

THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Appellate Jurisdiction)

DIVISION BENCH: THE HON'BLE MR. JUSTICE BISWANATH SOMADDER, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Arb. A. No. 01 of 2024

Sikkim Urja Limited
(Formerly: Teesta Urja Limited)
Through Authorized Representative
Satyan Sood,
Executive Director
(Project & Contractors)
B2/1A, Africa Ave,
Safdarjung Enclave,
New Delhi- 110029.

..... Appellant

Versus

1. Abir Infrastructure Pvt. Ltd.
Through its Managing Director,
Having its office at SF-2,
Bikaji Cama Bhawan, Bikaji Cama Place,
New Delhi – 110066.

2. NVYUGA Engineering Company Ltd.
Through its Authorised Signatory,
1259, Lakshmi Towers, Road No.36,
Jubilee Hills,
Hyderabad – 500033.

3. SEW Infrastructure Ltd.
6-3-871, “Snehalata”,
Greenlands Road, Begumpet,
Hyderabad – 500016 (A.P.)

..... Respondents

**Appeal under section 37 of the Arbitration and Conciliation
Act, 1996**

*[against the judgment dated 14.08.2023 passed by the learned Commercial Court,
Gangtok, in Arbitration Case No. 05 of 2019 in M/s Teesta Urja Ltd., vs. M/s ABIR
Infrastructure Pvt. Ltd. and Ors.]*

Appearance:

Mr. Anubhav Sinha, Mr. Akshaya Babu V., Mr. Rinzing Dorjee Tamang
and Mr. Varun Pradhan, Advocates for the Appellant.

Mr. R.S. Sravan Kumar and Mr. Sishir Mothay, Advocates for the Respondents No. 1 and 3.

Mr. Biswabrata Basu Mallick, Ms Allakha, Mr. Pramit Chhetri and Mr. Arun Rai, Advocates for the Respondent No.2.

J U D G M E N T

(30th May, 2025)

Bhaskar Raj Pradhan, J.

This is an appeal preferred under section 37 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act). The impugned judgment and order dated 14.08.2023 dismissed the petition filed by M/s Teesta Urja Ltd. [now, *Sikkim Urja Limited* (appellant)] under section 34 refusing to interfere with the arbitral award dated 01.10.2019 in favour of the respondents herein.

2. The grounds for interference under section 34 of the Arbitration Act are limited. When should a Court interfere under section 34 is clearly defined in the provision and amply clarified by the Hon'ble Supreme Court in its various judgments. On examination of the arbitral award, we find that the arbitral award is in conflict with the public policy of India, in that it is in contravention with the fundamental policy of Indian law. We also find that the arbitral award is vitiated by patent illegality appearing on the face of the award. The Arbitral Tribunal has also

imposed the liability of payment of cess upon the appellant although section 3 of *the Building and Other Construction Workers' Welfare Cess Act, 1996* (for short, the Cess Act, 1996) mandates that it is the respondent who are liable to pay it. While determining who is liable to pay the cess, the Arbitral Tribunal reversed the mandate of the law and imposed the liability upon the appellant instead. The arbitral award suffers from the vice of disregarding the two judgments of the Hon'ble Supreme Court in ***A. Prabhakara Reddy and Company vs. State of Madhya Pradesh and Others***¹ and ***M/s Dewan Chand Builders and Contractors vs. Union of India & Ors.***² Thus, the impugned judgment passed by the learned Commercial Court while exercising the powers under section 34 refusing to set aside such an arbitral award requires to be interfered with. We explain our reasons hereunder.

3. The claimant before the Arbitral Tribunal was the consortium of M/s Abir Infrastructure Pvt. Ltd. (respondent no.1 herein), M/s Navayuga Engineering Co. Ltd. (respondent no.2 herein) and M/s SEW Infrastructure Ltd. (respondent no.3 herein). The respondent therein was M/s Teesta Urja Ltd.

¹ (2016) 1 SCC 600

² (2012) 1 SCC 101

4. The consortium of the respondents along with M/s CGGC International Ltd, M/s CKD Hydro Power Pvt. Ltd, M/s SABIR Dam & Water Works Construction Co., was awarded the work for Turnkey execution of 1200 MW Teesta Stage-III of Hydroelectric Project in the State of Sikkim after a successful bid. For the said purpose various agreements were executed. The contracts were subject to arbitration for settlement of disputes. The contract was awarded on 18.04.2007 with subsequent amendments dated 26.05.2007. The contract was signed on 12.09.2007 and the project completed on 28.02.2017.

5. According to the Arbitral Tribunal, as stated in its award, the dispute arose with respect to the liability for the payment of cess under *the Cess Act, 1996*. Teesta Urja Ltd. addressed a letter on 29.08.2016 to the respondent no.2 with copies to the respondents no.1 and 3 making demands of Rs.5.88 crores, Rs. 8.12 crores and Rs.27.39 crores from the consortium members totalling to Rs.41.39 crores for cess @1% and required them to pay it from the date of the contract award on 18.04.2007. This was disputed by the respondents who invoked the arbitration clause.

The statement of claim by the respondents

6. The respondents through their statement of claims sought to have the letters dated 16.10.2010, 19.05.2014, 12.06.2014, 07.06.2016 and 04.08.2016 and 29.08.2016 issued by the appellant set aside. It also sought a declaration that 1% cess is not recoverable from the respondents and in the alternative the 1% cess be added in the contract price as per the contract between the parties. The respondents contended that the 1% cess was not recoverable because *the Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996* (for short, the BOCW Act 1996) and the Cess Act, 1996 were not operative in Sikkim at the time of submission of the bid and, therefore, is a subsequent legislation. It was also contended that clause 49 of *the General Conditions of Contract* (for short, the GCC) clearly showed that any change in the cost to the contractor (deduction or addition) because of any subsequent change in law after execution of the contract between the parties, shall be determined by the engineer in-charge and shall be added or deducted from the contract price and the engineer shall notify the contractor accordingly. It was the respondents' case that the BOCW Act, 1996 and the Cess Act, 1996 was implemented in the State of Sikkim only with effect from

06.09.2010, although the contract was awarded on 18.04.2007.

