

Supreme Court of India
Supreme Court of India
M/S. Dewan Chand Builders & ... vs Union Of India & Ors. on 18 November, 2011
Author: D Jain
Bench: D.K. Jain, Asok Kumar Ganguly
IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1830 OF 2008

M/S DEWAN CHAND BUILDERS & -- APPELLANT CONTRACTORS

VERSUS

UNION OF INDIA & ORS. -- RESPONDENTS WITH

CIVIL APPEAL NO. 1831 OF 2008

AND

CIVIL APPEAL NO. 1832 OF 2008

J U D G M E N T

D.K. JAIN, J.:

1. These appeals, by special leave, arise out of judgment and final order dated 28th February, 2007 in W.P.(C) No.3620/2003 [connected with W.P.(C) Nos.216-17 of 2006]; W.P.(C) Nos.7480-81/2006 & CM No. 5879/2006, and W.P.(C) Nos.7485-87/2006 & CM No.5886/2006] rendered by the High Court of Delhi, whereby, the said petitions were dismissed with costs of `25000/-. The High Court has held that The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (for short "the BOCW Act"); The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Central Rules, 1998, (for short the "1998 Central Rules"); The Building and Other Construction Workers Welfare Cess Act, 1996 (for short "the Cess Act") and The Building and Other Construction Workers Welfare Cess Rules, 1998 (for short "the Cess Rules") are constitutionally valid and within the competence of the Parliament as the levy under the impugned enactments is a "fee", referable to Entry 97 of List-I of the Seventh Schedule of the Constitution of India.

2. Since all the appeals involve a common pure question of law, these are being disposed of by this common judgment. For deciding the subject issue before us viz. constitutional validity of the Cess Act, even a reference to the factual aspects is unnecessary, except to note that the appellant in these appeals is a contractor, engaged in building and other construction works in the National Capital Territory of Delhi.

3. However, before addressing the contentions advanced on behalf of the parties, it will be useful to survey the relevant provisions of both the Acts and the Rules.

4. The background in which the BOCW Act was enacted, is set out in the Statement of Objects and Reasons, appended to the Bill preceding its enactment. To better appreciate the legislative intent, it would be instructive to refer to the following extract from the Statement of Objects and Reasons :

"It is estimated that about 8.5. Million workers in the country are engaged in building and other construction works. Building and other construction workers are one of the most numerous and vulnerable segments of the unorganized labour in India. The building and other construction works are characterized by their inherent risk to the life and limb of the workers. The work is also characterized by its casual nature, temporary relationship between employer and employee, uncertain working hours, lack of basic amenities and inadequacy of welfare facilities. In the absence of adequate statutory provisions, the requisite information regarding the number and nature of accidents is also not forthcoming. In the absence of such information, it is difficult to fix responsibility or to take any corrective action.

Although the provisions of certain Central Acts are applicable to the building and other construction workers yet a need has been felt for a comprehensive Central Legislation for regulating their safety, health, welfare and other conditions of service."

5. A fairly long preamble to the BOCW Act is again indicative of its purpose. It reads thus:

"An 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."

Further, Section 1(4) of the BOCW Act makes it clear that it: ".....applies to every establishment which employs, or had employed on any day of the preceding twelve months, ten or more building workers in any building or other construction work."

Some of the definitions under Section 2 of the BOCW Act, relevant for these appeals are:

(b) "beneficiary" means a building worker registered under Section 12;

(c) "Board" means a Building and Other Construction Workers' Welfare Board constituted under sub-section (1) of Section 18;

(d) (e) "building worker" means a person who is employed to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, in connection with any building or other construction work but does not include any such person-

(i) who is employed mainly in a managerial or administrative capacity; or

(ii) who, being employed in a supervisory capacity, draws wages exceeding one

thousand six hundred rupees per mensem or

exercises, either by the nature of the duties attached to the office or by

reason of the powers vested in him,

functions mainly of a managerial nature;

(f) (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;

(h) (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) (k) "Fund" means the Building and Other Construction Workers' Welfare fund of a Board constituted under sub-section (1) of Section 24."

The scheme of the BOCW Act is that it empowers the Central Government and the State Governments to constitute Welfare Boards to provide and monitor social security schemes and welfare measures for the benefit of the building and other construction workers. Section 7 requires every employer in relation to an establishment to which the BOCW Act applies to get such establishment registered. Section 10 makes this requirement mandatory and therefore, without such registration, the employer of an establishment, to which the BOCW Act applies, cannot employ building workers.

Chapter IV of the BOCW Act contains provisions stipulating the registration of building workers as beneficiaries and requires certain contributions to be made by such beneficiary at such rate per month as may be specified by the State Government. Where the worker is unable to pay his contribution due to any financial hardship, the Board can waive the payment of such contribution for a period not exceeding three months at a time.

