Ashvini Narwade

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2477 OF 2021

M/s. BNC Power Projects Ltd.,
& Another … Petitioners

Versus

Union of India & Others …Respondents

Adv. Harsh Paresh Dedhia with Adv. Kaman Ali Shaikh with Adv. Manoj Sable, Adv. Shantanu Thorat, Adv. Priya Dubey for the Petitioners.
Mr. Neel Helekar with A. a. Garge for Respondent No.1.
Mr. Abhay L. Patki, Addl. G. P. for the Respondent-State.
Mr. Advait Vajarutkar h/f Mr. Abhijeet Joshi for Respondent No.3.
Mr. Akshay Shinde for Respondent No.4.

CORAM: G. S. KULKARNI & FIRDOSH P. POONIWALLA, JJ.
DATED: 17th January, 2024

P.C.

1. We have heard learned Counsel for the parties. This Petition is filed praying for the following reliefs:-

> *"(a) That this Hon'ble Court be pleased to issue a Writ 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 all papers relating to the Petitioner's case pertaining to deduction 1% Cess on design and supply of equipment, and after examining the validity, legality and propriety thereof, quash and set aside the Impugned Circular dated 30.06.2016 read with Impugned letter dated 02.01.2017 and Impugned Circular dated 04.08.2017 to the extent that the Impugned Circulars have directed deduction of 1% Cess on design and supply of equipment as ex facie illegal, arbitrary and without jurisdiction;*
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> *(b) That this Hon'ble Court be pleased to issue a Writ of Declaration or any other appropriate writ, order or direction in the nature of Declaration under Article 226 of the*

Constitution of India declaring that Rule 3 of the Building and Other Construction Worker's Welfare Cess Rules, 1998 read with Section 3 of the Building and Other Construction Worker's Cess Act, 1996 that to the extent that it includes the cost of supply of equipment within the scope of the cost of construction of building and other construction work is arbitrary, unreasonable, a colourable exercise of power and is ultra vires the Cess Act and is in violation of Article 14 and 19(1)(g) of the Constitution of India;

(c) That this Hon'ble Court be pleased to issue a Writ of Mandamus or any other appropriate writ, order or direction in the nature of mandamus under Article 226 of the Constitution of India directing the Respondent No.3 to release the payment relating to the 1% Cess already deducted illegally on the design and supply of equipment;

(d) That this Hon'ble Court be pleased to issue a Writ of Prohibition or any other appropriate writ, order or direction in the nature of prohibition under Articles 226 of the Constitution of India prohibiting the Respondents from making deduction of 1% Cess from the payments to be made to the Petitioner Company where the deduction is made on account of cost of design and supply of equipment;

(e) That pending the hearing and final disposal of this Writ Petition, this Hon'ble Court be pleased to pass an interim order and injunction restraining the Respondent No.3 from making any further deductions of 1% Cess on the cost of design and supply of equipment;

(f) That pending the hearing and final disposal of this Petition this Hon'ble Court be pleased to direct the Respondent No.3 to release the payment relating to the 1% Cess already deducted illegally on the design and supply of equipment among with the interest till realisation of the principle amount;

(g) For ad-interim/ interim reliefs in terms of prayer clause (e) and (f) above please be granted;

(h) For the costs of this Petition; and

(i) For such further and other reliefs, as this Hon'ble Court may deems fit, proper and appropriate, in the nature and circumstances of this case."

2. At the outset, learned Counsel for the Petitioner has submitted that the challenge as in the present proceedings would stand covered by the decision of a co-ordinate bench of this Court in the matter of ***GE T and D India Ltd (Formerly Alstom T & D) & Anr. Vs. Union of India & Ors.*** in Writ Petition No. 668 of 2019 decided on 5th June 2023. In such proceedings, considering the provisions of the Building and Other Construction Worker's Cess Act, 1996, and more particularly section 3 thereof, read with Rule 3 and 4 of the corresponding Building and Other Construction Worker's Welfare Cess Rules 1998 ("Cess Rules"), and also considering the principles of law as laid down by the Supreme Court in ***Uttar Pradesh Power Transmission Corporation Limited Vs. CG Power and Industrial Solutions Limited***[1] this Court had allowed the Petition in terms of prayer clauses (a), (c) and (d) and had directed the Respondents that the amount ascertained be repaid or refunded in accordance with law within a period of four weeks from the date of the said order with interest. We note the said order which read as under:-