The statement of defence by the appellant

7. The appellant filed their statement of defence contesting the statement of claims of the respondents. It was submitted that there was no change in law under the contract. Clause 17.4 of the GCC makes it obligatory upon the respondent and sub-contractors to abide at all times with all existing labour enactments and the rules made thereunder, regulations, notifications and bye laws of the State or Central Government or local authority and any other labour law (including rules), regulations, bye laws that may be passed or notification that may be issued under any labour law in future either by the State or the Central Government or the local authority. It was also contended that clause 17.4 of the GCC clearly stipulated that the BOCW Act, 1996 and the Cess Act, 1996 were applicable. It was contended that under clause 33 of the GCC, the respondents were responsible for payment of all taxes/duties/levies, etc. It was submitted that the BOCW Act, 1996 had come into force on 01.03.1996 prior to the execution of the contract agreement dated 12.09.2007. Further, the Cess Act, 1996 came into effect in the whole of

India on 03.11.1995 and the Government of India (GOI) had on 26.09.1996 notified the rate of cess to the extent of 1% of cost of construction incurred by the employer. Thus, both the BOCW Act, 1996 and the Cess Act, 1996 have come into effect on 01.03.1996 and 03.11.1995 respectively, much prior to the date of submission of the price bids, i.e., 13.02.2007 by the respondents and the execution of the contract agreement dated 12.09.2007.

The issue framed by the Arbitral Tribunal

8. The issue formulated by the Arbitral Tribunal was:

“(xv) The whole issue before AT revolves around the point as to whether BOCW Act is a ‘Change in Law’ as per the contract between the parties because as per the Claimant this Act has come into force after the period of 30 days of opening of the Claimant’s bid. If this question is answered in favour of the Claimant, it has to be determined as to who has to bear the cost of Welfare Cess, either the Claimant/Contractor or the Respondent as Establishment.”

The award and findings of the Arbitral Tribunal

9. On examination of the BOCW Act, 1996 and the Cess Act, 1996, the Arbitral Tribunal concluded:

- “1. The work under this contract falls in category of ‘Building or Other Construction Work’ as per Definition section 2(1)(a)(d).*
- 2. Respondent is an ‘establishment’ within the meaning of this Act as per Definition section 2(1)(a)(j).*
- 3. The Claimant is an ‘employer’ in relation to the Respondent being an ‘establishment’ within the meaning of this Act as per Definition section 2(1)(a)(i). Section 7 of BOCW Act provides for Registration of ‘establishment’ within a period of 60 days from the commencement.*

4. The Rule 23(1) of BOCW Rules, 1998 prescribed the manner of making application for registration of establishment.

5. The Cess Act, in its sec. 3(1) provided for the Levy & Collection of Cess at rate not exceeding 2% but not less than one percent of the cost of construction incurred by an employer. The rate or levy of cess was to be specified by notification of the Central Govt. in the Official Gazette from time to time.

6. As per sec. 3(2) of this Act, the aforesaid cess was to be collected from every 'employer' in such manner and at such rate as may be prescribed.

7. The Central Govt., vide its S.O. 2899 dt. 26.09.1996 notified that the cess @ 1% of the cost of construction incurred by the Employer is to be levied and collected.

8. The Time and Manner of Collection of such cess was prescribed by the Cess Rule (4). The applicable Rule 4(3) in the present matter is reproduced as below:

Notwithstanding the provisions of sub-rule (1) and sub-rule (2), where the levy of cess pertains to building and other construction work of a Government or of a Public Sector Undertaking, such Government or the Public Sector Undertaking shall deduct or cause to be deducted the cess payable at the notified rates from the bills paid for such works."

10. Even while observing as above, the Arbitral Tribunal considered the failure of the appellant to take steps to comply with the provisions of the BOCW Act, 1996 and the Cess Act, 1996 from 2007 till 2010 until the Labour Department issued the Circular on 06.09.2010 and directed that it would be the appellant who would be liable to pay the cess and further that the respondents or any of the consortium members shall not be made liable to pay the cess even in the future. The Arbitral Tribunal held that the fact that the State of Sikkim formulated Rules in the year 2009 and resorted to implementation of the BOCW Act,

1996, the Cess Act, 1996 and the Rules made thereunder from 06.09.2010 only, the levying of cess would amount to change in law as envisaged in GCC clause 49.

11. The Arbitral Tribunal set aside the respondent's letters dated 16.10.2010, 19.05.2014, 12.06.2014, 07.06.2016, 04.08.2016 and 29.08.2016. The Arbitral Tribunal also held that the entire cost of cess as and when assessed by the competent authority for any period with regard to the contract shall be borne by Teesta Urja Ltd. It was also held that as no recovery of cess has yet been made from the respondents the same shall not be made hereinafter from the respondent and other consortium members either from their due payments or through encashment of bank guarantees.

Section 34 petition by M/s Teesta Urja Ltd.