Chapter V of the BOCW Act sets out the constitution and functions of the Building and Other Construction Workers' Welfare Boards. Section 24 sets out the provision for the constitution of the Welfare Fund and its application.

Part III of Chapter VI of the BOCW Act contains provisions concerning the safety, health and welfare of the construction workers generally and with reference to specific kinds of activities.

It is thus, clear from the scheme of the BOCW Act that its sole aim is the welfare of building and construction workers, directly relatable to their constitutionally recognised right to live with basic human dignity, enshrined in Article 21 of the Constitution of India. 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.

6. The means of generating revenues for making effective the welfare provisions of the BOCW Act is through the Cess Act, which is questioned in these appeals as unconstitutional.

7. The Statement of Objects and Reasons to the BOCW Act explained that it had been considered "necessary to levy a Cess on the cost of construction incurred by the employers on the building and other construction works for ensuring sufficient funds for the Welfare Boards to undertake the social security Schemes and welfare measures." Simultaneously with the enactment of the BOCW Act, the Parliament enacted the Cess Act. The Statement of Objects and Reasons to the Cess Act noted that the intention was to "provide for the levy and collection of a Cess on the cost of construction incurred by the employers for augmenting the resources of the Building and Other Construction Workers' Welfare Boards constituted by the State Governments under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Ordinance, 1995." Section 2(a) of the Cess Act defines the term "Board" to mean the Board constituted by the State Government under sub-section (1) of Section 18 of the BOCW Act. Section 2(d) of the Cess Act adopts all of the definitions contained in the BOCW Act and reads as under: "2(d) words and expressions used herein but not defined and defined in the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 shall have the meanings respectively assigned to them in that Act."

Section 3 of the Cess Act, the charging Section, reads as under:

"3. Levy and collection of Cess: (1) There shall be levied and collected a Cess for the purpose 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 incurred 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."

Section 4 of the Cess Act requires "every employer" to file a return in the manner prescribed. Section 5 spells out the process for the assessment of the Cess payable, while, Section 8 provides for interest payable in the event of a delayed payment of Cess. Section 9 stipulates penalty for non-payment of the Cess within the specified time. There is an internal mechanism of appeal under Section 11 for an employer who is aggrieved by the assessment order made under Section 5.

In exercise of the power conferred under Section 14 of the Cess Act, the Central Government framed the Cess Rules. Rule 3 thereof defines the cost of construction for the purpose of levy of Cess 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." Rule 4 of the Cess Rules makes it mandatory for deduction of Cess payable at the notified rates from the bills paid for the building and other construction work of a Government or a Public Sector Undertaking. Rule 5 prescribes the manner in which the proceeds of Cess collected under Rule 4 shall be transferred by such Government office, Public Sector Undertakings, local authority, or Cess collector, to the Board. The powers of the Assessing Officer and the Board of Assessment are enumerated in Rules 7 to 14 of the Cess Rules.

8. 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(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.

9. 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 (RE&CS), Rules, 2002 (for short "the Delhi Rules") vide Notification No. DLC/CLA/BCW/01/19 dated 10th January, 2002. Accordingly, Government of NCT of Delhi constituted the Delhi Building and Other Construction Workers Welfare Board vide Notification No. DLC/CLA/BCW/02/596 dated 2nd September, 2002. Thus, the Cess Act and the Cess Rules are operative in the whole of NCT of Delhi w.e.f. January, 2002.

10. As noted above, the principal ground for challenge to the validity of the Cess Act is the lack of legislative competence of the Parliament. Mr. Uday Joshi, learned counsel appearing on behalf of the appellant, strenuously urged that the impost levied by the Cess Act is a compulsory and involuntary exaction, made for a public purpose without reference to any special benefit for the payer of the Cess. It was argued that there exists no co-relationship between the payee of the Cess and the services rendered and therefore, the levy is in effect a tax. It was submitted that the maintenance of a separate corpus, i.e., Building and Other Construction Workers Welfare Fund, which also vests in the State, is a cloak to cover the true character of the levy, which is to be utilized for the benefit of the building worker, is in fact a `tax.'

11. Asserting that the Cess Act in fact provides for the levy of tax although it is termed as Cess, it was contended that no tax can be levied or collected in terms of Article 265 of the Constitution of India, except by authority of law. In other words, the power to make a legislation imposing a tax has to be traced with reference to a specific Entry in the Lists in the Seventh Schedule to the Constitution. According to the learned counsel, the subject matter of the present statute i.e. the Cess Act being fully covered by Entry 49 in List II (State List) pertaining to taxes on "lands and buildings", the power to levy Cess would not be available to the Parliament, based on the assumption of residuary power.

