IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

FAO No.3937 of 2017(O&M)

Date of Decision:-25.09.2017

Chief Engineer (NH), Punjab PWD (B&R) &Anr.

......Appellants.

Versus

M/s C & C Constructions Company Ltd. &Ors.

......Respondents.

CORAM:- HON'BLE MR. JUSTICE JASWANT SINGH

Present:- Mr. Amit Mehta, Senior Deputy Advocate General, Punjab for the appellants.

Mr. Kanwal Goyal, Advocate for the respondent no.1-Contractor.

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JASWANT SINGH, J.

1. The employer, i.e Chief engineer (NH) Punjab, PWD (B&R), is in appeal aggrieved against the order passed by the Ld. Additional District Judge, SAS Nagar, Mohali who, vide its decision dated 02.02.2017 has dismissed the objections filed by the appellant/department under section 34 (2) of the Arbitration and Conciliation Act, 1996 and thereby confirmed the Arbitration Award dated 25/10/2013 (A-6).

2. The facts leading to dispute between the parties, as emerging from record of the case are that the appellant-PWD invited bids for upgradation of Kharar-Banur-Tepla Road and in the Notice Inviting Tender (NIT), the Appellant fixed last date of receipt of tender as 30.11.2006, and Contractors were supposed to consider existing laws i.e. law existing 28 days prior to last date of receipt of tender, which would then be 02.11.2006 and is considered as 'base date'. In the year 1996, for the protection of unorganized workers, Government introduced Building and Other Construction Workers Cess Act, 1996 (for short 'Cess Act 1996') under an ordinance which was replaced by 1996 Act (w.e.f. 03.11.1995). As per Section 18 of the Building and Other Construction Workers (Regulations of Employment and Conditions of Service) Act, 1996 (for short 'BOCW Act, 1996'), every State Government is required to constitute a Welfare Board to exercise the powers conferred on and perform the functions assigned to it for benefit of the workers as per Section 22 of the BOCW Act, 1996.

Due to the reasons best known to the Punjab State Government, the officers of the Labour Department of Punjab Government were notified as "Assessing Authorities" and "Cess Collectors" within their respective jurisdiction for the purpose of Cess Act, 1996 and the Cess Rules 1998 vide Notification dated 6.2.2008. The labour Cess was to be collected from every employer and thereafter proceeds were to be deposited with the Welfare Board at the specified rate in order to carry out the purposes of the BOCW Act, 1996. Admittedly the State government framed the Punjab Building & Other Construction Workers (Regulation of Employment and Conditions of Service) Rules in exercise of power under Section 40 &

62 of the BOCW Act, 1996 to carry out its purpose, vide Notification dated 01.10.2008. The State Government vide circular dated 11.11.2008 decided to implement the provisions of BOCW Act, 1996, the Punjab BOCW Rules 2008, the Cess Act 1996 and Cess Rules 1998 for carrying out the purposes of the enactments. However, concededly the Punjab Welfare Board under Section 18, before which the collected cess was required to be deposited and thereafter appropriated for carrying out the purposes of the aforesaid enactments, was constituted vide Notification dated 30.04.2009. It is thus evident that the State of Punjab took a decision to implement the aforesaid enactments w.e.f. 11.11.2008 and the Board to carrying out the purpose of the enactments was constituted w.e.f. 30.04.2009, much later than the period when the written contract between the parties was executed and commenced w.e.f. 20.08.2007. It is also not in dispute that as per the provisions of the Cess Act 1996 read with Cess Rules 1998 framed by the Central Government thereunder the "labour Cess" was to be collected from the employer, however, in case of construction work carried out through a contractor by the Government department or public sector undertaking, the public Authorities were liable to be deduct Cess from the running bills of the contractor and deposit the same through the Cess collectors with the Welfare Board.

The State of Punjab implemented its 2008 Rules w.e.f. 11.11.2008, so the appellant-PWD started deducting Cess @ 1% from the running bill of the Respondent-Contractor, which was objected by Contractor and led to appointment of Arbitral Tribunal comprising three members , which vide its Award dated 25.10.2013 allowed claim of the Contractor and directed the appellant to refund Labour Cess which was deducted from the running bills of the respondent-Contractor.

3. Learned counsel for the appellant has vehemently argued that the Ld. Additional District Judge as well as the arbitrators, who have passed the award, have wrongly held that respondent No.1-claimant-contractor is entitled to recover the amount due towards 'labour cess' from the Appellant-Department because the State of Punjab had not implemented Building and Other Construction Workers Cess Act, 1996 (hereinafter referred to as Cess Act, 1996). He has argued that the levy of cess had come into force on 03/11/1995 under an ordinance and subsequently replaced by the 1996 act (w.e.f. 03/11/1995), however, implemented by the State Government subsequently but would be applied retrospectively in the present case w.e.f. 02.11.2006 i.e. the base date prior to the parties entering into a bid. As such, in any case, the State Government is entitled to recover the 'labour cess' from retrospective effect and there is no impediment on the said collection of 'labour cess'. In order to substantiate his argument, he has relied upon the judgment passed by Hon'ble Supreme Court in **A. Prabhakara Reddy and company Versus State of Madhya Pradesh and others (2016) 1 Supreme Court cases 600** (A-3).