12. Teesta Urja Ltd. filed a petition under section 34 of the Arbitration Act against the arbitral award. The appellant pleaded that:- the BOCW Act, 1996 came into effect from 01.03.1996 and the Cess Act, 1996 with effect from 03.11.1995; On 26.09.1996, the Government of India notified the rate of cess at 1% of the cost of construction and all these were notified much prior to the execution of the

contract agreement dated 12.09.2007; The appellant pointed out clause 17.4 of the GCC provided that the respondent shall abide by all existing labour enactments, rules, regulations, notifications, etc.; On 06.09.2010, the Department of Labour, Government of Sikkim (GOS) had issued a Circular for implementation of the BOCW Act, 1996 and the Cess Act, 1996; On 13.02.2010, the respondents being the contractors under the contract agreement got themselves registered with the office of the Registering Officer, Government of Sikkim under section 3 of the BOCW Act, 1996; On 06.04.2011, the Department of Labour directed the appellant to deposit the labour welfare cess from the cost of construction employed by the employer; On 28.06.2011, the Department of Labour directed the appellant to submit details of cost of construction incurred by the employer; On 01.05.2014, the Department of Labour directed the appellant to deposit the cess to the Sikkim Building & Other Construction Welfare Board; The appellant had requested the respondents by its letters dated 20.05.2014, 12.06.2014, 07.06.2016 and 04.08.2016 to report compliance of the provisions of the BOCW Act, 1996 and the Cess Act, 1996; On 29.08.2016, the appellant once again requested the respondents to report compliance and if they failed to do so, deduction of 1% cess of the cost of

construction to be done from the bills raised by the respondents; On 08.09.2016, the respondents denied their liability stating that it would constitute a change in law and invoked the provisions of clause 38 of the contract agreement for settlement of dispute under the contract. Ultimately, the Arbitral Tribunal constituted, rendered its award which was challenged on various grounds including failure to understand the BOCW Act, 1996 and the Cess Act, 1996 and interpret the judgment of the Hon'ble Supreme Court in **A. Prabhakara Reddy** and the Delhi High Court in **Delhi Metro Rail Corporation Limited vs. Simplex Infrastructure Ltd.**³

The impugned judgment of the learned Commercial Court

13. The learned Commercial Court vide judgment dated 14.08.2023 declined to interfere with the arbitral award by holding that the arbitral award did not contravene the fundamental policy of Indian law as claimed by Teesta Urja Ltd. The learned Commercial Court upheld the reasoning and interpretation of the Arbitral Tribunal and concluded that even though the BOCW Act, 1996 and the Cess Act, 1996 had been enforced from 1996 and 1995 respectively, it had not been made operational in Sikkim till the issuance of the Circular dated 06.09.2010. The learned

³ (2011) 3 Arb LR 307

Commercial Court did not examine who was liable to pay cess under the Cess Act, 1996 and whether the Arbitral Tribunal could have reversed the liability of the respondents as contractor to the appellant.

The appeal under section 37 by the appellant

14. The appellant has preferred the present appeal under section 37 of the Arbitration Act challenging the judgment dated 14.08.2023 passed by the learned Commercial Court. The appellant states that the name of Teesta Urja Ltd. changed to Sikkim Urja Ltd., w.e.f., 21.03.2023.

15. Heard learned counsel - Mr. Anubhav Sinha, for the appellant, Mr. R.S. Sravan Kumar for the respondents no.1 and 3 and Mr. Biswabrata Basu Mallick for respondent no.2.

The moot question

16. The moot question that arises for consideration is whether the respondents were liable to pay the 1% of the cost of construction as cess under the Cess Act, 1996 and whether the respondents could have taken advantage of clause 49 of the GCC as the appellant had failed to deduct cess from the bills of the respondents till the issuance of the Circular dated 06.09.2010 by the Labour Department?

Consideration

The Building and Other Construction Workers’ (Regulation of Employment and Conditions of Service) Act, 1996 (the BOCW Act, 1996)

17. The BOCW Act, 1996 dated 19.08.1996 came into force with retrospective effect from 01.03.1996 throughout the territory of India. The BOCW Act, 1996 was enacted to regulate the employment and conditions of service of buildings and other construction workers and to provide for their safety, health and welfare measures and for other matters connected therewith or incidental thereto.

18. Section 2(g), 2(i) and 2 (j) of the BOCW Act, 1996 defines the words ‘contractor’, ‘employer’ and ‘establishment’, thus:

“2. Definitions.—

(g) “contractor” means a person who undertakes to produce a given result for any establishment, other than a mere supply of goods or articles of manufacture, by the employment of building workers or who supplies building workers for any work of the establishment, and includes a sub-contractor;”
.....

(i) “employer”, in relation to an establishment, means the owner thereof, and includes, -

- (i)*
- (ii)*
- (iii) in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor;*
.....

(j) “establishment” means any establishment belonging to, or under the control of, Government, any body corporate or firm, an individual or association or other body of individuals which or who employs building workers in any building or

other construction work; and includes an establishment belonging to a contractor, but does not include an individual who employs such workers in any building or construction work not being more than rupees ten lakhs;”

The Building and Other Construction Workers’ Welfare Cess Act, 1996 (the Cess Act, 1996)

19. The Cess Act, 1996 dated 19.08.1996 came into force with retrospective effect from 03.11.1995. The Cess Act, 1996 was enacted to provide for the levy and collection of a cess on the cost of construction incurred by employers with a view to augmenting the resources of the Building and Other Construction Workers’ Welfare Boards constituted under the BOCW Act, 1996.

20. Section 2(d) provides that words and expressions used in the Cess Act, 1996 but not defined and defined in the BOCW Act, 1996 shall have the meanings respectively assigned to them in the BOCW Act, 1996.

21. Section 3 of the Cess Act, 1996 provided for levy and collection of cess. It reads:

“3. Levy and collection of cess.—(1) There shall be levied and collected a cess for the purposes of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, at such rate not exceeding two per cent. but not less than one per cent. of the cost of construction employed by an employer, as the Central Government may, by notification in the Official Gazette from time to time specify.

(2) The cess levied under sub-section (1) shall be collected from every employer in such manner and at such time, including deduction at source in relation to a building or other construction work of a Government or of a public sector

undertaking or advance collection through a local authority where an approval of such building or other construction work by such local authority is required, as may be prescribed.

