(2012) 05 MP CK 0006

In the Madhya Pradesh High Court

Case No : Writ Petition No''s. 3956 and 14029 of 2009

Technical Associates Ltd. APPELLANT

Vs

Assistant Labour Commissioner, Jabalpur and Others RESPONDENT

Date of Decision : 03-05-2012

Acts Referred:
Construction Workers Welfare Cess Act, 1996 — Section 3

Citation : (2012) 134 FLR 751

Hon'ble Judges : R.S. Jha, J;Ajit Singh, J

Bench : Division Bench

Advocate : Sumit Nema and Mukesh Agrawal, for the Appellant; Prakash Upadhyay for the Respondent No. 2 and Vivek Agrawal, Government Advocate for the State, for the Respondent

Final Decision : Dismissed

Judgement

Ajit Singh, J.—Since both Writ Petition Nos. 3956/2009 and 14029/2009 involve a common issue, they were heard together and are being decided by this order.

The petitioners are companies and registered under the Companies Act. They are contractors of electrical works. Respondent No. 2 is also a company registered under the Companies Act. It is wholly controlled by the State Government.

The petitioners have been awarded contracts by respondent No. 2 for erection of 33/11 KV S/Ss associated with 33 KV and 11 KV lines. These contracts have been awarded under Japan Bank of International Co-operation (JBIC) Scheme on TOTAL TURN-KEY BASIS which broadly includes the supply, transportation to work site, storage, insurance, erection, assembling, testing and commissioning of the lines and line equipments. The Scheme is being implemented through Rural Electrification Corporation, New Delhi, by respondent No. 2.

2. The relevant Clause 5.2 of the contract, which deals with the contract price, reads as under:

5.2 CONTRACT PRICE

(i) For supply portion (Lines and Sub-Stations)

The total Contract Price inclusive of all taxes and duties for the entire scope of work of supply portion under the Contract shall be Rs. 86446244/- (In words Rs. Eight crores sixty-four lacs forty-six thousand two hundred forty-four only).

Detailed break-up of the Contract Price for entire supply portion of New 33/11 KV S/Ss with associated 33 KV and 11 KV tines are given in Schedule-1 (including Schedule- 1.1, 1.2, 1.3, 1.4, 1.5, 1.6) enclosed with this award.

(ii) For erection portion (Lines and Sub-Stations)

The total Contract Price inclusive of all taxes and duties for the entire scope of work of erection portion under the Contract shall be Rs. 7281987/- (In words Rs. Seventy-two lacs eighty-one thousand nine hundred eighty-seven only).

Detailed break-up of the Contract Price for entire erection portion of New 33/11 KV S/Ss with associated 33 KV and 11 KV lines are given in Schedule-2 (including Schedule- 2.1, 2.2, 2.3, 2.4, 2.5, 2.6) enclosed with this award.

(iii) For Civil Works--The total Contract Price for Civil Works inclusive of all taxes and duties for the entire scope of work Civil Works under the Contract shall be Rs. 10771769/- (In words Rs. One crores seven lacs seventy-one thousand seven hundred sixty-nine only). Detailed break-up of the Contract Price for entire Civil works for 33/11 KV S/Ss are given in Schedule-3 (including Schedule-3.1 to 3.16) enclosed with this award. However, payment shall be made as per applicable schedule depending upon soil condition.

(iv) Total Contract Price

The total Contract Price inclusive of all taxes and duties for the entire scope of work (supply portion + erection portion + Civil works) under the Contract shall be Rs. 104500000/- (In words Rs. Ten crores forty-five lacs only).

3. The Parliament has enacted the Building and other Construction Workers'' (Regulation of Employment and Conditions of Service) Act, 1996 (in short, "the main Act") to regulate the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare measures and for other matters connected therewith or incidental thereto. Section 18 of this Act mandates every State Government to constitute a Welfare Board so as to provide and monitor social security, schemes and welfare measures for the benefit of building and other construction workers.

4. The Parliament also considered necessary to levy a cess on the cost of construction incurred by the employer on the building and other construction works for ensuring sufficient funds for the Welfare Board to undertake the social security schemes and welfare measures. The Parliament has, therefore, enacted the Building and other Construction Workers'' Welfare Cess Act, 1996 (in short,

"the Cess Act") Section 14 of this Act empowers the Central Government to make rules by notification in the official Gazette- for carrying out its provisions. In exercise of the powers so conferred, the Central Government has made the Building and other Construction Workers'' Welfare Cess Rules, 1998 (in short, "the Cess Rules").

