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(2025) 05 JH CK 1148

In the Jharkhand High Court

Case No : L.P.A. No.497 Of 2024

Jharkhand Building and Other Construction Workers Welfare Board — APPELLANT

Vs

M/s Anvil Cables Private Limited — RESPONDENT

Date of Decision : 09-05-2025

Acts Referred:
Constitution of India, 1950 — Article 32, 38, 39, 226, 265
Building and Other Construction Workers Act, 1996 — Section 2(1)(g), 2(1)(i), 2(1)(i)(iii), 3, 18
Contract Act. 1872 — Section 27, 72
Limitation Act, 1963 — Section 17(1), 17(1)(c)

Citation : (2025) 05 JH CK 1148

Hon'ble Judges : Sujit Narayan Prasad, J;Pradeep Kumar Srivastava, J

Bench : Division Bench

Advocate : Krishna Murari, Jayesh Anand, M.S. Mittal, Salona Mittal, Apoorva Singh, Sachin Kumar, Ravi Prakash Mishra, Ashok Kr. Yadav

Final Decision : Dismissed

Judgement

Sujit Narayan Prasad, J.

Prayer

Since all the appeals are having the common issues, as such, these appeals are directed to be heard together and are being disposed of with this common order.

2. The instant appeals preferred under Clause-10 of Letters

Patent are directed against the order dated 09.08.2024 passed by the learned Single Judge of this Court in Civil Review Nos.22 of 2024 and analogous cases, whereby and whereunder, the prayer to recall/review the orders passed by the learned Single Judge on different dates, i.e., in W.P.(C) Nos.5775 of 2023, 5777 of 2023, 5776 of 2023, 5778 of 2023, 6695 of 2023, 6262 of 2022 and 5458 of 2023 have been dismissed.

3. Since the issue involved in all these Letters Patent Appeals are identical in nature, as such, for the sake of convenience and with the consent of learned counsel for the parties, the fact involved in one of the cases, i.e., LPA No.497 of 2024 is being taken up.

Factual Matrix

4. The brief facts of the case, as per the pleading made in the petition, required to be enumerated, which read as under:

(i) It is the case of the writ petitioner that writ petitioner is a Company engaged in business of workers contract of the Government and was awarded contract for the tender for Rural Electrification Works of West Singhbhum District under Din Dayal Upadhyay Gram Jyoti Yojna project in XIIth plan pursuant to NIT No.277/PR/JBVNL/2018-19.

(ii) The writ petitioner was selected as the successful bidder, two separate orders were issued in his favour which are as follows:-

I. Letter of Award for supply of materials being LOA No.156/RE dated 17.12.2019.

II. Letter of Award for erection and civil works being LOA No.157/RE dated 17.12.2019.

(iii) The main grievance of the petitioner-Company is that the Letter of Award for supply of materials is defined as the "First Contract/Supply Contract" and the Letter of Award for erection works is defined as the "Second Contract"/Erection Contract.

In fact, clause-2 of both the LOAs read as (a) "total for supply contract-Rs.46,71,54,701.88", and (b) "total for service contract-Rs.9,96,37,316.01". It is the further case of the writ petitioner that the contracts for supply of materials and erection were separate and divisible contracts. Further, it has been stated by the writ petitioner that the total amount of labour cess deducted was Rs.32,59,088/-. Apart from this, there were other purchase and work order on which cess has been deducted by respondent-JBVNL and aggrieved by said deduction, the Writ Petition has been filed.

5. It is evident from the factual aspect that the writ petitioner, has preferred writ petitions, i.e., W.P.(C) Nos.5775 of 2023, 5777 of 2023, 5776 of 2023, 5778 of 2023, 6695 of 2023, 6262 of 2022 and 5458 of 2023, which have been allowed passing the order for refund of the amount which has been deducted by way of labour cess by the Jharkhand Urja Vitran Nigam Limited, in short "JUVNL".

6. The writ petitioner has preferred writ petitions impleading therein the respondents, i.e.,

(i) State of Jharkhand through the Secretary, Department of Labour, Employment & Training, having its office at Sharam Bhawan, Doranda, Ranchi.

(ii) Labour Commissioner, Department of Labour, Employment & Training, having

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its office at Sharam Bhawan, Doranda, Ranchi.

(iii) Assistant Labour Commissioner-cum-Cess Assessment Officer, having its office at Sharam Bhawan, Doranda, Ranchi.

(iv) Jharkhand Bijli Vitran Nigam Limited, through its Managing Director, having its office at Engineering Building, HEC, Dhurwa, Ranchi.