(3) The proceeds of the cess collected under sub-section (2) shall be paid by the local authority or the State Government collecting the cess to the Board after deducting the cost of collection of such cess not exceeding one per cent. of the amount collected.

(4) Notwithstanding anything contained in sub-section (1) or sub-section (2), the cess leviable under this Act including payment of such cess in advance may subject to final assessment to be made, be collected at a uniform rate or rates as may be prescribed on the basis of the quantum of the building or other construction work involved.”

22. As section 3 of the Cess Act, 1996 provides for levying and collection of cess from “employer”, it would be relevant to consider who the “employer” is. The word “employer” is not defined in the Cess Act, 1996. In terms of section 2(d) of the Cess Act, 1996 when we peruse the BOCW Act, 1996, section 2(i) defines the word “employer”, in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor.

GOI Notification dated 26.09.1996 stipulating rate of cess at 1%

23. On 26.09.1996, the Government of India, Ministry of Labour, notified the rate of cess @ 1% of the cost of construction incurred by an employer under the Cess Act, 1996.

GOS Notification dated 12.09.1997 notifying BOCW Act, 1996 & Cess Act, 1996

24. On 12.09.1997, Gazette Notification was issued by the Law Department, Government of Sikkim, thereby notifying the BOCW Act, 1996 and the Cess Act, 1996 in Sikkim Gazette.

The Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Central Rules, 1998

25. *The Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Central Rules, 1998* dated 19.11.1998 (for short, the BOCW Central Rules, 1998) came into force on 19.11.1998. The BOCW Central Rules, 1998 was made in exercise of the power conferred under section 62 and section 40 of the BOCW Act, 1996.

The Building and Other Construction Workers' Welfare Cess Rules, 1998

26. *The Building and Other Construction Workers' Welfare Cess Rules, 1998* (for short, the BOCW Cess Rules, 1998) came into force on 26.03.1998. It was made in exercise of the power conferred by sub-section (1) of section 14 of the Cess Act, 1996. Rule 4 of the BOCW Cess Rules, 1998 is relevant and quoted below:

“4. Time and manner of collection—(1) *The cess levied under sub-section (1) of section 3 of the Act shall be paid by an employer, within thirty days of completion of the*

construction project or within thirty days of the date on which assessment of cess payable is finalised, whichever is earlier, to the cess collector.

(2) Notwithstanding the provisions of sub-rule (1), where the duration of the project or construction work exceeds one year, cess shall be paid within thirty days of completion of one year from the date of commencement of work and every year thereafter at the notified rates on the cost of construction incurred during the relevant period.

(3) Notwithstanding the provisions of sub-rule (1) and sub-rule (2), where the levy of cess pertains to building and other construction work of a Government or of a Public Sector Undertaking, such Government or the Public Sector undertaking shall deduct or cause to be deducted the cess payable at the notified rates from the bills paid for such works.

(4) Notwithstanding the provisions of sub-rule (1) and sub-rule (2), where the approval of a construction work by a local authority is required, every application for such approval shall be accompanied by a crossed demand draft in favour of the Board and payable at the station at which the Board is located for an amount of cess payable at the notified rates on the estimated cost of construction:

Provided that if the duration of the project is likely to exceed one year, the demand draft may be for the amount of cess payable on cost of construction estimated to be incurred during one year from the date of commencement and further payments of cess due shall be made as per the provisions of sub-rule (2).

(5) An employer may pay in advance an amount of cess calculated on the basis of the estimated cost of construction along with the notice of commencement of work under section 46 of the Main Act by a crossed demand draft in favour of the Board and payable at the station at which the Board is located.

Provided that if the duration of the project is likely to exceed one year, the demand draft may be for the amount of cess payable on cost of construction estimated to be incurred during one year from the date of such commencement and further payment of cess due shall be made as per the provisions of sub-rule (2).

(6) Advance cess paid under sub-rules (3), (4) and (5), shall be adjusted in the final assessment made by the Assessing Officer.”

Contract Agreement dated 12.09.2007

27. On 12.09.2007, the contract agreement was executed between M/s Teesta Urja Ltd. on the one part and M/s Abir Constructions Pvt. Ltd. and M/s Sabir Dam & Water Works Construction Company on the other part, who were collectively referred to as the Contractor.

28. Clause 2 of the covenant stated that the contract consisted of the following documents which are deemed to be an integral part of the agreement as if herein set out verbatim and/or if hereto annexed, viz.,

“A. Volume-I

- 1. Contract Agreement*
- 2. Notification of Award (letter of acceptance)*
- 3. General Conditions of Contract (GCC)*
- 4. Special Conditions of Contract (SCC)*

B. Volume-II

Owner’s Requirements/Technical Specifications for Civil Works consisting of:

- 1. General Technical Specifications*
- 2. Particular Technical Specifications*

C. Volume-III

- 1. Project Profile*
- 2. Tender Drawings*

D. Volume-IV

Contractor’s Proposal and any other document forming part of the Contract”

General Conditions of Contract (GCC)

29. Two clauses in the GCC which forms an integral part of the contract agreement as noted above are important to examine. The appellant contends that under clause 17.4

of the GCC, the Contractor was required to abide by the BOCW Act, 1996 as well as the Cess Act, 1996. The respondents on the other hand contend that as per clause 49 of the GCC they were not bound by any change in law which was effected subsequent to the contract agreement. These clauses read as under:-

“17.4 During continuance of the Contract, the Contractor and his sub-contractors shall abide at all times by all existing labour enactments and rules made thereunder, regulations, notifications and bye laws of State or Central Government or local authority and any other labour law (including rules), regulations, bye laws that may be passed or notification that may be issued under any labour law in future either by the State or the Central Government or the local authority. The Contractor shall keep the Owner indemnified in cases any action is taken against the Owner by the competent authority on account of contravention by the Contractor of any of the provisions of any Act or rules made thereunder, regulations or notifications including amendments. If the Owner is caused to pay or reimburse, such amounts as may be necessary to cause or observe, or for non-observance of the provisions stipulated in the notifications/byelaws/acts/rules/ regulations including amendments, if any, on the part of the Contractor, the Engineer/Owner shall also have right to recover from the Contractor’s any bill or security available with the Owner either under this Contract or any other Contract any sum required or estimated to be required for making good the loss or damage suffered by the Owner.

