Delhi High Court
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Builders Association Of India And ... vs Union Of India (Uoi) And Ors. Etc. ... on 28 February, 2007
Equivalent citations: 139 (2007) DLT 578
Author: S Muralidhar
Bench: M Mudgal, S Muralidhar
JUDGMENT

S. Muralidhar, J.

1. The challenge in these writ petitions, and the connected appeals against interim orders, is to the constitutional validity of:

(a) The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 ('BOCW Act').

(b) The Building and Other Construction Workers' Welfare Cess Act, 1996 ('Cess Act').

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

(d) The Building and Other Construction Workers' Welfare Cess Rules, 1998 ('Cess Rules').

(e) The Delhi Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Rules, 2002 ('Delhi Rules').

2. The challenge to the statutes is by contractors who have entered into construction contracts. They are either in the process of executing the contract or have completed it. The contracts are with various government departments agencies or public sector undertakings (PSUs) for works to be executed in the National Capital Territory of Delhi. Beginning 2006, an amount constituting 1% of each of their bills, from 2002 onwards, has been sought to be levied towards cess payable under the Cess Act. While a demand towards cess has been raised for past payments, the current charges are being collected by deducting the 1% amount from the current bills at source. The contractors challenge the constitutional validity of the Cess Act principally on the ground of lack of legislative competence in Parliament to enact it. The BOCW Act is challenged for vagueness. The Central Rules, the Cess Rules and the Delhi Cess Rules are assailed on the ground that they are arbitrary and unconstitutional. Against the order dated 23.5.2006 of the learned Single Judge of this Court vacating interim orders of stay of the demand of cess, several appeals have been filed and these are also being disposed of by this judgment.

The BOCW Act 1996

3. The background to the making of the BOCW Act, is set out in the Statement of Objects and Reasons ('SOR') appended to the Bill preceding its enactment. The relevant portion of the SOR reads as follows:

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.

4. The SOR explained that Welfare Boards were proposed to be constituted in every state "so as to provide and monitor social security schemes and welfare measures for the benefit of building and other construction workers." It was pointed out that this was an improvement over the erstwhile the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Bill, 1988 which had been introduced in the Rajya Sabha on the 5th December, 1988.

5.1 The long title to BOCW Act is fairly indicative of its purpose and 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.

5.2 Further, Section 1(4) makes it clear that the BOCW Act:

...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.

5.3 Some of the definitions under the BOCW Act that require to be noticed 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) "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 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 (63 of 1948) or the Mines Act, 1952, (35 of 1952) apply;

(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;

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

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

(i) in relation to a building or other construction work carried out 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;

(k) "Fund" means the Building and Other Construction Workers' Welfare Fund of a Board constituted under Sub-section (1) of Section

24.

5.4 The scheme of the BOCW Act is that it empowers the Central Government and the State Government respectively to constitute the Building and Other Construction Workers' Advisory Committees at the Central and State Level. 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; without such registration the employer of an establishment to which the BOCW Act applies cannot employ building workers.

5.5 Chapter IV of the BOCW Act contains provisions requiring 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.

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

5.7 There are detailed provisions in Part III of the BOCW Act concerning the safety, health and welfare of the construction workers generally and in reference to specific kinds of activities.

5.8 The scheme of the BOCW Act indicates that the central focus of this statute is the building and construction worker and the welfare of such worker. Clearly the BOCW Act belongs to the genre of labour welfare legislation relatable to Articles 39(e), 42 and 43 of the Constitution of India. The Hon'ble Supreme Court has in Bandhua Mukti Morcha v. Union of India explained that such legislation would be straightaway enforceable under Article 21 which enshrines the right to human dignity. It was explained that (SCC p.184): "where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined

in Article 21."

5.9. The BOCW Act 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 worker. The provisions concerning registration of workers, providing them with identity cards, constitution of Welfare Boards and registration of beneficiaries under the Fund, providing for augmentation of the Fund and specifying the purposes for which the Fund will be used, providing for the safety and health of the worker, making the contravention of the provisions of the statute punishable and entailing penalties for the violator all go to emphasise the primary purpose of the BOCW Act, which is the welfare of the building and construction worker. These aspects of the BOCW Act are sought to be supplemented in considerable measure by the making of the Central Rules in 1998. Detailed rules have been made with regards to particular aspects of safety in construction work and for the health and welfare of the workers.