> *"1. The matter involves Section 3 of the Building and Other Construction Worker's Welfare Cess Act 1996 ("Cess Act") read with Rules 3 and 4 of the corresponding Building and Other Construction Worker's Welfare Cess Rules 1998 ("Cess Rules").*
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> *2. Briefly, it seems that the 3rd Respondent, the Maharashtra State Electricity Transmission Company Limited ("MSETCL") issued work orders in favour of the 1st Petitioner for 26 projects. These were related to various turnkey projects for the development of sub-station infrastructure. This was on 27th August 2009. On 27th August 2014, the 1st Petitioner and MSETCL entered into nine separate and distinct stand-alone projects. MSETCL awarded separate contracts for each scope of work by executing letters of Award. Copies of these documents are annexed as Exhibits "C", "D" and "E" to the Petition.*
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> *3. A few months later on 2nd May 2015, pursuant to the letter of Award, MSETCL and the 1st Petitioner executed separate agreements for each scope of work, namely separately for the supply of equipment and for the erection, testing and commissioning and for civil works. There were thus, three separate agreements per scope of work. The 1st Petitioner had itself registered with the Labour Department of the Government*

1 2021 SCC Online SC 389

of Maharashtra as an employer for the purposes of the Cess Act 1996. On 4th July 2016, the Labour Department issued a notification which clarified that design, supply and transportation costs would not fall within the purview of the Cess Act which levied a 1% cess. On 30th June 2016, however, MSETCL issued a circular, one that is impugned in this Petition at Exhibit "K", directing a deduction of 1% cess from the running account bills including bills for the cost of equipment supply. On 2nd January 2017 MSETCL followed the previous circular with a direction covering all projects stipulating a deduction of a 1% cess from the total project cost i.e. including the supply agreements only the cost of land stood excluded. On 27th July 2017, the State of Maharashtra issued a corrigendum with effect from 30th June 2016 saying that the labour cess would apply to civil works only. On 4th August 2017, this corrigendum was apparently withdrawn. The challenge in the Petition is to the continued levy of 1% cess on the supply contracts.

4. On behalf of the Petitioners, it is submitted that the matter is no longer res integra. It is fully covered by the decision of the Supreme Court in Uttar Pradesh Power Transmission Corporation Limited & Anr. vs CG Power and Industrial Solutions Limited & Anr. That judgment dealt specifically with the Cess Act 1996 and with Rules 3 and 4 of the Cess Rules. It contains an analysis of the statutory regime. Paragraph 51 of the judgment summarises the statutory regime in the following words:

> *"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."*
>
> *(Emphasis added)*

5. Then, in paragraphs 53 and 54, the Supreme Court laid down the position in law by holding:

> *"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. The final reliefs sought in the Petition read thus:

"(a) that this Hon'ble Court be pleased to issue a Writ 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 all papers relating the Petitioner's case pertaining to deduction of 1% Cess on design and supply of equipment, and after examining the validity, legality and propriety thereof, quash and set aside the Impugned Circular dated 30.06.2016 read with Impugned letter dated 02.01.2017 and Impugned Circular dated 04.08.2017 to the extent that the Impugned Circulars have directed deduction of 1% Cess on design and supply of equipment as ex facie illegal, arbitrary and without jurisdiction;

(b) that this Hon'ble Court be pleased to issue a Writ of Declaration or any other appropriate writ, order or direction in the nature of Declaration under Article 226 of the Constitution of India declaring that Rule 3 of the Building and Other Construction Worker's Welfare Cess Rules, 1998 read with Section 3 of the Building and Other Construction Worker's Welfare