.....
Salient features of some of the major labour laws that are applicable to construction industry are given below.

.....
(xv) The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act 1996 and the Cess Act of 1996

All the establishments who carry on any building or other construction work and employees 10 or more workers are covered under this Act. All such establishments are required to pay cess at rate not exceeding 2% but not less than 1% of the cost of construction as may be notified by the Government. The Employer (Contractor) to whom the Act applies has to obtain a registration certificate from the Registering Officer appointed by the Government.
.....”

49. **EFFECT OF CHANGES IN LAW**

If, after the date 30 days prior to the latest date for submission of Price Bids for the Contract, i.e. 13.02.2007 there occur in India, changes to any Central or State Statute, Ordinance, Decree, or other Law or any regulation or by-law of any local or other duly constituted authority, or the introduction of any such Central State Statute, Ordinance, Decree, Law, regulation or by-law which causes additional or reduced cost to the Contractor, other than those already covered under 'Article 32 — Price Adjustment and Escalation', in the execution of the Contract, such additional or reduced cost shall be determined by the Engineer-in-charge and shall be added to or deducted from the Contract Price and the Engineer shall notify the Contractor accordingly. Notwithstanding the foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall already have been taken into account in the indexing or any inputs to the Price Adjustment Formulae in accordance with the provisions of Article 32 of these conditions and further, adjustment of such additional or reduced cost shall be determined based on the actual, considering the difference of the taxes and duties prevailing as on the date 30 days prior to submission of price bid and as on the date of incurrence. The adjustment will be further subject to the condition that in case the benefits in duties and taxes under EXIM policy or any other policy of the Government are available, the adjustments will be made considering such benefits irrespective of whether the Contractor avails such benefits or not."

GOS Circular dated 06.09.2010

30. On 06.09.2010, the Department of Labour, Government of Sikkim addressed a Circular to all Secretaries/Heads of Department of Government of Sikkim regarding implementation of the BOCW Act, 1996, the Cess Act, 1996 and their respective Rules. It stated that the State Government is required to implement the provisions of the BOCW Act, 1996, the Cess Act, 1996 and their respective Rules in view of the direction of the Hon'ble Supreme Court passed in Writ Petition No. 318 of 2006, as already notified

in Sikkim Herald. It also specified that the cess was to be collected @ of 1% of the cost of construction incurred by an employer or any executing agency as the case may be. It clarified that as per Rule 5 of the BOCW Cess Rules, 1998, the proceeds of the cess collected under Rule 4 shall be transferred by such Government Office/Establishment as the case may be to the Building and Other Construction Welfare Board which has been constituted vide Notification No.13/DL dated 26.02.2010 and published in the Extraordinary Gazette No.64 dated 27.02.2010. All concerned were required to implement the said provision by deducting the cess from the cost of construction and forwarded to the Building and Other Construction Welfare Board. For the purpose of implementation of these Acts, list of all contractors/establishments registered with the concerned department including list of contractors/establishment executing different building and construction works were required to be forwarded to the Labour Department indicating the cost of construction of the work. The Circular further notified that in the event any contractor/establishment having submitted bill for payment in connection with execution of building and other construction work, 1% of the cost of construction is required to be deducted by the Department before the bills are

cleared, being the amount payable as cess in terms of the provision of Section 3 of the Cess Act, 1996 read with Rule 4 of the BOCW Cess Rules, 1998. It notified that henceforth all Works Department or any other Department/Establishment as the case may be while entering into any agreement with any Contractor/Establishment for execution of any building and other construction works including works being executed departmentally shall in compliance of the provisions of the BOCW Act, 1996 and the Cess Act, 1996 ensure deduction @ 1% of the cost of construction as cess.

The Sikkim Building & Other Construction Welfare Board

31. In exercise of the powers conferred by sub-section (1) and sub-section (3) of section 18 of the BOCW Act, 1996, the State Government constituted the Sikkim Building & Other Construction Welfare Board for the purposes of BOCW Act, 1996 vide Notification dated 26.02.2010 published in the Sikkim Government Gazette on 27.02.2010.

The Sikkim Building & Other Construction Workers' (Regulation of Employment and Conditions of Service) Rules, 2010

32. The Labour Department, Government of Sikkim, in exercise of the powers conferred by section 40 and sub-section (1) of section 62 of the BOCW Act, 1996 issued

Notification dated 31.08.2010 published in the Sikkim Government Gazette on 01.09.2010 making *the Sikkim Building & Other Construction Workers' (Regulation of Employment and Conditions of Service) Rules, 2010* (the Sikkim Rules, 2010) with effect from 27.02.2009.

33. The learned Commercial Court came to a finding that the BOCW Act, 1996, the Cess Act, 1996 and the rate of cess @ 1% of the cost of construction had already been notified by the Central Government when the contract agreement was signed by the parties on 12.09.2007. The respondents do not contest this fact obviously because it is factually correct. However, the learned Commercial Court seemed to have been persuaded to take cognizance of the fact that in spite of the enforcement as above for almost three years since the execution of the contract agreement there was no whisper between the parties to implement those provisions and the appellant was roused to the situation only when the Labour Department issued the Circular dated 06.09.2010. The learned Commercial Court therefore came to the conclusion that although the BOCW Act, 1996 and the Cess Act, 1996 were already notified as on 12.09.2007, it came to be implemented in the State of Sikkim only after 06.09.2010 in compliance to the Order of

the Hon'ble Supreme Court, thus, the learned Commercial Court did not find any flaw in the reasoning of the Arbitral Tribunal that the concerned provisions came to be implemented in Sikkim after 06.09.2010. The learned Commercial Court was of the view that the Arbitral Tribunal has been supported by the judgment of the Hon'ble Supreme Court in ***Dewan Chand Builders*** (supra).

