

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 668 OF 2019

GE T and D India Ltd (Formerly Alstom T and D India Ltd) & Anr ...Petitioners
Versus
Union of India & Ors ...Respondents

Mr Tushar Jarwal, *with Mrunal Parekh, Rahul Sateer & Mohit Tiwari, i/b DMD Advocates, for the Petitioners.*
Mr Abhay Patki, *Addl. GP, for the Respondent-State.*
Mr Akshay Shinde, *for the Respondent-MSETCL.*
Mr Abhijeet A Joshi, *with Varsha Sawant & Aditya Joshi, for Respondent No 3.*

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

PC:-

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**").
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.

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 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.*¹ 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

¹ (2021) 6 SCC 15.

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;

(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 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.

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.

(Neela Gokhale, J)

(G. S. Patel, J)