(v) General Manager (Project & Financial Management), Jharkhand Bijli Vitran Nigam Limited, having its office at Engineering Building, HEC, Dhurwa, Ranchi seeking therein the following prayers:-

"(i) For the issuance of an appropriate writ / order / direction or a writ in the nature of a declaration, declaring that the Respondents can deduct Labour Cess under the Cess Act (defined hereinafter) only on the erection charges which involves engaging the services of labours and not against other payments such as payment for supply of materials which does not involve any labour component, as decided by this Hon'ble Court in Flowmore Ltd. v. State of Jharkhand, 2022 SCC OnLine Jhar 633 and upheld by the Division Bench in L.P.A. No. 511 of 2022 (vide order dated 27.7.2023) relying on the judgment of the Hon'ble Supreme Court in U.P. Power Transmission Corporation Limited v. CG Power & Industrial Solutions Limited reported in (2021) 6 SCC 15.

(ii) For the issuance of an appropriate writ/order/ direction to the Respondents, or a writ in the nature of mandamus, directing the Respondents to refund, forthwith and at the earliest, the sum of Rs. 32,59,088 and such further deductions of the like nature, illegally and arbitrarily deducted by Respondent No. 4 as Labour Cess on supply of materials under the BOCW Act, the Cess Act and the Cess Rules in respect of the West Singhbhum Package-2 Project under the Deendayal Upadhyaya Gram Jyoti Yojna ('DDUJGY") Scheme;

(iii) For the issuance of an appropriate writ/order/ direction to the Respondents, or a writ in the nature of mandamus, directing the Respondents to pay interest at the rate of 18% p.a., from the date of deduction till the date of actual payment, being the compensation for the amount retained by the Respondents illegally and without jurisdiction; and

(iv) For the issuance of an appropriate writ/ order/ direction to the Respondents, or a writ in the nature of mandamus, directing the Respondents to henceforth refrain from levying Labour Cess on supply of materials from future bills."

7. The matter was heard by the learned Single Judge of this Court. The learned Single Judge, on appreciation of the statutory provision, as contained under the provision of Building & Other Construction Workers Welfare Cess Act, 1996 (hereinafter referred to as the "Cess Act, 1996") and the judgment rendered by the Hon'ble Apex Court in the case of Uttar Pradesh Power Transmission Corporation Limited & Anr. vs. CG Power and Industrial Solutions Limited and Anr., 2021 SCC OnLine 383, has allowed the writ petition with the following direction, which is being referred as under:-

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“The Writ Petition is allowed with a direction to the respondent nos.2 and 3 to refund the deducted amount under the supply portion within eight weeks from the date of order with simple interest @ 6 % on the said amount. There will be no further deduction of cess on the supply part of the contract.”

8. The appellant had preferred review petition against the order passed by the learned Single Judge on the ground that the Board is necessary party since the amount which has been deducted by the JUVNL under the labour cess head, had been transmitted in the account of the Board which has been spent by taking beneficial measure for the labourers. The amount has been spent and as such, the amount cannot be refunded in favour of the writ petitioner as per the direction passed by the learned Single Judge and in that view of the matter, the impleadment of the Board by way of necessary party in the proceeding before the learned Single Judge, was highly warranted but without impleading the Board as a party, the writ petition has been disposed of with a direction upon the Board to refund the said amount.

9. The learned Single Judge has rejected the said plea on consideration of the fact that the Labour Commissioner, Department of Labour, Govt. of Jharkhand has been impleaded as party to the proceeding, i.e., in the writ petition and the Board is being headed by the Chairman who happens to be the ex-officio Chairman in the capacity of holding the post of Commissioner, Department of Labour.

10. Learned Single Judge, while exercising the power of review and basing upon the judgment passed by the Hon’ble Apex Court in the case of Uttar Pradesh Power Transmission Corporation Limited & Anr. vs. CG Power and Industrial Solutions Limited and Anr. (supra) wherein it has been held that the labour cess on the material supply is not applicable but even then the same has been deducted by the JUVNL, party to the contract along with the writ petitioner and as such, the writ petition has been allowed and consequent direction has been passed on consideration of the fact that the amount which has been deducted by the JUVNL on the basis of audit report had transmitted the amount of the Board and hence, the Board has been directed to refund the said amount for its onward disbursement in favour of the writ petitioner.

11. Learned Single Judge has observed that the very authority to deduct the amount under the labour cess head has been held to be not proper but even then based upon the audit report, the amount has been deducted and transmitted to the account of the Board and as such, the direction so passed by the learned Single Judge cannot be said to suffer from an error.

12. Moreover, the issue with respect to non-impleadment, it has been considered that the Labour Commissioner was the party and decision to prefer Letters Patent Appeal against the order passed by the learned Single Judge, has been taken by Labour Commissioner-cum-Chairman of the Board.

