not accessory to the execution of the contract, was voluntary or gratuitous. In the last class there was no sale because though the property passed, it did not pass for a price. Whether a contract was of the first or the second class must depend upon the circumstances; if it was of the first

class, it was composite contract for work and sale of goods; where it was of the second category, it was a contract for execution of work not involving sale of goods. The majority of the learned Judges was of the view that in order that there should be a sale of goods which was liable to sales tax as part of a contract for work under a statute enacted by the Provincial or State Legislature, there must be a contract in which there was not merely transfer of title to goods as an incident of the contract, but there must be a contract, express or implied, for sale of the very goods which the parties intended should be sold for a money consideration, i.e., there must have been in the contract for work an independent term for sale of goods by one party to the other for a money consideration. The question in each case was one about the true agreement between the parties and the terms of the agreement must be deduced from a review of all the attendant circumstances. But from the mere passing of title to goods either as integral part of or independent of goods, it could not be inferred that the goods were agreed to be sold, and the prices were liable to sales tax. Whether a contract for service or for execution of work involved a taxable sale of goods must be decided on the facts and circumstances of each case. The burden in such a case lay upon the taxing authorities to show that there was a taxable sale, and that burden was not discharged by merely showing that property in the goods which belonged to the party performing service or executing the contract stood transferred to the other party. In that case, the assessee-company was a dealer carrying on the business of redrying in its factory raw tobacco entrusted to it by its customers. The assessee redried the tobacco, packed it in packing materials purchased from the market and delivered it to the customers. For redrying each bale of tobacco the assessee had charged the customers a certain sum but there was no separate charge for the value of the packing materials used. The assessee was assessed to sales tax under the Madras General Sales Tax Act, 1939, on the value of the packing materials on the ground that there was a sale of the packing materials. The High Court found that the packing of the redried tobacco and its storage for the requisite period was an integral part of the redrying process and held that there was no sale of packing materials. On appeal in that case, this Court by majority held that the finding recorded by the High Court that it was intended by the parties that the "packing material" should form an integral part of the process of redrying the without the use of the "packing material" redrying process could not be completed, and that

there was no independent contract for sale of "packing material". It was only as an incident of redrying process and as a part thereof that the assessee had to seal up the package of tobacco, after it had emerged from the reconditioning chamber, with a view to protect it from atmospheric action. In the absence of any evidence from which contract to sell "packing material" for a price might be inferred, the use of the "packing material" by the assessee must be regarded as an execution of the works contract and the fact that the tobacco delivered by the constituent was taken away with the "packing material" would not justify an inference that there was an intention to sell the "packing material". Mr. Justice Subba Rao, as the Chief Justice then was, held, however, that all the ingredients of the charging Section read with the definition of "sale" were satisfied. He observed that unless it could be said that the material used for packing was transformed into some other commodity not covered by the definition of "goods", it could not be held that there was no sale of the material. The packing material remained distinct from the dried tobacco. Property in it passed to the customer, who had paid for it. On the basis of the practice prevailing in the factory of the assessee, contracts for sale arose easily by implication and therefore the Sales Tax Authorities had rightly assessed the turnover in regard to the packing materials.

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11. Therefore, from the above decisions it follows that in order to be sale taxable to duty, not only the property in the goods should pass from the contractor to the Government, or the appellant in this case but there should be an independent contract-separate and distinct-apart from mere passing of the property where a party purchases or procures goods from the Government. Mere passing of property from the contractor to the Government would not suffice. There must be sale of good. The primary object of the bargain judged in its entirety must be viewed. In the instant case, Clause (10) is significant as we have set out hereinbefore. For the purpose of performance, the contractor was bound to procure materials. But in order to ensure that quality materials are procured, the PWD undertook to supply such materials and stores as from time to time required by the contractor to be used for the purpose of performing the contract only. The value of such quantity of materials and stores so supplied was specified at a

rate and got set off or deducted from any sum due or to become due thereafter to the contractor. Mr. Virmani, appearing for the appellant submitted before us that in the instant case, there was no such independent and separate sale. But we are unable to accept. Though, in a transaction of this type there is no inherent sale; a sale inheres from the transaction. Clause (10) read in the proper light indicates that position. (underlining added)

9. A reading of paras 3 and 4 of the Supreme Court judgment in the case of *M/s N.M. Goel and Co. (supra)* makes it abundantly clear that where cement is supplied under a contract similar to the contract in question there is in fact sale for consideration by the petitioner to the respondent and this is also the view of the Arbitrator in the impugned Award and I do not find any illegality or perversity in such a matter for this Court to interfere with the impugned Award in this regard.