12. Per contra, Mr. R.P. Bhatt, learned senior counsel appearing on behalf of the respondents, defending the constitutional validity of the subject legislation, stressed that the Cess Act is within the legislative competence of Parliament with reference to Entry 97 of List I in the Seventh Schedule. In the written submissions filed on behalf of the respondents, it is pleaded that the charging Section in the Cess Act makes it clear that the levy is attracted when there is an activity of building and construction. The collection of cess on the cost of construction is for enhancing the resources of the Building & other Construction Workers' Welfare Boards constituted under the BOCW Act. The Cess so collected is directed to a specific end spelt out in the BOCW Act itself; it is set apart for the benefit of the building and construction workers; appropriated specifically for the performance of such welfare work and is not merged in the public revenues for the benefit of the general public.

13. It is evident from the contentions raised on behalf of the appellant that there is a two pronged attack on the legislative competence of the Parliament to enact the Cess Act: (i) it is a 'tax' and not a 'cess' because no element of quid pro quo exists between the payer of the cess and the beneficiary and (ii) if it is a 'tax' then it is a tax on 'lands and buildings' falling within the ambit of Entry 49 List II (the State List) of the Seventh Schedule, ousting the legislative competence of the Parliament.

14. Thus, the core issue arising for consideration is whether the cess levied under the scheme of the impugned Cess Act is a 'fee' or a 'tax'. Before embarking on an evaluation based on the said submissions, it would be apposite to briefly examine the concept of 'tax' and 'fee'.

15. The question whether a particular statutory impost is a 'tax' or 'fee' has arisen as a challenge in several cases before this Court, which in turn necessitated the demarcation between the concepts of 'Cess', 'tax' and 'fee'. The characteristics of a fee, as distinct from tax, were explained as early as in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*¹ (generally referred to as the 'Shirur Mutt's Case'). The ratio of this decision has been consistently followed as a locus classicus in subsequent decisions dealing with the concept of 'fee' and 'tax'. The Constitution Bench of this Court in *Hingir Rampur Coal Co. Ltd. Vs. State of Orissa*² was faced with the challenge to the constitutional validity of the Orissa Mining Areas Development Fund Act, 1952, levying Cess on the petitioner's colliery. The Bench explained different features of a 'tax', a 'fee' and 'cess' in the following passage:

'The neat and terse definition of Tax which has been given by Latham, C.J., in *Matthews v. Chicory Marketing Board* (1938) 60 C.L.R. 263 is often cited as a classic on this subject. 'A Tax', said Latham, C.J., 'is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered'. In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a Fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee

¹ 1961 (2) SCR 537

is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of Fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied.'

(Emphasis

supplied by us)

It was further held that,

“It is true that when the Legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly form part of services to the public in general. If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area the fact that in benefiting the specified class or area the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case it is necessary to enquire, what, is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy.”

(Emphasis supplied by us)

16. On the basis of the above considerations, this Court in the aforementioned case, examined the scheme of the Act impugned in that case in depth and opined that the primary and the principal object of the Act was to develop the mineral areas in the State and to assist in providing more efficient and extended exploitation of its mineral wealth. The Cess levied did not become a part of the consolidated fund and was not subject to an appropriation in that behalf. It went into a special fund earmarked for carrying out the purpose of the Act and thus, its existence established a correlation between the Cess and the purpose for which it was levied, satisfying the element of quid pro quo in the scheme. These features of the Act impressed upon the levy the character of a ‘fee’ as distinct from a ‘tax’.

17. Recently in State of W.B. Vs. Kesoram Industries Ltd. & Ors.³, the Constitution Bench of this Court, was faced with a challenge to the Constitutional validity of the levy of Cesses on coal-bearing lands; tea plantation lands and on removal of bricks earth. Relying on the decision in Hingir Rampur Coal Co. Ltd (supra), speaking for the majority, R.C. Lahoti, J. (as His Lordship then was), explained the distinction between the terms ‘tax’ and ‘fee’ in the following words: (SCC HN) “The term cess is commonly employed to connote a Tax with a purpose or a tax allocated to a particular thing. However, it also means an assessment or levy. 3 (2004) 10 SCC 201

Depending on the context and purpose of levy, cess may not be a tax; it may be a fee or fee as well. It is not necessary that the services rendered from out of the Fee collected should be directly in proportion with the amount of Fee collected. It is equally not necessary that the services rendered by the Fee collected should remain confined to the person from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged.”

18. In the light of the tests laid down in Hingir Rampur (supra) and followed in Kesoram Industries (supra), it is manifest that the true test to determine the character of a levy, delineating ‘tax’ from ‘fee’ is the primary object of the levy and the essential purpose intended to be achieved.

