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

\+ **OMP No. 363/2015**

% **7th July, 2015**

BBEL-MIPL JOINT VENTURE ..... Petitioner

Through: Mr. Sanjeev Kumar and Mr. Naik H.K, Advs.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA

..... Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996. Petitioner was the claimant in the arbitration proceedings. Claim no.2 was made by the petitioner for reimbursement of the labour cess amount of Rs.2,68,71,577/-. Cess was deducted from each interim payment certificate at 1% of the gross value of the work done. The case of the petitioner is that the cess which has been imposed under the Building and Other Construction Workers' Welfare Cess Act, 1996 (in short 'BOCW Act') is a subsequent legislation which came into force after

opening of the bid submitted by the petitioner, and being a subsequent legislation, respondent had wrongly deducted the cess which is liable to be reimbursed to the petitioner.

2. The sole issue before this Court is as to whether the BOCW Act is a 'subsequent legislation' as per the contract between the parties, because as per the petition this Act has come into force after the period of 28 days after opening of the bid submitted by the petitioner. The Arbitral Tribunal comprising of three arbitrators has negated the claim of the petitioner. Relevant portion of the Award with regard to claim no.2 is dealt with from paras 80 to 104 of the Award. In these paragraphs the arbitral tribunal has referred to and considered the issue and held that the BOCW Act cannot be said to be a subsequent legislation. The conclusion is stated in paras 102 and 103 of the Award and these paras read as under:-

> "**102.** From the above it is clear that under the BOCW Service Act the Orissa Govt. had already made the BOCW Service Rule in 2002. Hence the Board and the other Service Rules for the Welfare of the BOCW Service Act was also constituted in 02.08.2002. In our considered opinion that the Resolution of the Labour and Employment department published on 18.12.2008 cannot be construed as a subsequent legislation for more than one reason namely **(i)** it was only the Central Govt. which had the authority to fix the rate of Cess under Sec. 3(1) and from the rules under Sec. 14(1) & 14(3) which would be applicable for the whole country, **(ii)** The Orissa Govt. had

adopted for implementation in its Gazette Notification dated 29.07.2003 the Central Govt. Cess Rules 1998, **(iii)** Orissa state had adopted the Central Rules from 29.07.2003 the Cess Rules were in force from that date, **(iv)** The BOCW Cess Act under Sec. 3(1) empowers only the Central Govt. to levy the Cess by notification in the official Gazette, **(v)** Under Sec. 3(2) of the Cess Act only the manner of collection of Cess as levied by the Central Govt. in relation to "……….*a building or other construction work* ***of a Government or a public sector undertaking or advance collection through a local authority where……."*** is specified. Hence, the time of implementation of the provisions of the Cess Act or the time at which it should be implemented is not left to "***a Government or a public sector undertaking or advance collection through a local authority"*** since the Cess Act on a conjoint reading of Secs. 3(1), 3(2), 14(1), 14(3) make it clear that the Central Govt. only has the prerogative to fix the rate of Cess and levy the same.

103. In the light of the above findings we find that in the present case the resolution of the Orissa Govt. gazette on 18.12.2008 cannot be considered as a subsequent legislation to invoke provisions of Clause 70.8 of the Contract since the Central Govt. had notified the rate of Cess in 1996 and the Orissa Govt. had already framed and adopted the BOCW Service Rules on 02.08.2002"

3. The issue to be decided is no longer *res integra* and the same has been pronounced upon by a Division Bench judgment of this Court in the case reported as ***Delhi Metro Rail Corporation Limited Vs. Simplex Infrastructures Limited 2011 (3) ArbLR 307 (Delhi)***. This judgment categorically holds that merely because a State Government seeks to implement the BOCW Act subsequently by making rules and constitution of the Board to be constituted under the BOCW Act, the same will not mean

that the BOCW Act had not already come into force in the year 1996. The relevant observations and the ratio of this judgment in ***Delhi Metro Rail Corporation Limited***'s case ***(supra)*** are contained in paras 8 to 10 and which paras read as under:-

> "8. On a plain reading of the provisions extracted above the following emerges:
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> > (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 v. 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 deductable 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."

4. I am bound by the aforesaid Division Bench judgment of this Court and merely because an SLP has been filed, cannot mean that the ratio of the judgment in the ***Delhi Metro Rail Corporation Limited***'s case ***(supra)*** will not apply.

5. Reliance placed by the counsel for the petitioner upon the judgment in the case of ***Dewan Chand Builders and Contractors Vs. Union of India & Others (2012) 1 SCC 101,*** and its para 18, does not help the petitioner because this paragraph does not deal with and pronounce on the issue as to when the BOCW Act came into operation.

6. Similarly, reliance placed by the petitioner on the judgment of the Supreme Court in the case of ***National Campaign Committee for Central Legislation on Construction Labour Vs. Union of India and***

Others (2011) 4 SCC 647 cannot help the petitioner in its argument that merely because the State may have chosen not to implement the BOCW Act cannot mean that the Central Act itself had not come into operation. The judgment relied upon was passed because the States were not implementing the BOCW Act and accordingly directions were issued for implementation of the BOCW Act, however that does not mean that the Central Legislation did not come into force from 1996 and under which legislation, the relevant notification was issued by the Central Government as reproduced in ***Delhi Metro Rail Corporation Limited***'s case ***(supra)***, fixing the cess at 1%.

7. In view of the above, the Award is neither illegal being in violation of the law of the land or that it is in violation of any contractual clause between the parties or the same is in any manner perverse for this Court to interfere with the same.

8. Dismissed.

JULY 07, 2015 **VALMIKI J. MEHTA, J.**

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