10. The admitted facts are that under the subject contract petitioner supplied a total of 12786.85 metric tons of cement of which 9643.35 metric tons was obtained by the petitioner from outside the State of Maharashtra whereas 3143.50 metric tons was sourced from within the Maharashtra State. With respect to the cement sourced within the Maharashtra State, tax was paid by the petitioner and therefore this part is not in dispute between the parties. What is in dispute between the parties is the supply of cement by the petitioner to the respondent which was sourced by the petitioner from

outside the Maharashtra State on which the petitioner had only paid the Central Sales Tax and not paid the sales tax under the Bombay Sales Tax Act. The competent authority acting under the Maharashtra Act, 1989 firstly issued Notice to the petitioner herein on 19.04.1999 and thereafter had issued Notice to the respondent herein on 10.5.1999 asking the respondent to file revised returns for the years 1996-97 and 1997-98 on the cement supplied by the petitioner to the respondent sourced from outside the Maharashtra State on which legally payable sales tax under the Bombay Sales Tax Act was not paid. The assessing authority demanded tax on revised assessment which would have been much higher but the respondent under the Amnesty Scheme paid the amount of tax of Rs.27,30,600/- alongwith the reduced interest liability of Rs.4.41 lacs and which otherwise would have been a higher amount of Rs.14.70 lacs. Effectively therefore respondent instead of paying Rs.42,00,600/- only paid Rs.31,71,600/-. It is this amount which was claimed by the respondent in the arbitration proceedings from the petitioner and the Arbitrator has only allowed recovery of the principal amount of tax paid of Rs.27,30,600/- by disallowing the claim of interest of Rs.4.41 lacs.

11. In my opinion, Clause 12 of the Contract leaves no manner of doubt by its first two lines that all tax and levies of any and every nature whatsoever be it a levy under a Central Act or the State Act of Maharashtra, stood duly paid by the petitioner to the requisite authorities and cement supplied at a fixed rate of Rs.2,800/- per metric tons by the petitioner to the respondent was arrived at by taking account of payments already made by the petitioner towards every Central and State taxing statutes. Surely, the respondent tendered for contract on the representation that no tax will have to be paid by the respondent to the petitioner on account of any Central or State taxing statute of cement supplied by the petitioner to the respondent, but the respondent however was forced to pay the tax under the Maharashtra Act, 1989 because it was found that admittedly the petitioner had not paid sales tax under the Bombay Sales Tax Act with respect to the cement supplied by the petitioner to the respondent sourced by the petitioner from outside the State of Maharashtra.

12. In my opinion, it makes no difference even if the respondent knew that the petitioner was supplying cement to the respondent which was sourced from outside the State of Maharashtra because respondent in view of Clause 12 of the Contract was entitled to believe that the petitioner had paid

all taxes and levies on such cement supplied by the petitioner to the respondent including the cement which was sourced by the petitioner from outside the State of Maharashtra.

13(i). In my opinion, Article 69.1 of the GCC and Clause 25 of the SCC or any other clause for that matter which is relied upon by the petitioner will not help the petitioner to contest his liability with respect to the works contract tax paid by the respondent to the concerned authority inasmuch as the liability of the respondent to pay all taxes would surely be only for those taxes for which there was no representation under the contract that the said tax stood paid by the petitioner. Respondent was to be liable for all the taxes which it had to pay to any authority on account of the respondent entering into the contract with the petitioner, but surely not the Central and State tax and levies with respect to the sale of cement by the petitioner to the respondent inasmuch as Clause 12 of the Contract categorically stated that when the cement was supplied by the petitioner to the respondent at a fixed rate, the supply of cement was with all taxes paid.

(ii) A harmonious reading will have to be given to Clause 25 and Article 69.1 on the one hand with Clause 12 of the Contract on the other hand.