34. In ***Dewan Chand Builders*** (supra), the Hon'ble Supreme Court examined the judgment rendered by the High Court of Delhi in which it was held that the BOCW Act, 1996, the BOCW Rules, 1998, the Cess Act, 1996 and the BOCW Cess Rules, 1998 were constitutionally valid and within the competence of the Parliament as the levy was a fee referable to Schedule VII List 1 Entry 97 of the Constitution of India. While doing so, the Hon'ble Supreme Court surveyed the relevant provisions of both the Acts and the Rules. The Hon'ble Supreme Court was of the view that from the scheme of the BOCW Act, 1996 its sole aim is the welfare of building and construction workers, directly relatable to their constitutionally recognized right to live with basic human dignity, enshrined in Article 21 of the Constitution of India. It was held that it envisages a network of authorities at the Central and State Levels to ensure that

the benefit of the legislation is made available to every building and construction worker, by constituting welfare boards and clothing them with sufficient powers to ensure enforcement of the primary purpose of the BOCW Act, 1996. It was held that the means of generating revenues for making effective the welfare provisions of the BOCW Act, 1996 is through the Cess Act, 1996. The Hon'ble Supreme Court held that it is manifest from the overarching schemes of the BOCW Act, 1996, the Cess Act, 1996 and the Rules made thereunder that the sole object is to regulate the employment and conditions of service of building and other construction workers, traditionally exploited section in the society and to provide for their safety, health and other welfare measures. It was held that the BOCW Act, 1996 and the Cess Act, 1996 break new ground in that, the liability to pay cess falls not only on the owner of the building or establishment, but under Section 2(1)(i)(iii) of the BOCW Act, 1996, the contractor as well. The extension of the liability on to the contractor is with a view to ensure that, if for any reason it is not possible to collect cess from the owner of the building at a stage subsequent to the completion of the construction, it can be recovered from the contractor. It was held that the Cess Act, 1996 and the BOCW Cess Rules, 1998 ensure that the cess is collected at source from the

bills of the contractors to whom payments are made by the owner. The Hon'ble Supreme Court opined that the burden of cess is passed on from the owner to the contractor.

35. Both the Arbitral Tribunal as well as the learned Commercial Court referred to the decision of the Hon'ble Supreme Court in **A. Prabhakara Reddy** (supra). The Arbitral Tribunal concluded that the appellant was duty bound to collect the cess from the respective running account bills of the contractor after (a) the Cess Act 1996 and the Rules came into effect and (b) the Board was constituted. The Arbitral Tribunal was also of the view that similar view had been taken by the Hon'ble Supreme Court in **Dewan Chand Builders** (supra). This was not correct as would be clear from a reading of both the judgments.

36. In **A. Prabhakara Reddy** (supra), the appellants therein who were engaged in the business of construction of buildings, etc. raised a grievance against demand of cess under the Cess Act, 1996. The agreements of contracts for construction of projects were finalised and work order issued to contractors between December 2002 to March 2003. However, Madhya Pradesh Building & Other Construction Workers Welfare Board (in short, the MP

Welfare Board) came to be constructed on 09.04.2003 followed by Gazette Notification on 10.04.2003. Therefore, it was contended that there could be no provision in the contracts as to who shall bear the burden of paying cess under the Cess Act, 1996. It was contended that the Assistant Labour Commissioner in his letter to the Chief Engineer of the Project concerned in Jabalpur had communicated that cess is to be recovered w.e.f., 01.04.2003. It was therefore contended that no cess could be levied for the tenders, contracts and work orders for construction that came into existence before the MP Welfare Board was constituted on 09.04.2003/10.04.2003. It was also contended that if demand of cess is made on construction works undertaken or even contemplated on account of issue of work order before the constitution of the MP Welfare Board, then such demand would amount to making the Cess Act, 1996 operate retrospectively and that would be unwarranted, illegal and unjust. Repelling this contention, the Hon'ble Supreme Court held:

“12. Although the learned Senior Counsel for the appellants had taken us through the entire scheme of the main Act as well as the Cess Act and also the Rules framed thereunder, but nothing helps the appellants' case and in view of the limited issues arising for determination, we do not feel persuaded to go into details of the Cess Act and the Rules unnecessarily. We are of the considered view that after the Cess Act and the Rules came into effect and the Board was constituted, with the notification specifying the rate of cess to be levied upon the cost of construction incurred by the

employer already in place, the respondents were duty-bound to collect the cess by raising the demands in respect of the ongoing construction works if the workers in such construction activities were eligible for the benefits under the BOCW Act.