13. The aforesaid document dated 23.09.2022 has been appreciated by the

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learned Single Judge while exercising the power of review and as such, applying the scope of review, the learned Single Judge has rejected the review petitions, against which, the present appeals have been preferred.

Arguments of the learned counsel for the appellant:

14. Mr. Krishna Murari, learned counsel for the appellant in all the appeals, has taken the following grounds in assailing the impugned order that:-

(i) The Board is a necessary party and as such, without impleading the Board as a party to the writ petition, the direction so passed upon the Board, cannot be said to be proper and as such, review petitions have been filed for recall of the order passed by the learned Single Judge so that the review petitioner may have the opportunity to address the Court.

(ii) Learned Single Judge while exercising the power of review has not appreciated the aforesaid aspect of the matter and direction has been given to refund the amount so that it be transmitted in the account of the petitioner on the basis of the fact that the amount cannot be deducted under the labour cess head on the issue of supply of material.

(iii) The Judgement rendered by the Hon’ble Apex Court in the case of Uttar Pradesh Power Transmission Corporation Limited & Anr. vs. CG Power and Industrial Solutions Limited and Anr. (supra) will not be applicable in the facts and circumstances of the case, since, the law which has been laid down in the aforesaid case is basically on different facts.

15. Learned counsel for the appellant, based upon the aforesaid grounds, has submitted that the order passed by the learned Single Judge, therefore, requires interference.

Arguments of the learned senior counsel for the Respondent

16. Mr. M.S. Mittal, learned senior counsel appearing for the Respondent has taken the following grounds in defending the order passed by the learned Single Judge.

(i) It has been submitted that it is incorrect on the part of the appellant to take the ground that there was no party to the proceeding, rather, the Chairman of the Board by virtue of holding the post of Labour Commissioner and the Labour Commissioner is party to the writ petition as respondent no.2 in all the aforesaid writ petitions. The counter affidavit has duly been filed on behalf of respondent nos.2 to 4 in one of the writ petitions.

Argument therefore has been advanced that Since the Labour Commissioner is the ex-officio Chairman of the Board and as he was impleaded as party, who has also contested the case and therefore, if the learned Single Judge has passed the order and directed to refund the amount then it is not available for the Board to take the ground that the Board has not been impleaded as party. Although, the Board is not party but the Officer concerned, who was in the helm of affairs of

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the Board, is party to the proceeding, meaning thereby, he was having the full knowledge with respect to the case. But he has not chosen to appear in the capacity of the Chairman of the Board. As such, the ground which is being taken in the review petitions of non-impleadment of the said party is nothing but to frustrate the order passed by the learned Single Judge.

(ii) Further, learned counsel by referring to the case before this Court, being W.P.(C) No.3835 of 2020 has submitted that the facts of the present cases are similar to the facts of W.P.(C) No.3835 of 2020 (M/s Flowmore Limited, Ranchi Vrs. The State of Jharkhand & Ors.), wherein, also the Board was not party. Thereafter, communication dated 23.09.2022 was issued by the Secretary of the Jharkhand Building and Other Construction Workers Welfare Board wherein the decision was taken to prefer an appeal. Thereafter, L.P.A. No.511 of 2022 (The State of Jharkhand & Ors. Vrs. M/s Flowmore Limited & Ors.) was preferred, in which, the order passed by the writ court was affirmed by dismissing the Letters Patent Appeal.

(iii) It has been contended that the communication dated 23.09.2022 has been annexed at page-124 of the paper book of L.P.A. No.566 of 2024.

It has been submitted that the aforesaid order clarifies that the Commissioner, being the ex-officio Chairman of the Board, was having full knowledge of pending proceeding and when he has lost before the learned writ Court both under the original jurisdiction and jurisdiction of the review, thereafter, has preferred the present appeals only to mislead the Court by way of taking the ground that they are necessary party.

(iv) The issue on merit has also been taken into consideration by the learned writ court at the time of exercising the original jurisdiction wherein by taking note of implication of the labour cess as per the definition madeunder Section 3 of the Act, having been interpreted and dealt with by the Hon'ble Apex Court in the judgment rendered in the case of Uttar Pradesh Power Transmission Corporation Limited & Anr. vs. CG Power and Industrial Solutions Limited and Anr. (supra), the direction has been passed for refund of the said amount by taking into consideration the fact that the Hon'ble Apex Court in the aforesaid case has held that the clear statutory scheme of BOCW Act excludes a supply contract from its ambit.

(v) The issue of necessary party which is being agitated on behalf of the appellant cannot be said to be available to be agitated since the Labour Commissioner who is also the Chairman of the Board was having full knowledge of the case was also contested by filing the affidavit.

