Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 398 OF 2021

Kalpataru Power Transmission & Anr ...Petitioners
Versus
Union of India & Ors ...Respondents

Mr Mayur Khandeparkar, *with Yuvraj Singh, i/b Desai & Diwanji, for the Petitioner.*
Mr Kedar Dighe, AGP, *for the Respondent-State.*
Mr Abhijeet Joshi, *with Varsha Sawant & Aditya Joshi, for Respondent No. 3.*
Mr Akshay Shinde, *for Respondent No. 4.*

CORAM G.S. Patel & Neela Gokhale, JJ.
DATED: 5th June 2023

PC:-

1. The matter seems to us to be identical to Writ Petition 668 of 2019 in which we have just delivered a short judgment. This matter also arises under that the Building and other Construction Workers (Regulation of Employment and Conditions of Service) Cess Act 1996 and the corresponding Rules of 3 and 4 of 1998. We have briefly heard learned AGP on the question of whether or not this Writ Petition is fully covered by the decision of Supreme Court in

Uttar Pradesh Power Transmission Corporation Limited & Anr vs CG Power and Industrial Solutions Limited & Anr.[1]

2. Briefly, the facts. The 1st Petitioner was identified by the 3rd Respondent, MSETCL, as a strategic alliance partner and was a successful bidder for developing transmission infrastructure. This was in 2009. On 27th August 2009, there were two implementation agreements. There were also two Letters of Award issued by MSETCL to the 1st Petitioner. There followed separate and divisible contracts dated 20th November 2011. Under these, the 1st Petitioner was a contractor for fabrication and supply of equipment and material required for setting up power transmission infrastructure projects. Several agreements came to be executed in that regard. 42 separate work orders came to be issued to the 1st Petitioner. Each of these covered, broadly stated, two categories of works for each project, viz., (i) equipment and material supply and (ii) erection and construction of transmission towers and associated civil works. The 1st Petitioner registered itself under the Cess Act 1996.

3. The submission on behalf of the Petitioners by Mr Khandeparkar is that clearly the Cess Act can only apply to construction contracts and has no application to contracts regarding supply. Despite this MSETCL has made a 1% deduction of Cess on the total project costs, including the supply component.

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1 (2021) 6 SCC 15.

4. The submission by the learned AGP is that the tender was one but this was divided into separate components "for convenience of parties". For this reason, the cess was correctly applied, it is submitted, to the total project cost and it is not possible to segregate the levy of Cess or to limit it to the construction component alone. The Supreme Court decision in *UP Power Transmission* is therefore distinguishable on this fundamental aspect of the matter.

5. We do not believe the submission is well founded. Paragraphs 51, 53 and 54 of the Supreme Court decision in *UP Power Transmission* put the matter beyond all controversy.

> "51. **The clear statutory scheme of the BOCW Act excludes a supply contract from within its ambit.** On behalf of the Respondent No.1, it is pointed out that several public authorities and corporations, such as the Delhi Metro Rail Corporation and Karnataka Power Transmission Corporation Limited, have issued instructions that no cess under the BOCW Act is leviable on a contract for supply of goods. Copies of the KPTCL circulars dated 22.8.2012 and 28.8.2012 to this effect are annexed to the Rejoinder of the Respondent no.1 in the High Court.
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> 53. **Cess under the Cess Act with BOCW Act is leviable in respect of building and other construction works. The condition precedent for imposition of cess under the Cess Act is the construction, repair, demolition or maintenance of and/or in relation to a building or any other work of construction, transmission towers, in relation inter alia to generation, transmission and distribution of power, electric lines, pipelines etc. Mere installation and/or erection of pipelines, equipments for generation or transmission or distribution of power, electric wires, transmission**

towers etc. which do not involve construction work are not amenable to Cess under the Cess Act. Accordingly no intimation or information was given or any return filed with the Assessing Officer under the Cess Act or the Inspector under the BOCW Act in respect of the First and Second Contracts, either by UPPTCL or by the Respondent No.1.

54. **A contractor who enters into a pure Supply Contract is statutorily exempted from levy under the BOCW Act.** The Contract in question is a Supply Contract as would be evident from Clause 8.7 of the Special Conditions of Contract which states:

> "The contract shall be a 'Divisible Contract' with single point responsibility, hence no works Contract tax shall be payable and the Purchaser shall not bear any liability on this account."

(*Emphasis added*)

6. Plainly, there is no question of levy of cess under the Cess Act or the Cess Rules to those contracts that are purely supply contracts. The reasons why the Cess is inapplicable to supply contracts is clearly stated in the decision of the Supreme Court.

7. The final prayers in the Petition are (a), (b), (c), (c)(i) and (c)(ii).

"(a) This Hon'ble Court be pleased to issue a writ of or in the nature of *certiorari* or any other appropriate writ, order or direction, in the nature of certiorari, under Article 226 of the Constitution of India, calling for the records and papers in relation to the Impugned Communications and Demands that is::

(a) Communication dated 2nd January 2017 (Exhibit K) and dated 3rd January 2019 (Exhibit R) by MSETCL (Exhibit K) requiring deduction of 1% cess of the project cost including supply component.

(b) Circular dated 4th August 2017 (Exhibit M) and Circular dated 29th September 2018 (Exhibit N) requiring payment of Labour Cess on the entire project cost including supply component.

(c) Communication dated 25th April 2019 (Exhibit T), dated 23rd may 2019 (Exhibit U) and 18th November 2019(Exhibit Y) requiring and insisting deduction of Labour Cess on the contract value of supply of equipment.

(d) Demand Notice dated 11th October 2019 (Exhibit Z) demanding from the Petitioners "pending labour cess" in respect of the supply contract.

and after going through the legality and validity thereof, the same be quashed and set aside insofar as the same purport to levy, demand, collect or extract from the Company, a cess for the purposes of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, on the supply of equipment and material under the Project Documentation (as defined in paragraphs 7 and 8 of this Petition);

(b) That this Hon'ble Court be pleased to declare that no labour cess under the provision of The Building and other Construction Workers' Welfare Cess Act, 1996 and The Building and other Construction Workers' Welfare Cess Rules, 1998 is leviable form the Petitioner in respect of the equipment supply contracts entered into between the Petitioner and Respondent MSETCL and such supply contract are not covered by the Cess Act and the Cess Rules.

(c) This Hon'ble Court be further pleased to issue a writ of or in the nature of *mandamus* or any other appropriate writ, order, direction or declaration;

(i) restraining the Respondents (or any of them, and whether by themselves or through their officers, subordinates, servants or agents) from levying, demanding, collecting or extracting from the Company, a cess for the purposes of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, on the supply of equipment and material under the Project Documentation (as defined in paragraphs 7 and 8 of this Petition); and

(ii) requiring the Respondents to release to Petitioner No. 1 all payments, deposits, retentions or exactions of cess for the purposes of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, on the supply of equipment and material under the Project Documentation (as defined in paragraphs 7 and 8 of this Petition)."

8. In view of this discussion, Rule is made absolute in terms of prayer clauses (a) and (c), (c)(i) and (c)(ii). As regards the prayer clause (c)(ii), the amount involve is stated on Affidavit by MSETCL in the tabulation at page 519. This statement is noted.

(Neela Gokhale, J) **(G. S. Patel, J)**