13. *The fact that the task of registering the workers and providing them the benefit may take sometime, would not affect the liability to pay the levy as per the Cess Act. Any other interpretation would defeat the rights of the workers whose protection is the principal aim or primary concern and objective of the BOCW Act as well as the Cess Act. Cess is a fee for service and hence, its calculation, as per settled law is not to be strictly in accordance with quid pro quo rule and does not require any mathematical exactitude. The scheme of the BOCW Act, the Cess Act and the Rules warrant that the lawfully imposable cess should be imposed, collected and put in the statutory welfare fund without delay so that the benefits may flow to the eligible workers at the earliest. The scheme of the BOCW Act or the Cess Act does not warrant that unless all the workers are already registered or the welfare fund is duly credited or the welfare measures are made available, no cess can be levied. In other words the service to the workers is not required to be a condition precedent for the levy of the cess. The rendering of welfare services can reasonably be undertaken only after the cess is levied, collected and credited to the welfare fund.*

14. *We also find no merit in other submission advanced on behalf of the appellants that there is a legal impediment in charging levy on the cost of construction incurred by the employer from a particular period on account of constitution of the Board from a particular date or for any other reason. This argument is fallacious. Such beneficial measures for the welfare of the workers are applicable even to the construction activity which may have commenced before coming into force of the BOCW Act and the Cess Act, if they are subsequently covered by the provisions of these Acts. There can be no legal obstacle in ignoring the construction cost incurred before the cess became leviable by distinguishing it from the cost of construction incurred later, from a date when the Board is available to render service to the building and other construction workers. The levy of cess in these facts and circumstances cannot be faulted for any reason. The demand of cess in the given facts cannot amount to retrospective application of the Cess Act. Hence the appeals must fail."*

37. The Hon'ble Supreme Court in **A. Prabhakara Reddy** (supra) also opined that in **Dewan Chand Builders** (supra) it had dismissed the challenge to the

constitutionality of the Cess Act, 1996 and the Rules framed thereunder and held that the levy is in fact “fee” and not a tax.

38. The clear and unequivocal pronouncement of the Hon’ble Supreme Court in **A. Prabhakara Reddy** (supra) as seen in paragraphs 12, 13 and 14 quoted above and in **Dewan Chand Builders** (supra) was unfortunately misinterpreted by the Arbitral Tribunal in favour of the respondents who were contractors. The Arbitral Tribunal’s conclusion that it would not be proper to charge the respondents for the cess which had become applicable in the State of Sikkim in the year 2009-2010 and therefore the amount of cess should directly be borne by the appellant is contrary to public policy as the award is contrary to the fundamental policy of Indian law. It also suffers from patent illegality which goes to the root of the matter and appears on the face of the award, is so unfair and unreasonable that it shocks the conscience of the Court. It was not within the jurisdiction of the Arbitral Tribunal to give directions for payment of the cess to the appellant contrary to the liability imposed by section 3 of the Cess Act, 1996 upon the respondents and what was not even prayed for by the respondents. The Arbitral Tribunal travelled beyond the

confines of its jurisdiction to arbitrate upon the dispute raised by the respondents and gave directions contrary to the Cess Act, 1996. It also suffers from the vice of disregarding the judgment of the Hon'ble Supreme Court in **A. Prabhakara Reddy** (supra) and **Dewan Chand Builders** (supra) which were binding upon the Arbitral Tribunal. The direction of the Arbitral Tribunal for the appellant to bear the entire cost of cess and further as no recovery of cess had been made, the same shall not be made hereinafter from the respondents and other consortium members either from their due payments or through encashment of bank guarantees is contrary to section 3 of the Cess Act, 1996 which mandates that it is to be paid by the respondents as 'contractors'. This is clear not only from the reading of section 3 of the Cess Act, 1996 but also from paragraph 17 of the judgment of the Hon'ble Supreme Court in **Dewan Chand Builders** (supra) which unfortunately was ignored by both the Arbitral Tribunal and the learned Commercial Court. The said paragraph 17 of **Dewan Chand Builders** (supra) reads thus,

“17. It is manifest from the overarching schemes of the BOCW Act, the Cess Act and the Rules made thereunder that their sole object is to regulate the employment and conditions of service of building and other construction workers, traditionally exploited sections in the society and to provide for their safety, health and other welfare measures. The BOCW Act and the Cess Act break new ground in that, the liability to

pay cess falls not only on the owner of a building or establishment, but under Section 2(1)(i)(iii) of the BOCW Act

“in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor”;

The extension of the liability on to the contractor is with a view to ensure that, if for any reason it is not possible to collect cess from the owner of the building at a stage subsequent to the completion of the construction, it can be recovered from the contractor. The Cess Act and the Cess Rules ensure that the cess is collected at source from the bills of the contractors to whom payments are made by the owner. In short, the burden of cess is passed on from the owner to the contractor.”

39. The learned Commercial Court instead of appreciating what was the issue before the Hon’ble Supreme Court and the ratio thereof, was swayed by the analogy of a statement made in the judgment of the Hon’ble Supreme Court in **Dewan Chand Builders** (supra) in paragraph 18 thereof with the present case to come to the conclusion that even in Sikkim, the State Government implemented the BOCW Act, 1996 and the Cess Act, 1996 only from 06.09.2010, i.e., the date of issuance of the Circular by the Labour Department, GOS. For convenience, paragraph 18 of **Dewan Chand Builders** (supra) is reproduced below:-

“18. *Although both the statutes were enacted in 1996, the Central Government in exercise of its powers under Section 62 of the BOCW Act notified the Delhi Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Rules, 2002 (for short “the Delhi Rules”) vide Notification No. DLC/CLA/BCW/01/19 dated 10-1-2002. Accordingly, the Government of NCT of Delhi constituted the Delhi Building and Other Construction Workers' Welfare Board vide Notification No. DLC/CLA/BCW/02/596 dated 2-9-2002. Thus, the*

Cess Act and the Cess Rules are operative in the whole of NCT of Delhi w.e.f. January 2002.”