The argument, therefore, has been advanced that since the Labour Commissioner was party to the proceeding and as such, the instant petition is only to be looked into regarding the propriety of the order passed by the learned Single Judge in review petitions being Civil Review Nos.22, 23, 27, 28, 30, 46 and 45 of 2024 and the High Court is to exercise the power under Article 226 in

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the touchstone of scope of review, the issue involved in the review petitions, is to be considered.

(vi) The review court has considered each and every aspect of the matter and thereafter has come to the conclusion of having no case to review the order passed by the original court, hence, the present appeal which is against the order passed by the review court is not worth to be considered, as such, the same is fit to be rejected.

17. The learned Single Judge since has passed an order, hence, there cannot be said to be any impropriety in the order passed by the learned Single Judge or the order passed in exercise of jurisdiction of review.

18. The learned senior counsel, based upon the aforesaid grounds, has submitted that the impugned order therefore requires no interference.

Analysis

19. We have heard the learned counsel for the parties and gone across the finding recorded by the learned Single Judge in the impugned order.

20. Before proceeding to examine the issue, it needs to refer herein that an opportunity of detail hearing has been given to the learned counsel for the appellant, namely, Mr. Krishna Murari, which would be evident from various orders passed by this Court dated 10.02.2025, 05.03.2025 and 11.03.2025.

21. It is evident from one of the orders, i.e., order dated 05.03.2025 that certain issues have been framed.

22. This Court has considered to interact with the Labour Commissioner on the issue since in spite of the query being made to the learned counsel for the appellant regarding the applicability of the judgment rendered in the case of Uttar Pradesh Power Transmission Corporation Limited & Anr. vs. CG Power and Industrial Solutions Limited and Anr.(supra) and the question of applicability of unjust enrichment, this Court has thought it proper to interact with the Labour Commissioner to assist the Court on the issue on merit, therefore, has passed an order to call upon the Labour Commissioner. The Labour Commissioner has appeared.

23. The question, which requires consideration in the present case is that:

(i) The Labour Commissioner who is the Chairman of the Board if already impleaded as party, who has filed counter affidavit before the learned writ Court, then how, is it available for the Labour Commissioner to take the ground that the Board has not been impleaded as party. As such, the order which has been passed by the learned Single Judge, needs to be recalled.

(ii) Whether the Labour Commissioner who is also the Chairman of the Board, can be allowed to agitate the ground of not impleading the Board as a party when he is fully conscious with the pending proceeding before this Court and also

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contested the case.

(iii) Whether the Labour Commissioner, highest in hierarchy in the Labour Department, can be allowed to take plea of non-impleadment, even though, he was having full knowledge about pending proceeding, rather, he has waited for disposal of the writ petition without making any reference to the Court that he also holds the post of Chairman of the Board.

(iv) Whether in a case where the amount which has been deducted, held to be contrary to the statute, can be allowed to be retained merely on the ground of principle of unjust enrichment and the money has been spent by the Board.

24. All the issues are interlinked and as such, the same are being dealt with hereinafter together.

25. The first issue with respect to the position of Board to be considered as necessary party, this Court is of the view that the consideration is to be given with respect to the interpretation of necessary party, proper party and the affected party.

26. The necessary party is such party in whose absence, there cannot be any adjudication of the issue on merit, while, the proper party is such party in whose absence the proceeding can be decided but for substantive justice, such party may be impleaded as party to the proceeding. The interpretation of necessary or proper party has been dealt with by the Hon'ble Apex Court in the case of Poonam v. State of U.P., [(2016) 2 SCC 779], wherein the Hon'ble has dealt with the issue of 'necessary party'. The relevant paragraph of the said judgment is quoted as under:

"14. First, it is necessary to understand about the concept of necessary and proper party. A four-Judge Bench in Udit Narain Singh Malpaharia v. Board of Revenue [Udit Narain Singh Malpaharia v. Board of Revenue, AIR 1963 SC 786] has observed thus: (AIR p. 788, para 7)

"7. … it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding."

27. It is evident from the ratio laid down by the Hon'ble Apex Court regarding the interpretation of the word "necessary party or proper party".

28. This Court has dealt with this issue because the argument, all along of the Board, is that they are necessary party but they have not provided an opportunity. Therefore, this Court deems it fit and proper to consider the issue even though the argument has been advanced on behalf of the writ petitioner that the Labour Commissioner who happens to be the Chairman of the Board

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being the party to the proceeding and on behalf of whom, the affidavit has been sworn before the writ Court in one of the writ petitions.

29. Whether the question of necessary or proper party will be a ground for consideration as has been agitated on behalf of the appellant, is required to be considered in backdrop of the argument advanced on behalf of the writ petitioner.