5. u/s 3 of the Cess Act the Central Government has issued a notification to levy and collect a cess at the rate of one per cent of the cost of construction incurred by the petitioners. One of the modes prescribed to collect the cess levied is deduction at source.

6. When respondent No. 2 deducted the cess levied at source on the bills furnished by the petitioners they filed the present petitions by referring to the above quoted Clause 5.2 of the contract contending that they are not liable to pay cess attributable for supply portion i.e. 5.2(i). According to the petitioners, under the Cess Act they are liable to pay cess only on the cost price (sic) to erection portion i.e. 5.2 (ii) and civil works in 5.2 (iii). The petitioners submit that the deduction of one per cent cess by respondent No. 2 on the entire contract price mentioned in Clauses 5.2(i), 5.2 (ii) and 5.2 (iii) is illegal. On the other hand, the State Government and respondent No. 2 in their separate returns have justified their action of deducting one per cent cess on the entire contract price as mentioned in Clause 5.2(iv).

7. Therefore, the sole question which calls for determination in these petitions is that whether respondent No. 2 is entitled to deduct one per cent cess on the entire contract price mentioned in Clause 5.2(iv) or only in respect to 5.2(ii) and 5.2(iii) [and not 5.2(i)].

8. The expressions "building and other construction work", "employer" and "establishment" are defined in sub-section (d) (i) and (j) of section 2 of the Main Act. They read as under:

2(d) "building or other construction work" means the construction, alteration, repairs, maintenance or demolition, of or, in relation to buildings, streets, roads, railways, tramways, airfields, irrigation, drainage, embankment and navigation works, flood control works (including storm water drainage works), generation, transmission and distribution of power, water works (including channels for distribution of water), oil and gas installations, electric lines, wireless, radio, television, telephone, telegraph and overseas communications, dams, canals, reservoirs, watercourses, tunnels, bridges, viaducts, aqueducts, pipelines, towers, cooling towers, transmission towers and such other work as may be specified in this behalf by the appropriate Government, by notification but does not include any building or other construction work to which the provisions of the Factories Act, 1948 or the Mines Act, 1952 apply.

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

(i) in relation to a building or other construction work carried on by or under the authority of any department of the Government, directly without any contractor, the authority specified in this behalf, or where no authority is specified, the head of the department;

(ii) in relation to a building or other construction work carried on by or on behalf of a local authority or other establishment, directly without any contractor, the chief executive officer of that authority or establishment.

(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 in relation to his own residence the total cost of such construction not being more than rupees ten lakhs.

9. By reading the above quoted definitions it is clear that the construction, in relation to buildings, generation, transmission and distribution of power and electric lines, is very much included within the meaning of "building and other construction work". It is also clear that respondent No. 2, being an establishment under the control of Government, falls within the meaning of "establishment" and the petitioners as contractors are employers in respect to the building or other construction work. There is, thus, no dispute with regard to the applicably of the provisions of the Main Act, Cess Act and the Cess Rules on the petitioners.

10. Section 3 of the Cess Act is the charging section. It reads as under:

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 Services) Act, 1996, at such rate not exceeding two per cent, but not less than one per cent, of the cost of construction incurred by an employer, as the Central Government may, by notification in the official Gazette, from time to time specify.

11. Likewise, Rule 3 of the Cess Rules deals with levy of cess and it reads as under:

3. Levy of cess.--For the purpose of levy of cess under sub-section (1) of section 3 of the Act, cost of construction shall include all expenditure incurred by an employer in connection with the building or other. construction work but shall not include--

--cost of land;

any compensation paid or payable to a worker or his kin under the Workmen''s

Compensation Act, 1923.

A joint reading of the above quoted section 3 and Rule 3 shows that cess levied not less than one per cent of the cost of construction incurred by the petitioners as employers is payable by them. The cost of construction cannot be divided in parts, as argued by the petitioners, into supply portion and erection portion. Even the cost for supply portion is incurred by the petitioners and cannot be separated from the total cost incurred mentioned in Clause 5.2 (iv). The cess is on the total cost of construction. The definition of cost of construction in Rule 3 excludes only cost of land and any compensation paid or payable to worker or his kin under the Workmen''s Compensation Act, 1923. The expression "expenditure" in Rule 3 does not obviously include cost of land even so it is specifically excluded in the proviso to the Rule. If the intention of the Cess Act and Cess Rules was to exclude the cost of supply part, it would have been referred in Rule 3 where exceptions are provided. We, therefore, hold that respondent No. 2 is entitled to deduct one per cent cess on the total contract price mentioned in Clause 5.2 (iv) and that the petitioners are liable to pay cess even for supply portion.

The petitions fail and are dismissed with costs of Rs. 1,000/- to each petitioner.