40. As noted earlier, the BOCW Act, 1996 and the Cess Act, 1996 has come into effect on 01.03.1996 and 03.11.1995 respectively, much prior to the date of submission of the price bids, i.e., 13.02.2007, by the respondents and the execution of the contract agreement dated 12.09.2007. Clause 17.4 including sub-clause (xv) thereof of the GCC clearly mandated that the respondents as the contractors shall abide at all times the labour laws including the BOCW Act, 1996 and the Cess Act, 1996. A reading of the definition of the words ‘contractor’, ‘employer’ and ‘establishment’ as defined in section 2(g), 2(i) and 2(j) respectively in the BOCW Act, 1996, along with the Cess Act, 1996 and the Rules framed thereunder, it becomes clear that the respondents as contractors were liable to pay the cess. Section 3 of the Cess Act, 1996 imposed a liability upon the contractors to pay the cess. Therefore, the contractors were liable under section 3 of the Cess Act, 1996 from the date of enforcement. On 26.09.1996, the Government of India, Ministry of Labour notified the rate of cess @ 1% of the cost of construction incurred by an employer under the Cess Act, 1996. Thus, the respondents were liable to pay 1% of the cost of construction, w.e.f., from

the date of the contract agreement, i.e., 12.09.2007, as by then the BOCW Act, 1996, the Cess Act, 1996 as well as the rate of cess Notification dated 26.09.1996 had already been enforced. Rule 4 of the BOCW Cess Rules, 1998 which provides for time and manner of collection of cess when applied to the facts of this case, it is apparent that the respondents were liable to pay the cess within thirty days of completion of one year from the date of commencement of work and every year thereafter at the notified rates on the cost of construction incurred during the relevant period till the completion of the project in 2017.

41. Clause 49 of the GCC clearly stipulates that it is only changes to any law or the introduction of any such law which causes additional or reduced cost to the contractor that would be considered as change in law. In the facts of the present case, we find that there has been no change in either the BOCW Act, 1996 or the Cess Act, 1996 or the Rules framed thereunder. The respondents were fully aware that under clause 17.4 they were liable to pay the cess. Section 3 of the Cess Act, 1996 also fixed the liability upon the respondent as contractors. The rate of cess had also been fixed in the year 1996 itself and therefore, the respondents were aware of that too. The coming into force of

the Sikkim Rules, 2010, w.e.f., 27.02.2009, would not change the liability of the respondents to pay the cess. The constitution of the Sikkim Building & Other Construction Workers' Welfare Board in 2010 also would not change the situation for the respondents' liability under section 3 of the Cess Act, 1996. The liability under the Cess Act, 1996 to pay the cess upon the respondents as contractors is not consequent to the constitution of the Sikkim Building and other Construction Workers' Welfare Board. The failure of the State Government to take effective steps under the BOCW Act, 1996, the Cess Act, 1996 and constitute the Sikkim Building and Other Construction Workers' Welfare Board cannot reverse the liability of the respondents to pay the cess and impose it upon the appellant.

42. We are of the view that the BOCW Act, 1996, the Cess Act, 1996 and the Rules framed thereunder constitute the fundamental policy of Indian law. The objects and reasons of these enactments make it abundantly clear that it was a policy of the Government of India to regulate the services of the building and other construction workers. The BOCW Act, 1996 was enacted to regulate the employment and conditions of service of millions of building and other construction workers and to provide for their safety, health

and welfare which was hitherto before one of the most vulnerable segments of the unorganised labour in our country. These building and other construction workers' work is characterised by their inherent risk to the life and limb of the workers. The work is also characterised by casual nature, temporary relationship between employer and employee, uncertain working hours, lack of basic amenities and inadequacy of welfare facilities. Similarly, the Cess Act, 1996 was enacted for the levy and collection of a cess on the cost of construction incurred by the employers with a view to augmenting the resources of the Building and Other Construction Workers' Welfare Boards. The Building and Other Construction Workers' Welfare Boards are constituted under section 18 of the BOCW Act, 1996. The functions of the Building and Other Construction Workers' Welfare Boards are enumerated in section 22 and quite evidently it is to provide financial and other assistance to the building and other construction workers. The BOCW Cess Rules, 1998 provides in rule 3 thereof that for the purpose of the levy of cess under sub-section (1) of section 3 of the Cess Act, 1996, the cost of construction shall include expenditure incurred by an employer in connection with building and other construction work but shall not include the cost of land, any compensation paid or payable to a worker or his

kin under the Workmen's Compensation Act, 1923. Rule 4 thereof is relevant and already reproduced hereinabove. Rule 4 makes the time and manner of collection of cess amply clear. Therefore, the arbitral award passed by the arbitral tribunal nullifying the respondents' liability to pay cess under the Cess Act, 1996 violated the fundamental policy of India by depriving the building and other construction workers of their benefits under the welfare schemes.

43. The learned Commercial Court failed to examine the perversity of the award rendered by the Arbitral Tribunal. The Arbitral Tribunal conclusion to the issue framed by it is perverse and against the law. The date of enforcement or coming into force of the BOCW Act, 1996 is clearly spelt out in section 1(3) thereof, which states that it shall be deemed to have "come into force on 1st day of March 1996". Thus, the respondents' submission that it came into force after the period of 30 days of opening of the respondents bid was a non-issue. This Court is of the opinion that the learned Commercial Court ought to have set aside the award on the grounds of patent illegality, contravention with the fundamental policy of Indian law, and disregarding the judgments of the Hon'ble Supreme Court which were all available to it under section 34 of the

Arbitration Act. The failure has resulted in perpetuating the perversity which shocks the conscience of this Court. This Court, therefore, in exercise of the powers conferred upon it under section 37 of the Arbitration Act, sets aside the impugned judgment dated 14.08.2023, passed by the learned Commercial Court as well as the award passed by the Arbitral Tribunal.

44. Accordingly, the appeal is allowed and stands disposed of.

45. In the facts of the present case, we are also of the considered view that the cost of arbitration including the present appeal shall be borne by the respondents. It is accordingly ordered.

(Bhaskar Raj Pradhan)
Judge

(Biswanath Somadder)
Chief Justice

Approved for reporting : **Yes**
Internet: **Yes**

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