30. The admitted fact which we have gathered from the document dated 23.09.2022 that the Board decided to file an appeal, being aggrieved with the order passed by the writ court, wherein, the writ court has directed the respondent-JUSNL to refund the Labour Cess against the bill for supply of materials, for ready reference, the communication dated 23.09.2022 is being quoted as under:-

31. Moreover, it is evident that the copy of the affidavit filed on behalf of the respondent, the Labour Commissioner, wherein, the affidavit has been sworn by one of the officers under the authority of Labour Commissioner-cum-Chairman of the Board.

32. It is evident therefrom as also evident from the party position of the writ petition that the Labour Commissioner is the party to the writ petition and the Chairman of the Board is the same authority who holds the post of Labour Commissioner.

33. An affidavit has been filed under the authority of the Labour Commissioner who is also the Chairman of the Board and further, the Labour Commissioner in the capacity of the Chairman of the Board has taken decision to prefer the instant appeals as per the content of the communication dated 23.09.2022 as quoted and referred hereinabove.

34. It is, thus, evident from the aforesaid document and the counter affidavit that the Labour Commissioner was the party to the writ petition, the proceeding filed at its inception by invoking the jurisdiction conferred under Article 226 of the Constitution and not only that the case was contested and in presence of the Labour Commissioner who has been represented by the learned State counsel, the order was passed by the learned Single Judge directing the Board to refund the amount in favour of the writ petitioner on the ground that there cannot be any deduction on the head of Labour cess on the material supplied.

35. The Labour Commissioner who is the Chairman of the Board since was party to the writ petition and as such, this Court is of the view that if one individual is holding two posts, one by way of original assignment and another by holding original assignment in ex-officio capacity, the other post, i.e., the Chairman of the Board, then, the question of having no knowledge will not be available to be agitated.

36. The question of ex-parte decision will only be said to be ex-parte decision, if in absentia of a party, the order is being passed by the Court. Herein, the said situation is not available due to the reason that the Labour Commissioner and

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the Chairman of the Board are the same individual, as has been admitted by the learned counsel for the appellant and would be evident from the counter affidavit filed by one of the officers who has fully been authorized to sworn the affidavit on behalf of Labour Commissioner and the communication dated 23.09.2022.

37. The question of knowledge is required to be there so as to have the opportunity to defend.

38. If the individual carries the post of Labour Commissioner is different to that of the Chairman of the Board then, what is being argued on behalf of the appellant, will be said to be correct, due to the reason that in absence of knowledge of pending proceeding by the Chairman of the Board on the ground of two different identity holding the post of Labour Commissioner and the Chairman, then, certainly it is available for the Board to take the ground that the Chairman was having no knowledge about the pending proceeding.

39. Herein, the Labour Commissioner and the Chairman of the Board are the same individual and the same authority, has also filed counter affidavit raising all the issues, which is available to be agitated by the Chairman of the Board, has been agitated by the Labour Commissioner by virtue of original assignment. Hence, this Court is of the view that the ground which is being taken that the Board being the necessary party has not been impleaded as party, as such, the order passed by the learned Single Judge needs to be recalled, cannot be said to have any force due to the aforesaid reasons.

40. This Court, therefore, is of the view that it is not a case in the backdrop of the discussion made hereinabove to agitate the issue of non-impleadment of the necessary party, i.e., the Board, since, the highest hierarchy of the Board, i.e., Labour Commissioner who also happens to be Chairman was impleaded as party and he has also contested the case by filing counter affidavit.

41. This Court, therefore, is not hesitant in holding that merely because the reference of the Board, i.e., Jharkhand Building and Other Construction Workers Welfare Board has not been made party, then the order passed by the learned Single Judge will be said to be in absence of the Board, is not worth to be considered.

42. The issue on merit has been argued by the learned counsel for the appellant as also the learned counsel for the writ petitioner, the respondent herein.

43. We have considered the order passed by the learned Single Judge, wherein, the purport of the Labour Cess Act has been taken into consideration.

44. We have discussed the statutory command, as referred in the judgment rendered in the case of Uttar Pradesh Power Transmission Corporation Limited (Supra), wherein, the "Labour Cess" has been dealt with which strictly bars to collect the Labour Cess on the supply of material, for ready reference, the relevant paragraphs of the aforesaid judgment, i.e., paragraph-51 to 54, are

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being referred as under:-

“51. The clear statutory scheme of the BOCW Act excludes a supply contract from within its ambit. On behalf of Respondent 1, it is pointed out that several public authorities and corporations, such as the Delhi Metro Rail Corporation and Karnataka Power Transmission Corporation Ltd., 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 Respondent 1 in the High Court.