4. On the other hand, Ld. counsel for the respondent No. 1-

claimant has argued that although the Central Act had come into force in the year 1995, however, a bare perusal of the rules framed by the State of Punjab under section 40 and 62 of BOCW Act 1996, namely the Punjab Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2008 would show that they have come into force prospectively which is evident from Rule (1) Sub-rule (2) of 2008 Rules. He has further argued that a perusal of the record would reveal that Labour cess is to be recovered from the organizations/contractor based on contracts commenced w.e.f 1.10.2008 i.e prospectively. Thus, he has submitted that both the Additional District Judge as well as the Arbitrators, have rightly allowed the claim of respondent No. 1-claimant and there is no infirmity, much less any illegality so as to warrant interference from this court, especially considering the limited scope under section 34 and 37 of the Arbitration and Conciliation Act 1996.

5. After hearing learned Counsel for the parties and perusing the paper book, this court is of the opinion that the present appeal is devoid of any merit and same is liable to be dismissed.

It is not in dispute that the provision to levy 'labour cess' came into force from 03/11/1995, by virtue of an ordinance and finally replaced by Cess Act 1996 (a Central Act). However, for one reason or the other, the said Act was never implemented in the State of Punjab concededly till entering of contract between the parties. It was only after the judgment passed by the Hon'ble Supreme Court, State of Punjab, under compulsion, decided to implement the said Act by notifying its rules by exercising the powers given under section 40 and 62 of the BOCW Act 1996, vide Notification dated 01/10/2008 and further issued directions to the concerned officers vide its circular dated 11/11/2008 to carry out the provisions of the BOCW Act 1996 & Cess Act, 1996, by relying upon 2008 rules.

It is undisputed that as per the Cess Act 1996 read with Cess Rules 1998, the labour Cess was to be collected from the employers by the Cess Collectors/Assessing Authorities (notified vide Notification dated 6.2.2008) and the amounts deposited with the Welfare Boards for utilisation for the purpose of BOCW Act 1996. Admittedly, the Punjab Welfare Board came into existence w.e.f. 30.04.2009 vide Notification No.S.O.17/C.A.27/96/S.18/2009 and the Punjab BOCW Rules came into existence on 01/10/2008 vide notification number G.S.R 52/C.A0 27/1996/Ss 40 and 62/2008 dated 01/10/2008, which states that it shall come into effect prospectively, as is evident from wording of Rule 1 (2) of the 2008 rules. The said rule 1 (2) reads as under:

> "*(2) They shall come into force on and with effect from the date of their publication in the official Gazette.*"

Meaning thereby, the Cess Act 1996 remained in a morbid state in the State of Punjab and it is for the 1st time on 01/10/2008 that the State Government woke up from its slumber and decided to implement the Cess Act by framing the aforesaid rules. Further, there is no dispute that Punjab government has constituted the Punjab Welfare

Board under Section 18 of the BOCW Act, 1996 vide notification dated 30th of April 2009. Even further, the parties are *ad-idem* that the Cess Act 1996 as well as Cess Rules 1998 to collect 'labour cess' were implemented in the state of Punjab vide government circular dated 11/11/2008.

6. Though, learned Counsel for the appellant has rightly argued that the State Government is well within its right to levy 'cess' from a backdate and recover the same from the concerned contractors, however, in the present case, State Government, introduced Rules w.e.f. 01.10.2008 and implemented vide Circular dated 11.11.2008 so contractor cannot be made liable to pay 'Labour Cess' prior to introduction of Rules. The said amount of 'labour cess' was required to be deducted from running bills of the contractor and deposited by Appellant-PWD, but was deducted on or after 11.11.2008, which means respondent-contractor could not be expected to know his liability of "Cess" at the time of entering into Contract with the Appellant. It is different issue to say that whether State Government can recover cess from backdate than the issue of bearing burden by employer or contractor in terms of the existing contract.

Therefore, in the opinion of this Court, the moot point that requires to be adjudicated is whether the levy of 'cess' which has been deducted by the Appellant from the bills of respondent-Contractor, is liable to be returned to the Contractor-respondent by the appellant-department in view of the contract entered amongst the parties or not.