5.10 In 2002 the Delhi Rules were made by the central government in exercise of its powers under Section 62 of the BOCW Act. Notified on 10.1.2002, the Delhi Rules were made applicable to "building and other construction work relating to any establishment in relation to which the appropriate government is the Lt.Governor of the National Capital Territory of Delhi." Modelled on the Central Rules of 1998, the Delhi Rules contain additional provisions in Part V Chapter XXX concerning the Welfare Board for workers, the constitution and administration of the Delhi Fund and the purposes for which the said Fund is to be deployed.

5.11 The means of generating revenues for making effective the welfare provisions of the BOCW Act is through the Cess Act, which we now proceed to examine.

The Cess Act 1996

6.1 Simultaneous with the enactment of the BOCW Act in 1996, the Parliament enacted the Cess Act. The SOR 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." The SOR to the Cess Act noted that "the intention was to make over, after due appropriation by Parliament by law, the proceeds of the cess, to the State Building and Other Construction Workers' Welfare Boards and the cost of collection not exceeding one per cent of the cess collected to the State Governments to whom it was proposed to delegate the authority to collect the cess."

6.2 While the term "Board" is defined by Section 2(a) of the Cess Act to mean the Board constituted by the State Government, 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.

6.3 Section 3 of the Cess Act, which is its 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.

6.4 Section 4 of the Cess Act requires "every employer" to file a return in the manner prescribed. Section 5 defines the power of assessment process while Section 8 interest payable in the event of delayed payment of cess, Section 9 stipulates penalty. There is an internal mechanism of appeal under Section 11 for an employer who aggrieved by the assessment order made under Section 5.

6.5 The Central Government has, by virtue of the power under Section 14 of the Cess Act, made the Building and Other Construction Workers' Welfare Cess Rules, 1998 ('Cess Rules'). Rule 3 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.

6.6 Rule 4 of the Cess Rules makes it mandatory for deduction of cess payable at the notified rates from the bill paid for the "building and other construction work of a Government or a Public Sector Undertaking." Rule 5 prescribes the manner in which the proceedings 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 power of Assessing Officer, Board of Assessment and the bill costs, the order of assessment are all further explicated from Rules 7 to 14 of the Cess Rules.

7. The overall scheme of the BOCW Act, the Cess Act and the rules made there under is, therefore, both comprehensive and exhaustive. While the statutes sketch out the broad framework, the Rules spell out the details. 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." This extending of the liability net to the contractor is a conscious step taken by Parliament to account for the fact that the government may be faced with a situation where it is unable to collect cess under the Cess Act from the owner of the building at a stage subsequent to the completion of the construction. 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. The law acknowledges the fact that, in effect, the burden of the cess is passed on by the owner to the contractor.

The impugned Notifications and Circulars

8. Although the statutes were enacted in 1996, for reasons which are not very clear, they were notified by the Government of National Capital Territory of Delhi ('GNCTD') much later when the Delhi Rules 2002 were framed. There is no ready explanation available for the delay. The order issued on 16.8.2005 by the Office of

Labour Commissioner, GNCTD states as under:

The Government of NCT of Delhi vide Notification No. DLC/CLA/BCW/01/19 dated 10.1.2002 notified the Delhi Building and Other Construction Workers (RE&CS), Rules, 2002 and accordingly has constituted the Delhi Building and Other Construction Workers Welfare Board vide Notification No. DLC/CLA/BCW/02/596 dated 2nd September, 2002. Accordingly, the Building and Other Constitution Workers Welfare Cess Act, 1996 (hereinafter referred as the Cess Act) and Building and Other Construction Workers Welfare Cess Rules, 199 (hereinafter referred as the Cess Rules) have become operative w.e.f. January, 2002 in the whole of NCT of Delhi.

Section 3 of the Cess Act provides for mandatory levy and collection of cess on the cost of construction which are covered under Section 2(d) of the Building and Other Construction Workers (RE&CS) Act, 1996 (hereinafter referred as the main Act). The Government of India vide Notification No. S-61011/9/95-RW [SO.2899] dated the 26th September, 1996 has provided that the cess shall be levied at 1% of the cost of construction incurred by an employer which shall exclude the cost of land and any compensation paid or payable to a worker or his kin under the Workmen Compensation Act, 1923.