52. Under Section 2(1)(g) of the BOCW Act the term “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. Respondent 1 is apparently not a contractor, within the meaning of Section 2(1)(g) of the BOCW Act in respect of the first, second and fourth contracts. Nor is Respondent 1 employer within the meaning of Section 2(1)(i) of the BOCW Act. Section 2(1)(i) of the BOCW Act defines “employer” to include the contractor in relation to a building and other construction work carried on by or through a contractor or by employment of building workers supplied by a contractor. Respondent 1 neither falls within the definition of “contractor‟ in Section 2(1)(g) nor 2(1)(i)(iii) of the BOCW Act. Apparently, Respondent 1 is not liable to cess in respect of the first, second and fourth contracts.

53. Cess under the Cess Act read with the 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 Respondent 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.”

45. It is evident from the aforesaid paragraphs, wherein, it has been laid down

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by considering the purport of the Act that the Labour Cess cannot be deducted from the supply of material.

46. The question of unjust enrichment since has been taken and as such, the same also needs to be discussed by this Court.

47. The principle of unjust enrichment has been taken into consideration by the Hon'ble Apex Court in the case of MafatLal Industries Ltd & Ors Vs. Union of India & Ors [(1997) 5 SCC 536], wherein, at paragraph-108 of the said judgment, it has been held as under:-

"108. The discussion in the judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

(i) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff — whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter — by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein.

No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 — and of this Court under Article 32 — cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law" within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Both the enactments are self contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act, both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and given effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit or a writ petition. All

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refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasise in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal — which is not a departmental organ — but to this Court, which is a civil court.

(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception : Where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be reopened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, C.J. in Tilokchand Motichand [(1969) 1 SCC 110 : (1969) 2 SCR 824 : AIR 1970 SC 898] and we respectfully agree with it.

Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying clause (c) of sub-section (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or

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where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

(iv) It is not open to any person to make a refund claim on the basis of a decision of a court or tribunal rendered in the case of another person. He cannot also claim that the decision of the court/tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without reopening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well-established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963, has no application to such a claim for refund.

(v) Article 265 of the Constitution has to be construed in the light of the goal and the ideals set out in the Preamble to the Constitution and in Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes like Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the petitioner-plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.

(vi) Section 72 of the Contract Act is based upon and incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision.

(vii) While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the petitioner-plaintiff has suffered no real loss or prejudice, having passed on the burden of tax or duty to another person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case of large claims, it may well result in financial

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chaos in the administration of the affairs of the State.

(viii) The decision of this Court in STO v. Kanhaiya Lal Mukundlal Saraf [1959 SCR 1350 : AIR 1959 SC 135 : (1958) 9 STC 747] must be held to have been wrongly decided insofar as it lays down or is understood to have laid down propositions contrary to the propositions enunciated in (i) to (vii) above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in Kanhaiya Lal [1959 SCR 1350 : AIR 1959 SC 135 : (1958) 9 STC 747] have also been wrongly decided to the above extent. This declaration — or the law laid down in Propositions (i) to (vii) above — shall not however entitle the State to recover the taxes/duties already refunded and in respect whereof no proceedings are pending before any authority/Tribunal or Court as on this date. All pending matters shall, however, be governed by the law declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an authority, Tribunal or Court or otherwise.

(ix) The amendments made and the provisions inserted by the Central Excises and Customs Law (Amendment) Act, 1991 in the Central Excises and Salt Act and the Customs Act are constitutionally valid and are unexceptionable.

(x) By virtue of sub-section (3) to Section 11-B of the Central Excises and Salt Act, as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in sub-section (3) of Section 27 of the Customs Act, 1962, as amended by the said Amendment Act, all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactments. No suit for refund of duty is maintainable in that behalf. So far as the jurisdiction of the High Courts under Article 226 of the Constitution — or of this Court under Article 32— is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it override it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.

(xi) Section 11-B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that Union of India v. Jain Spinners [(1992) 4 SCC 389] and Union of India v. ITC [1993 Supp (4) SCC 326] have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated — in the sense that the appeal period has also expired — before the commencement

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of the 1991 (Amendment) Act (19-9-1991), they cannot be reopened and/or governed by Section 11-B(3) [as amended by the 1991 (Amendment) Act]. This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.

(xii) Section 11-B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It, therefore, cannot be said that Section 11-B is a device to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962."

