

(2014) 11 CAL CK 0115

Calcutta High Court

Case No: M.A.T. 339 of 2014 and CAN 2265 of 2014

Steel Authority of India Limited

APPELLANT

Vs

NCC Limited

RESPONDENT

Date of Decision: Nov. 19, 2014

Hon'ble Judges: Tapash Mookherjee, J; Jyotirmay Bhattacharya, J

Bench: Division Bench

Advocate: L.K. Gupta, Ananda Sen, Arunava Ghosh, D.N. Roy and Munmun Tewary, Advocate for the Appellant; Arunava Ghosh, D.N. Roy and Munmun Tewary, Advocate for the Respondent

Judgement

Jyotirmay Bhattacharya, J.

1. This mandamus appeal is directed against the judgment and/or order passed by a Learned Single Judge of this Court on 17th December, 2013 at the instance of some of the respondents of the said writ petition.

2. The writ petitioner filed the said writ petition challenging the action of the appellants herein in deducting some amount under the Building & Other Construction Workers" Welfare Cess Act, 1996 in relation to the contract entered into between the parties for execution of the construction work. An interim relief was also claimed in the said writ petition for refund of the amount deducted towards Labour Cess from the bills of the petitioner pertaining to contract agreements bearing Nos. PEDD/EXP-B/STRL-201/006 dated 22nd May, 2008 and PEDD/EXP-B/STRL-200/065 dated 22nd May, 2008. Such relief was sought for by the writ petitioner in the following set of facts.

3. The appellant/company invited tender for structural works, reheating furnaces and rolling mills for expansion of IISCO steel plant at Burnpur. The writ petitioner was declared as a successful tenderer and was awarded the contract. Clause-IX of general conditions of contract provides that the contractors shall bear and pay all taxes, duties, levies and charges assessed on the contractor, sub-contractor or their

employees by Municipal, State or Central Government authorities except those specifically provided in the contract. A meeting was held at the pre-bid stage wherein it was agreed that the tenderer shall quote the rates by including all types of taxes, duties, levies, transport, freights, insurance etc., as applicable and as may be made applicable till completion for which no extra payment shall be made on any account whatsoever.

4. The R.A. bills were raised in terms of the contract but some amount was withheld by the appellant/company which constrained the writ petitioner to write a letter for providing the reasons for withholding the said amount. The appellant/company herein in its reply stated that the amount has been deducted on account of Cess Act, 1996, insurance lapse, lapses on safety and cost of materials issued. The appellant/company sought to invoke Clause 8 of the special condition of contract which provides that the contractor shall also be responsible for implementation of all statutory rules and regulations including the building and other conditions of Contract Act, 1996 (if applicable) and the Cess Act, 1996. Other correspondences exchanged between the parties could not bring the parties to a consensus relating to the applicability of the Building & Other Construction Workers" (Regulation of Employment and Conditions of Service) Act, 1996 and Cess Act to the nature of the work provided under the said work contract.

5. As a matter of fact, the fate of the writ petition was dependent on the answer on the issue as to whether the BOCW Act and the Cess Act are applicable to the present contract or not. If it is found that the BOCW Act is applicable and consequently the Cess Act is also applicable then the deduction which was made by the appellant/company will be illegal.

6. The parties, in fact, restricted their submissions on the issue regarding applicability of those two Acts in the facts of the present case, before the learned Trial Judge. They did neither advance any other argument before the Learned Trial Judge nor invited the Learned Trial Judge to decide any issue other than the issue regarding applicability of those two Acts in the facts of the present case. Accordingly, the Learned Trial Judge concentrated on the issue regarding applicability of those two Acts in the facts of the instant case and ultimately by relying upon an unreported judgment of the Orissa High Court in the case of M/s. Sterlite Energy Limited v. State of Orissa & Ors. (W.P. No. 15924 of 2009) decided on 4th September, 2010 held that if the building and other construction work is made in relation to a factory or mines to which the provisions of the Factories Act or the Mines Act applies, it excludes the applicability of the BOCW Act and the Cess Act.

7. Considering the facts and circumstances of this case, the Learned Trial Judge ultimately held that the Factories Act, 1948 is applicable in the present case as the construction work for which the work order was issued to the writ petitioner relates to expansion of the appellants" factory.

8. Holding as such, the Learned Trial Judge held that the BOCW Act does not apply in the present case and consequently the Cess Act does not apply. The Learned Trial Judge, thus, held that deduction under the Cess Act which was made by the appellant/company was illegal as the BOCW Act and the CESS Act do not apply in the present case.

9. The appellant/company felt aggrieved by the said judgement and order passed by the Learned Single Judge of this Court. Accordingly, the appellant/company has come up with this mandamus appeal before this Court.