19. There is no doubt in our mind that the Statement of Objects and Reasons of the Cess Act, clearly spells out the essential purpose, the enactment seeks to achieve i.e. to augment the Welfare Fund under the BOCW Act. The levy of Cess on the cost of construction incurred by the employers on the building and other construction works is for ensuring sufficient funds for the Welfare Boards to undertake social security schemes and welfare measures for building and other construction workers. The fund, so collected, is directed to specific ends spelt out in the BOCW Act. Therefore, applying the principle laid down in the aforesaid decisions of this Court, it is clear that the said levy is a ‘fee’ and not ‘tax’. The said fund is set apart and appropriated specifically for the

performance of specified purpose; it is not merged in the public revenues for the benefit of the general public and as such the nexus between the Cess and the purpose for which it is levied gets established, satisfying the element of quid pro quo in the scheme. With these features of the Cess Act in view, the subject levy has to be construed as 'fee' and not a 'tax'. Thus, we uphold and affirm the finding of the High Court on the issue.

20. At this juncture, we may also deal with the argument of learned counsel appearing for the appellant that, since there exists no 'quid pro quo' between the payer (contractors) of the fee and the ultimate beneficiary (workers) of the services rendered, the said levy is in fact a tax. While it is true that 'quid pro quo' is one of the determining factors that sets apart a 'tax' from a 'fee' but the concept of quid pro quo requires to be understood in its proper perspective.

21. A Constitution bench of this Court in *Kewal Krishan Puri and Anr. Vs. State*

of Punjab and Anr.

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while dealing with

provisions of the Punjab Agricultural Produce Markets Act, 1961, held that the element of quid pro quo must exist between the payer of the Fee and the special services rendered. Taking note of the well recognized distinct connotations between 'tax' and 'fee', the Bench observed that a 'fee' is a charge for special service rendered to individuals by the Governmental agency and therefore, for levy of fee an element of quid pro quo 4 1980 (1) SCC 416

quo for the services rendered was necessary; service rendered does not mean any personal or domestic service and it meant service in relation to the transaction, property or the institution in respect of which the fee is paid. A significant principle deduced in the said judgment was that the element of quid pro quo may not be possible, or even necessary, to be established with arithmetical exactitude but even broadly and reasonably it must be established, with some amount of certainty, reasonableness or preponderance of probability that quite a substantial portion of the amount of fee realized is spent for the special benefit of its payers. Each case has to be judged from a reasonable and practical point of view for finding an element of quid pro quo.

22. In *Sreenivasa General Traders and Ors. Vs. State of Andhra Pradesh and Ors.*⁵, a Bench of three learned Judges, analysed, in great detail, the principles culled out in *Kewal Krishan Puri* (supra). Opining that the observation made in the said decision, seeking to quantify the extent of correlation between the amount of fee collected and the cost of rendition of service, namely: "At least a good and substantial portion of the amount collected on account of fees, may be in neighbourhood of two-thirds or three-fourths, must be shown with reasonable certainty as being spent for rendering services in the market to the payer of fee" appeared to be an obiter, the Court echoed the following views insofar as the actual quid pro quo 5 (1983) 4 SCC 353

quo between the services rendered and payer of the fee was concerned:

"The traditional view that there must be actual quid pro quo for a fee has undergone a sea change in the subsequent decisions. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the element of revenue for general purpose of the State predominates, the levy becomes a tax. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be rendered. In determining whether a levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a

specified area of class; it may be of no consequence that the State may ultimately and indirectly be benefited by it. The power of any legislature to levy a fee is conditioned by the fact that it must be "by and large"

a

quid

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the services rendered. However,

correlation between the levy and the services rendered (sic

or) expected is one of general character and

not of

mathematical exactitude. All that is necessary is that there should be a "reasonable relationship" between the levy of the Fee and the services rendered."

(Emphasis supplied)

23. Viewed from this perspective, the inevitable conclusion is that in the instant case there does exist a reasonable nexus between the payer of the Cess and the services rendered for that industry and therefore, the said levy cannot be assailed on the ground that being in the nature of a 'tax', it was beyond the legislative competence of Parliament.

24. Having reached the conclusion that the levy by the impugned Act is in effect a 'fee' and not a 'tax', we deem it unnecessary to deal with the second limb of the challenge, viz. the impost is a tax on "lands and buildings", covered by Entry 49 in List II of the Seventh Schedule.

25. In view of the foregoing discussion, we do not find any infirmity in the conclusions arrived at by the High Court while upholding the validity of the impugned Acts. All the appeals, being bereft of any merit are dismissed with costs, quantified at `25,000/- in each set of appeals.

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(D.K. JAIN, J.)

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(ASOK KUMAR GANGULY, J.)

NEW DELHI;

NOVEMBER 18, 2011.

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