48. The question of unjust enrichment is to be considered in the light of issue of entitlement, as has been held by the Hon'ble Apex Court in the case of Eastern Coalfields Limited Vrs. Tetulia Coke Plant Private Limited and Ors., reported in (2011) 14 SCC 624, wherein, it has been held at paragraph-12 which reads as under:-

"12. The learned Additional Solicitor General has also submitted before us that the respondents are not entitled to the benefit, if they are otherwise entitled to on the principles of unjust enrichment. We specifically asked the learned Additional Solicitor General during the course of the arguments to show us whether any such plea was taken in the writ petition which was filed before the learned Single Judge. The learned Additional Solicitor General was unable to show that any such defence or plea was taken about unjust enrichment in the pleadings filed before the learned Single Judge. Such an issue was also not argued before the learned Single Judge as no such reference is there in the order of the learned Single Judge. It is, however, stated by the learned Additional Solicitor General that such an issue was raised before the Division Bench. But we could not find the same raised in the pleadings nor was it considered. But a mention is made in the judgment that such a plea was argued. However, on going through the records, we find that no such ground has also been taken even in the memorandum of appeal filed in the present appeal. Therefore, without taking a plea of unjust enrichment either in the writ petition or before this Court, we are not inclined to allow him to argue the plea at the time of argument and entertain such a plea, particularly, in view of the fact that the respondents did not have any notice of such a plea taken for the first time at argument stage."

49. It is evident from the settled proposition that the issue of unjust enrichment will not be applicable if the amount which has been deducted is contrary to the statutory provision. Reference also needs to be made of judgment rendered by the Hon'ble Apex Court in the case of Ashoka Smokeless Coal India(P) Ltd. & Ors. Vrs. Union of India & Ors., (2007) 2 SCC 640, wherein, the scheme under which the amount has been deducted itself has been held to be invalid. For ready reference, the relevant paragraphs of Ashoka Smokeless Coal India (P) Ltd. & Ors. Vrs. Union of India & Ors. (supra) is quoted as under:

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“2. The validity and/or legality of a scheme framed by Coal India Limited for sale of coal by electronic auction (e-auction) is in question in these appeals and transferred applications.

E-auction

45. A new scheme known as e-auction was made purportedly to meet the liberalisation policy of the Central Government in regard to import of coal and opening of private coal mines and to provide pragmatic and transparent system of distribution of coal. 4.8 million tonnes of coal were offered to the non-core sector in 2003-2004. The quantity earmarked for non-core sector was restricted to 933 validly linked consumers. The objectives of the said scheme are stated to be as under:

“Objectives

The present system of sale of coal to non-core sector consumers needs to be made more pragmatic and transparent by accommodating the following changes:

(a) A consumer having requirement of specified quality of coal from a particular colliery/source and siding/pilot should have an access to buy coal by paying the market determined price for the same.

(b) This approach would enable the non-core sector consumers to receive coal of their choice, on payment of market price, determined through auction confined to non-core sector consumers.”

Conclusion

188. Coal being a scarce commodity, its utility for the purpose for which it is needed is essential. Although, technically, in view of the fact that no price is fixed for coal, there may not be any black marketing in the technical sense of the terms; but this Court cannot also encourage black marketing in general sense. Nobody should be allowed to take undue advantage while dealing with a scarce commodity. The very fact that despite best efforts of the Central Government, the coal companies failed to curb the menace of a section of people and to deal in coal excluding other general people therefrom or the linked consumers misusing their position of obtaining allotment of coal either wholly or in part, it is absolutely necessary that some mechanism should be found out for plugging the loopholes. The Union of India or the coal companies appear to have lost confidence in the State Governments. They had carried out joint inspection and in that process they must have arrived at a satisfaction about the genuineness of the claims of industrial units for which the linkage system was meant for.

189. Before us most of the consumers, with a view to obtain supply of coal had filed documents to prove their genuineness. The said documents must be scrutinised by the authorities of the coal companies. In the event, they have any suspicion, inspection should be carried out by officers appointed by the Chairman-cum-Managing Director of the company concerned within whose jurisdiction the

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unit is situated.

190. With a view to evolve a viable policy, a committee should be constituted by the Union of India with the Secretary of Coal being the Chairman. In such a committee, a technical expert in coal should also be associated as most of the projects involve consumers of coal, particularly manufacturers of hard coke and smokeless fuel. In our opinion, it may not be difficult to find out, having regard to the technologies used therein as regards the ratio of the input vis-à-vis the output, with a balance and 10% margin. On the basis of such finding alone, apart from the requirements of five years, supply should form the basis of MPQ. We may, however, hasten to add that the Central Government in collaboration with the coal companies would be at liberty to evolve a policy which would meet the requirements of public interest vis-à-vis the interest of consumers of coal. They would be entitled to lay down such norms as may be found fit and proper. They would be entitled to fix appropriate norms therefor. In the event, any industrial unit is found to violate the norms, it should be stringently dealt with.