14. Any doubt with respect to interpretation of Clause 12 of the Contract and the categorical language used in the same is removed when we refer to Section 64A of the Sale of Goods Act which provides that if a buyer of goods is forced to pay sales tax although the contract did not envisage such sales tax to be paid by the buyer (and who is the respondent in this case), then, the buyer/respondent will be entitled to reimbursement for the tax paid. The relevant part of Section 64A of the Sale of Goods Act reads as under:-

“Section 64A. In contracts of sale, amount of increased or decreased taxes to be added or deducted.”-(1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section(2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time,-

(a) If such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b)xxxx xxxx

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(2) The provisions of sub-section(1) apply to the following taxes, namely:-

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods.”

(underlining added)

15(i). In the present case, application of Section 64A of the Sale of Goods Act, in fact in my opinion is only as a matter of abundant caution

inasmuch as respondent could have even succeeded without Section 64A of the Sale of Goods Act, because, the representation made by the petitioner to the respondent as regards the aspect that the petitioner had paid all the taxes and levies for the cement supplied by the petitioner to the respondent was found to be false and this is a clear breach of contract between the parties and when such a breach of contract results, the aggrieved party under Section 73 of the Indian Contract Act, 1872 is entitled to damages from the party who has committed the breach (which is the petitioner in this case) with respect to the losses which are suffered on account of breach of contract.

(ii) Since the petitioner is guilty of breach of contract in not having paid the sales tax under the Bombay Sales Tax Act, and which was the liability of the petitioner in view of the clear language of Clause 12 of the Contract, petitioner is guilty of breach of contract and once the respondent suffers losses on account of breach of contract by having to pay taxes to the authority under the Maharashtra Act, 1989, the respondent can hence recover such losses from the petitioner by seeking reimbursement of the taxes paid by the respondent under the Maharashtra Act, 1989.

16. I also do not agree with the argument urged on behalf of the petitioner of estoppel against the respondent, and which argument has also

been rightly rejected by the Arbitrator, inasmuch as, when the respondent had given the No Claim Certificate after receiving the payment under the final bill, the respondent had no knowledge that it would have been made liable to pay tax under the Maharashtra Act, 1989 because the Notice by the concerned tax authority was received by the respondent on 10.5.1999 whereas the No Claim Certificate was given by the respondent after receiving the amount under the contract earlier on 25.2.1999. Estoppel can only be with respect to a known fact, and estoppel cannot apply with respect to a fact which a person comes to know at a later stage. I therefore agree with the conclusion of the Arbitrator in this regard which has been given at internal pages 16 and 17 of the impugned Award.

17. I also reject an argument urged on behalf of the petitioner as per which the petitioner argues that the respondent was not liable to pay tax to the concerned authority under the Maharashtra Act, 1989 in view of the provisions of the Central Sales Tax Act, 1956 because petitioner had paid the Central Sales Tax with respect to the cement sourced outside the State of Maharashtra, inasmuch as, no provision of the Central Sales Tax Act could be pointed out to me on behalf of the petitioner that merely because petitioner has paid Central Sales Tax, petitioner would not have been liable to pay sales tax under the Bombay Sales Tax Act. In fact the Maharashtra
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Act, 1989, in order to assess the liability under the said Act with respect to fixing of the turnover value for determination of the tax, as per Section 6(1)(A)(d)(ii) states that from the monetary value of the turnover for the payment of tax, then with respect to goods on which if sales tax is paid under the Bombay Sales Tax Act then such value of material supplied with tax paid is to be reduced from the monetary turnover value for computation of work contract tax. There is therefore no provision that merely because Central Sales Tax is paid by the petitioner for cement sourced by the petitioner outside the State of Maharashtra, there would be no further liability upon the respondent under the Maharashtra Act, 1989 inasmuch as, with respect to every local sale in the State of Maharashtra, local sales tax was payable under the Bombay Sales Tax Act.

18. Learned counsel for the petitioner finally argues that petitioner is a no profit and no gain Central Government employees' welfare association, and therefore this Court should exempt the payment of interest, however, sympathy and equity cannot substitute legal liability, and since law states that once principal is payable interest thereon also should be payable, hence there is no reason why interest should not be payable by the petitioner to the respondent, more so because the Arbitrator has only awarded a reasonable rate of interest at 9% per annum simple.

19. In view of the above, I do not find any merit in the petition, and the same is therefore dismissed, leaving the parties to bear their own costs.

OCTOBER 06, 2015
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VALMIKI J. MEHTA, J.