7. As per the arguments raised by the counsel for the Appellant-Department, the Cess Act of 1996 finds mention in the contract (Annexure A-1 and A-2 appended with the basic contract), as one of the Acts which are in existence in the State of Punjab and hence the Contractor had knowledge about the existing law and therefore, subsequently cannot seek recovery of the deducted 'labour cess'.

Thus, now it is to be seen that whether the contractor, at subsequent stage, can feign ignorance qua the existence of the Cess Act 1996 by keeping into consideration the clauses of contract.

8. It is not in dispute that the bid of the respondent-Contractor was accepted on 12.07.2007, and the agreement was signed amongst the parties on 20.08.2007, which required work to commence on 01/09/2007, with a stipulation to complete it within 28 months i.e till 17/10/2012. It is also not in dispute that there was no delay in execution of the Work. Clause 6.4 of Particular Conditions of Contract requires the contractor to abide at all times by all the existing labour enactments and rules made there under, regulations, notifications and by-laws of state or Central Government or Local Authority and any other labour law (including rules), regulations, by-laws that may be passed or notification that may be issued under any law in future either by the State or Central Government or the local authority.

Further, as per the said agreement, there is a Clause 13.7 of General Conditions of Contract (GCC), which states that contract price shall be adjusted, to take account of any increase or decrease in cost resulting from change in the laws of the country, including introduction of new laws as well as repeal or modification of the existing laws, provided such a change has occurred after the '*base date*', which affects the performance of the contract. *Base date*, as per the contract, meant a date, 28 days prior to the last date for submission of tender/bid i.e. 30.11.2006 regarding undertaking of work w.e.f. 01/09/2007, thus, concededly would be 02.11.2006.

9. Therefore, from close scrutiny of the facts of the case, it comes out that at the relevant time when the contract was entered amongst the parties, there was no mechanism whereby it was necessary for the respondent-contractor to pay the 'labour Cess' to the State. As stated earlier, the levy of 'labour Cess' and implementation of the same was not carried out till 11/11/2008 and it was implemented prospectively and as such, when work was awarded or 28 days before the bid opening, the provisions of 'Cess Act' and 'Cess Rules' were not in force and not applicable/implemented in the state of Punjab. It is well settled law that no tax or fee can be collected in the absence of any mechanism even though there is a charging section in the enactment as held by Hon'ble Supreme Court in para no.33 of the judgment cited as **Commissioner, Central Excise & Customs, Kerala Vs. Larsen & Toubro Limited and connected matters (2016) 1 Supreme Court Cases 170**.

10. It is also not disputed that there was no demand or collection of 'labour Cess', before base date from anybody in the entire State of Punjab. Thus, although the Act i.e 'the Cess Act' and 'Cess Rules' were in existence on the 'Base date' but the Punjab Government decided to implement it subsequent to base date. Hence, it is safe to conclude that Contractor had made necessary inquiries at the time of making the bid and took a calculative decision not to include 'labour Cess' in its costs for making the bid as the same was not applicable at the relevant point of time i.e at the time of entering into contract. Further, the Court is of the opinion that Contractor cannot be made to assume that in future State of Punjab would implement the 'labour cess' and thereafter will seek recovery of the same retrospectively. The contractor had bonafidely given his bid by taking into consideration all the relevant costs that it might incur. Thus, the Contractor was right in claiming the refund/reimbursement of 'labour cess' recovered by the State Government from the appellant-department, as there was change in law subsequent to 'base date', which led to increase of costs incurred by the contractor. It is apposite to notice here that Appellant-department at any stage neither has adduced Bill of Quantities (BOQ) or their internal calculation, which is made prior to inviting Bids to show that the component 'labour cess' was a part of cost of the project. Appellant being department of State Government always prepares BOQ as well as internal calculation of cost of work which is compared with bids of the Contractors and then final contract amount is determined.

Hence, in view of the facts and circumstances as discussed above, especially when the Cess Act 1996 was not implemented by the State of Punjab till the crossing of the Base Date and even by the time contract was executed between the parties, respondent-Contractor cannot be made to bear the extra financial burden, not covered under any clause of the Contract. The act of mentioning of the applicability of the Acts/Laws in the Contract *simplicitor ,* in facts of the present case, is to be treated as indicative only, without entitling the department to fasten the liability upon the Contractor.

In view of the above, this court does not find any reasoning to interfere in the Award dated 25.10.2013 passed by the Arbitral Tribunal; and judgment dated 02.02.2017 passed by learned Additional District Judge, SAS Nagar Mohali/Objecting Court, which is hereby upheld and resultantly the present first appeal stands dismissed.

(JASWANT SINGH)
JUDGE

September 25th, 2017
Vinay

Whether speaking/reasoned	***Yes/No***
Whether Reportable	***Yes/No***