193. However, discussions made hereinbefore should not be taken to lay down a law that the Central Government and for that matter the coal companies cannot change their policy decision. They evidently can; but therefor there should be a public interest as contradistinguished from a mere profit motive. Any change in the policy decision for cogent and valid reasons is acceptable in law; but such a change must take place only when it is necessary, and upon undertaking of an exercise of separating the genuine consumers of coal from the rest. If the coal companies intend to take any measure they may be free to do so. But the same must satisfy the requirements of constitutional as also the statutory schemes; even in relation to an existing scheme e.g. Open Sales Schemes, indisputably the coal companies would be at liberty to formulate the new policy which would meet the changed situation. E-advertisement or e-tender would be welcome but then therefor a greater transparency should be maintained.

194.For the reasons aforementioned, Civil Appeals Nos. 2972 and 2975 of 2005 being devoid of any merits are dismissed. Civil appeal arising out of SLP (Civil) No. 24034 of 2005 is allowed and the impugned judgment of the Madhya Pradesh High Court is set aside. No separate order is required to be passed on Civil Appeal No. 5547 of 2004 arising out of the judgment and order of the Calcutta High Court as the said case would also be governed by this judgment. All other appeals, writ petition and transferred cases are disposed of with the aforementioned observations and directions."

50. The judgment rendered in the case of Ashoka Smokeless Coal India(P) Ltd. (supra) has been considered in the case of S.J. Coke Industries Private Limited & Ors. Vrs. Central Coalfields Limited & Ors., (2015) 8 SCC 72 holding therein that if the very basis of deduction itself has been held to be valid, the party concerned from whom, the money has been deducted, the same is to be refunded, for ready reference, the relevant paragraphs of the judgment passed in the case of S.J. Coke Industries Private Limited & Ors. (Supra) are being quoted as under:-

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“38. Keeping in view the stand taken by CCL and the manner in which they contested the cases at all stages in different High Courts and in this Court by raising same pleas despite their adjudication by this Court lead us to draw a conclusion that untenable pleas were being raised by CCL just to defeat the legitimate claim of the citizens determined in their favour by this Court in earlier litigations and which was known to CCL.

40. As a consequence, the appeals filed by Central Coalfields Ltd. — CA arising out of SLPs (C) Nos. 14430, 15985, 15986, 15987, 15989, 15990 and 15991 of 2013 stand dismissed.

41. CCL is directed to verify the claim of each of the writ petitioners and then after giving adjustment of any amount if already found paid to the writ petitioners against their claim in question, refund the balance amount along with interests @ 6% to the respective writ petitioners (companies). Let this be done within three months.”

51. The question of unjust enrichment therefore will not be applicable if the amount has been deducted contrary to the statutory provision having no authority to deduct the same.

52. Adverting to the facts of the present case herein also the Labour cess has been deducted on the basis of audit report, while, the statute prohibits the same.

53. Therefore, applying the principle laid down in the case of S.J. Coke Industries Private Limited & Ors. (supra), this Court is of the view that in the facts and circumstances of the present case in a situation of Labour cess being held to be not applicable in the supply of material, the principle of unjust enrichment, will not be applicable.

54. It has been submitted by Mr. Mittal, learned senior counsel for the respondent that out of eight cases, in two of the cases, the amount which has been deducted under the Labour cess head has already been refunded back in favour of the party concerned.

55. This Court posed a pin-pointed question to the learned counsel for the appellant on the issue of refund of the amount in pursuance to the order passed by this Court in the case of W.P.(C) No.6262 of 2022 and W.P.(C) No.241 of 2023. The aforesaid fact has not been disputed.

56. Therefore, the question is that the Board being the statutory creation can be allowed to adopt the pick and choose policy.

57. The conduct of the Board itself suggests that they have chosen not to challenge the issue of refund of money which has been deducted by the JBVNL and transmitted to the account of the Board, then what authority they can be allowed to take the ground not to refund the amount.

58. Further, the JBVNL who is the party to the contract said to be concluded one and the JBVNL has accepted the order passed by the learned writ Court based

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upon the statutory command having been interpreted by the Hon'ble Apex Court in the case of Uttar Pradesh Power Transmission Corporation Limited & Anr. (supra), hence, the Board merely because the amount has been transmitted by the party to the contract, i.e., JBVNL in no stretch of imagination, can come with the plea that such amount even though has illegally been deducted is not to be refunded back in favour of the writ petitioner.

59. This Court, in view of the aforesaid discussion and adverting to the order passed by the learned Single Judge in the writ petition as also under the jurisdiction of review, is of the view that no error has been committed while passing the order impugned, therefore, all the appeals are to be dismissed.

60. In the result, the instant appeals fail and are dismissed.

61. In consequent to dismissal of the instant appeals, pending interlocutory application(s), if any, also stands disposed of.

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