> *Cess Act, 1996 that to the extent that it includes the cost of supply of equipment within the scope of the cost of construction of building and other construction work is arbitrary, unreasonable, a colourable exercise of power and is ultra vires the Cess Act and is in violation of Article 14 and 19 (1) (g) of the Constitution of India;*
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> *(c) that this Hon'ble Court be pleased to issue a Writ of Mandamus or any other appropriate writ, order or direction in the nature of mandamus under Article 226 of the Constitution of India directing the Respondent No.3 to release the payment relating to the 1% Cess already deducted illegally on the design and supply of equipment;*
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> *(d) that this Hon'ble Court be pleased to issue a Writ of Prohibition or any other appropriate writ, order or direction in the nature of prohibition under Article 226 of the Constitution of India prohibiting the Respondents from making deduction of 1% Cess from the payments to be made to the Petitioner where the deduction is made on account of cost of design and supply of equipment."*

> *7. In this matter we note that interim relief was first granted on 29th March 2023 and has continued ever since.*
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> *8. In light of the discussion above, we issue rule, make it returnable forthwith and make rule absolute in terms of prayer clauses (a), (c) and (d). No costs. The amount ascertained is to be repaid or refunded in accordance with law within four months from today, with interest if any, as provided in law."*

3. Similar orders came to be passed in the case of ***Kalpataru Power Transmission & Anr. Vs. Union of India & Ors.,*** Writ Petition 398 of 2021. We are informed that Respondent No.4 has assailed the orders passed by this Court in ***GE T and D India Ltd (supra)*** before the Supreme Court, which are the subject matter of Special Leave Petition (Civil) Diary No(s).38536 of 2023, on which the Supreme Court, on 11th December 2023, has passed the following Order:-

> *" Learned counsel for respondent no.1/Caveator sought for refund of 3,36,13,135/- (approx.) with interest, as the same has also been ordered by the High Court. Only that portion of the*

> *order of the High Court with regard to payment of interest shall remain stayed,pending disposal of this special leave petition.*
>
> *The amount paid by respondent no. 1 to the petitioner herein shall be refunded to respondent no.1, on or before 31.12.2023.*
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> *Tag with Diary (s). 37452/2023."*

4. Thus it appears to be clear that, in respect of the principal, reliefs as prayed by the Petitioner in these proceedings is covered by the orders passed by the Division Bench of this Court in ***GE T and D India Ltd (supra)*** and ***Kalpataru Power Transmission (supra) .*** It appears that the Supreme Court in passing the interim order as noted by us has not granted stay to the refund of the principal amount and only the payment of interest has been stayed.

5. In the aforesaid circumstances, in our opinion the present proceedings also made to be disposed of, considering the orders passing by this Court. We accordingly allow the Petition in terms of prayer clauses (b) & (c) which read thus:-

> *"(b) That this Hon'ble Court be pleased to issue a Writ of Declaration or any other appropriate writ, order or direction in the nature of Declaration under Article 226 of the Constitution of India declaring that Rule 3 of the Building and Other Construction Worker's Welfare Cess Rules, 1998 read with Section 3 of the Building and Other Construction Worker's Cess Act, 1996 that to the extent that it includes the cost of supply of equipment within the scope of the cost of construction of building and other construction work is arbitrary, unreasonable, a colourable exercise of power and is ultra vires the Cess Act and is in violation of Article 14 and 19(1)(g) of the Constitution of India;*
>
> *(c) That this Hon'ble Court be pleased to issue a Writ of Mandamus or any other appropriate writ, order or direction in the nature of mandamus under Article 226 of the Constitution of India directing the Respondent No.3 to release the payment relating to the 1% Cess already deducted illegally on the design and supply of equipment;*

6. In so far as the payment of interest is concerned, the same shall be subject to the orders which may be passed by the Supreme Court in the pending proceedings filed by Respondent No.4, i.e., Special Leave Petition (Civil) Diary No(s). 38536 of 2023.

(FIRDOSH P. POONIWALLA, J.) **(G. S. KULKARNI, J.)**