10. In course of hearing of this appeal both the parties have principally agreed with the findings of the Learned Trial Judge to the effect that the Factories Act, 1948 is applicable in the present case and as such the provision of the BOCW Act and the Cess Act do not apply.

11. However the Appellant company could not agree with the other part of the findings of the Learned Trial Judge whereby the Learned Trial Judge declared that the deduction under the Cess Act was illegal. The writ petitioner is also not satisfied as the relief by way of refund of the deducted amount was not granted to it. Such deduction was made by the Appellant company since the time of receipt of the reply from the concerned authority confirming that Cess Act is not payable in respect of the work under execution as the construction work which is being done is in the nature of expansion of factories and hence Factories Act is applicable.

12. In this regard, we have considered the pleadings of the parties. On perusal of the pleadings of the parties it appears to us that apart from the issue raised in the said writ petition as to the applicability of those two Acts viz., the BOCW Act and the Cess Act in the present case, the writ petitioner also challenged the legality of the deduction which was made by the appellant/company from the running bills of the writ petitioner submitted from time to time in course of execution of the work carried out in pursuance of the contract entered into between the parties.

13. The writ petitioner contended that it did not include any amount on account of labour cess in its R.A. bills as there was some confusion with regard to applicability of the BOCW Act and the Cess Act in the present case. The appellants herein in their affidavit disputed such contention of the writ petitioner.

14. Though such a dispute was raised and the consequential relief which the writ petitioner claimed in the said writ petition for refund of the amount already deducted by the appellant/company towards Labour Cess from the bills of the writ petitioner, depends upon the resolution of such dispute but the Learned Trial Judge did not resolve the said dispute between the said parties presumably for the reason that this part of the dispute was not agitated before the Learned Trial Judge.

15. Be that as it may, despite those two Acts do not apply still then appellant/company cannot legally deduct any amount on account of Labour Cess

from the bills of the writ petitioner unless it is established that the writ petitioner included any amount towards Labour Cess in its R.A. bills and the appellant/company paid any amount to the writ petitioner on account of Labour Cess to the writ petitioner.

16. Thus we find that the following two issues emerge in the facts of this case and the reliefs claimed by the writ petitioner by way of refund of deducted amount on account of labour cess depends upon the resolution of these following issues:--

"(1) whether the price quoted by the writ petitioner while submitting tender included the cess component under the concerned Cess Act, 1996?

(2) Whether any amount was included by the writ petitioner towards labour cess in its R.N. Bills?"

17. This part of the dispute cannot be resolved without trial on evidence. For resolution of such dispute, investigation into the disputed question of facts is necessary which in our considered view cannot be done conveniently by the writ court. As such we feel that no useful purpose will be served by remitting this part of the dispute to the writ court for its resolution.

18. Under such circumstances we proposed to relegate the parties to the Civil Court for resolution of this part of the dispute between the parties. However, the learned Advocates of both the parties suggested that for speedy disposal of this dispute, such dispute may be referred to arbitrator instead of sending the parties to the civil court. This suggestion given by the parties appears to us as a very effective one and accordingly we refer the above dispute for its resolution through arbitration to Mr. Justice Aloke Chakrabarti, a retired judge of this Hon'ble High Court being an arbitrator appointed by this Court and the learned Arbitrator is requested to conclude the arbitration proceeding within six months from the date of entering into reference.

19. The writ petitioner is directed to submit its statement of claim before the learned Arbitrator within two weeks from date. The appellants are directed to submit their defence before the learned Arbitrator within two weeks thereafter.

20. The remuneration of the learned Arbitrator is fixed at Rs. 30,000/- for each sitting of the Arbitral Tribunal, to be paid by the parties in equal share. The infrastructural costs to be incurred for each sitting of this Tribunal will also be borne by the parties equally.

21. Before parting with, we make it clear that the findings which are arrived at by the Learned Trial Judge regarding applicability of those two Acts viz., the BOCW Act and the Cess Act in the present case has not been challenged before us by any of the parties and we have also found no apparent illegality in the conclusion drawn by the Learned Trial Judge in this regard in the impugned order. As such, this part of the finding of the Learned Trial Judge is affirmed with this rider that the declaration

regarding illegality of the impugned deductions will become operative subject to the decision of the Arbitral Tribunal on the issue as mentioned above.

22. We further make it clear that the parties are at liberty to apply for interim order before the Learned Arbitrator.

23. The appeal is thus disposed of.

Re: CAN 2265 of 2014 (Stay)

24. In view of disposal of the appeal in the manner as aforesaid, no further order need be passed on the stay application. The stay application being CAN 2265 of 2014 is thus deemed to be disposed of.

25. Let a plain copy of this order be given to the learned advocates of the parties for communication of this order to the learned Arbitrator.