



CASE COMMENTARY ON UPPTCL & ANR. vs. CG POWER AND INDUSTRIAL SOLUTIONS LIMITED & ANR.

NIDHI KUMARI*

INTRODUCTION

Arbitration is a modern and cost-effective technique of resolving a disagreement without resorting to litigation or going to court when there is a need to do so. Arbitration Clauses/Agreements are typically discussed and signed early in a commercial partnership to ensure that in the event of a disagreement, the parties will have a clear understanding of how they intend to handle their differences.

Arbitration, in comparison to a court action or even litigation, is a far more information-gathering process due to the fact that it is a more streamlined process. However, this does not imply that the presence of the clause/agreement precludes a party from bringing an action in court through another means. In this particular case, the Supreme Court decided unequivocally that the existence of an arbitration clause does not preclude the Constitutional Courts from hearing any writ petition arising out of a commercial dispute.

FACTS OF THE CASE

In this case¹, Respondent No, M / s CG Power and Industrial Solutions Limited, entered into a framework agreement with UPPTCL for the construction of 765/400 KV stations in Unnao, Uttar Pradesh. According to the Framework Agreement, there were four separate contracts that dealt with the work of sub-stations. (Clause 3 of the contract)

The first contract covered the delivery of all equipment and supplies in accordance with the Price Schedule of the contract.

* 1st year law student at Banasthali Vidyapeeth

¹ Uttar Pradesh Power Transmission Corporation Ltd. v. CG Power and Industrial Solutions Limited, 2021 SCC OnLine SC 383

The second contract covered the load, site management, construction, testing and delivery of all equipment and supplies provided by the contractor under the first contract.

The third contract will cover all Civil work including the items to complete the scope for commissioning and handing over of the entire substation.

The fourth contract covered operations and management Fees under the Cess Act were paid in respect of the Third Contract, which covers all civil works. Eventually, an audit of the 765 KV Transmission Division, Unnao, was conducted by the Auditor General under the Senior Accountant General for the period from April 2012 to April 2016.

In the Audit Report, the Accountant General indicated a default on part of the UPPTCL by not deducting labour cess according to the first contract from the bills of Respondent No.1. The Executive Engineer of the Petitioner, using the letter, notified Respondent No. 1 that 1% Labor Cess had to be collected from the contractor at project cost, including the supply equipment and materials. The respective Respondent was also informed that simple interest was charged on the Labor Cess at a rate of 2% per month. However, by letter No.184 dated September 2, 2016, the respondent objected to the imposition of a Labor Cess accounting for 1% of the construction costs, claiming that the company was not included under the definition of a contractor under the first tender. Further Respondents also by a letter dated November 14, 2016, also objected that the arrears/outstanding Cess, should be set aside on the grounds that the first contract was exempted from cess under the BOCW (Building and Other Construction Workers) and the Cess Act 1996.²

VIEWS OF THE HIGH COURT

A Writ Petition was filed by the respondent. On the 3rd of January 2019, the communications were challenged before the Allahabad High Court's Lucknow bench. The high court left open the legal question of whether a cess would be payable in connection with Respondent No. 1's supply of equipment to UPPTCL. The respondent filed a Rejoinder, alleging that the provisions of the BOCW Act did not apply to the first contract, in response to which UPPTCL filed a counter to the application. However, it was noted that UPPTCL did not raise any objections to

² BOCW (Building and Other Construction Workers) and the Cess Act 1996, <https://legislative.gov.in/sites/default/files/A1996-28.pdf>

the writ petition's maintainability based on the existence of an alternative remedy in its counter statement.

Finally, the Allahabad High Court ruled in favour of Respondent No 1 in an order dated February 24, 2020, holding that in the absence of a levy and assessment order, no BOCWW Cess could be deducted from the amount owed to Respondent No 1. In response to the Allahabad High Court's order, the owner (UPPTCL) filed a Special Leave Petition with the Supreme Court.

ARGUMENTS FROM THE SIDE OF THE PETITIONER

The initial position of UPPTCL (petitioner) was revealed in the relevant section of the CAG report, which stated, "Management stated that the labour cess from supply bills has not been deducted because there was no involvement of labour in material supply, whereas labour cess has been deducted from the erection bill." The response was untenable since labour cess would be subtracted from the cost of building, which covered the delivery of materials and the erection of work."

ARGUMENTS FROM THE SIDE OF RESPONDENT

In his appearance on Respondent No 1's behalf, Mr. Ramesh Singh contended that the four contracts were recognised as the single legally binding arrangement. The supply contract was recognised by the parties as a separate and distinct contract for all purposes, including the imposition of any taxes or levies, and was treated as such. He went on to say that, in terms of payment under Section 9.1 of Special Contract Conditions, the Payment Schedule was divided into two parts: the supply and delivery of equipment and materials, which totalled Rs. 275,09,33,042.00, and the total contract amount, which totalled Rs. 302,06,08,217.00. He also pointed out that, in terms of payment under Section 9.1 of Special Contract Conditions, the Payment Schedule was divided into two parts: the supply and delivery of equipment and materials. As an additional point, he stated that the contract's terms and conditions made it crystal apparent that the First contract was for the delivery of equipment and materials, and that it was distinct from a contract for the construction of a civil engineering structure.

ISSUES

- Whether BOCWW Cess is to be levied only on construction, repair, demolition or maintenance of and/or in relation to a building or any other work of construction?

OBSERVATIONS BY THE COURT

- **Supply contract and scope of work.**

The Supreme Court, relying on the cases of Lanco Anpara and Chand Builders and Contractors v. Union of India³, reached the conclusion that the BOCW Act did not apply in the context of a supply contract with the government.

According to the Court, after conducting a thorough examination of the BOCW Act, the act's provisions were meant only for the benefit of builders and other construction workers, and that it had enough provisions for their safety, health, and financial security. The Court found that there were no conditions in the first contract, second contract, third contract, or fourth contract or in Special Contract Conditions for Plant Supply and Performance, for which UPPTCL could withhold any amount from bills released by Respondent Number 1 and also considering Section 2(1) of the BOCW Act, the Respondent No. 1 was neither a “contractor” nor “employer”, in respect of the first, second, and fourth contracts within the meaning of Section 2(1)(g) and Section 2(1)(i) of the BOCW Act.

The Supreme Court went even further, stating that no cess may be levied on components of supply and delivery equipment and materials since they do not fall under the purview of the BOCW Act. Construction work is not required for the simple installation and/or erection of a structure.

- **The arbitration clause does not debar the Constitutional Courts from entertaining any writ petition.**

According to the Court, the UPPTCL never objected to the petition or highlighted the existence of an arbitration clause. As a result, the Court ruled that even if there are other remedies available, this does not restrict or prohibit the Court from refusing to hear the Writ petition. The Supreme Court also relied on the cases Pimpri Chinchwad Municipal Corporation & Ors. v Gayatri Construction Company & Ors⁴ and Whirlpool Corporation v Registrar of Trade Marks, Mumbai and Others⁵ to reach its decision in the present case. SC held that the High Court can accept the writ petition while there is an arbitration clause if there are:

³ Lanco Anpara and Chand Builders and Contractors v. Union of India, CIVIL APPEAL NO. 6223 OF 2016

⁴ Pimpri Chinchwad Municipal Corporation & Ors. v Gayatri Construction Company & Ors, CIVIL APPEAL NO. 4912 OF 2008

⁵ Whirlpool Corporation v Registrar of Trade Marks, Mumbai and Others (1998) 8 SCC 1

- i. Violation of Fundamental Right
- ii. Violation of Principles of Natural Justice
- iii. Lack of Jurisdiction
- iv. Vires of the Act is under attack.

CONCLUSION

“Relief under Article 226 of the Constitution of India may be provided in a contract-related case,” the Supreme Court of India said in the case. Because the writ authority conferred by Article 226 is discretionary, the High Court will normally decline to accept a writ petition that includes adjudication of disputed matters of fact that may necessitate the examination of witness testimony and the analysis of evidence. A writ petition can also result in monetary relief being granted.

The Court ultimately determined that the findings of the High Court were not subject to a genuine challenge and that the impugned decision and Order did not necessitate any interference under Article 136 of the Constitution of India, and thus dismissed the Special Leave Petition with costs.

It is clear from this decision that the civil works are distinct from the other aspects, and it informs contractors that the BOCW Act does not apply to components of supply and delivery equipment and material. This decision provides solace to contractors who are already experiencing difficulties during the COVID period. As a result of this judgement, contractors should review their contracts and take the necessary measures to guarantee that the owner does not remove any money that isn't legally required. Contractors may also seek a writ of mandamus in suitable circumstances, even if the contract has an arbitration provision. It is critical to understand that the Arbitration Clause is regarded as an alternative remedy and cannot be used to prevent Writ Jurisdiction from being exercised under certain circumstances.