9. This order, while setting out the definition of "Building and Other Construction Workers" under Section 2(d) of the Act, emphasises the applicability of Section 3(2) of the Cess Act which requires collection of cess by deduction at source in relation to a building or other construction work that pertains to a Government or a Public Sector Undertaking (PSU). All Government Departments, local bodies viz. Municipal Corporation of Delhi (MCD), New Delhi Municipal Council (NDMC), Delhi Development Authority (DDA), Delhi Jal Board (DJB), Delhi Cantonment Board (DCB) have been directed to obtain the estimated cost of the construction along with the building plans submitted to them for approval by the concerned employers i.e. owners/contractors, builders etc. Such bodies have been asked to collect upfront an amount of 1% of the estimated cost furnished and remit it in favor of the Welfare Board to the Labour Commissioner. The order makes it clear that all Government Departments, PSUs and other Government bodies carrying out any building or other construction work shall, "in case the work is carried out through a contractor, deduct mandatory 1% of the amount of cost approved as per the tender notification from the bills at the time of making payment to the contractors."

10. Following the aforementioned Government Order dated 16.8.2005, the Delhi Metro Rail Corporation (DMRC) [which is the respondent No. 3 in the connected Writ Petition (C) Nos. 3281-82 of 2006 [Sam (India) Built Well Pvt. Ltd. and Anr. v. Union of India] issued a Circular dated 9.1.2006 requiring all its contractors engaged in the work of construction of metro rail abide by the provisions of the BOCW Act and the Cess Act. The said Circular mandated that the Chief Project Manager/Head of Department executing any construction work should get registered under Section 7 of 1996 Act and also compliance with the provisions of the Cess Act. It is further mandated that under Section 4 of the Cess Act 1% per cent of the cost of construction shall be deducted in each running account and final bill and the deducted amount shall be remitted to the Welfare Board. It also states itself certain guidelines for assessment of the cess on 1.1.2002. Finally in para 4 of the said circular dated 9.1.2006 it is proposed thus:

4. All contracts should be grouped into categories as shown in the enclosed format (Annexure-2) and the following items shall be excluded from the contract value:

i)Cost of any items directly bought out by DMRC either through separate contracts or part of any contract like rolling stock, rail, signaling and telecom equipment, heating and ventilation equipment, lifts and escalators, overhead electric traction equipment, automatic fare collection equipment and any other special equipment etc., shall be excluded while assessing 1% of Cess amount.

ii) contract wise separate list be maintained for all excluded items mentioned above for future reference.

11. Simultaneous with the issuance of above circular, the DMRC informed the Secretary, Labour Department, Govt. of NCT of Delhi that it was "very much concerned to implement the Labour Welfare provisions" and that it was "making an ad hoc payment of Rs. 5 crores under Rule 4(5) as advance cess, which shall be adjusted, in the final assessment as per Rule 4(6)."

The present petitions

12. The Builders Association of India filed the first mentioned writ petition in this batch on 24.5.2003 assailing the validity of the BOCW Act, the Cess Act, the Central Rules and the Delhi Rules 2002. It also challenged the show cause notice dated 7.5.2003 issued by the Assistant Labour Commissioner to the various building contractors demanding/recovering one per cent cess in terms of the Cess Act and the Rules made there under.

13. In the connected writ petitions, the additional challenge is to validity of the Circular dated 9.1.2006 issued by the DMRC and the quashing of the various show cause notices issued under the Cess Act and the Rules there under. Some of the petitions seek the quashing of the circular dated 7.2.2006 issued by the DDA which is on the same lines as the Circular dated 9.1.2006 issued by the DMRC. Likewise, the petitions challenge the circular dated 12.12.2005 issued by the Superintendent Engineer, CPWD, the Circular dated 13.9.2006 issued by the Delhi Jal Board ('DJB'), the notice dated 23.2.2006 issued by the Married Accommodation Project ('MAP'). The connected appeals are, as already noticed, against an order of the learned Single Judge vacating the interim stay of demand that was earlier granted.

14. The principal ground of challenge to the validity of the Cess Act is based on the ground of lack of legislative competence in Parliament. It has been pleaded that the BOCW Act is in fact a law pertaining to buildings and since the cess is in fact a tax the subject matter of the legislation falls under Entry 49 List II (State List) of the Seventh Schedule to the Constitution of India. In reply, it has been stated by the Respondent Union of India that the legislation is traceable to Entries 23 (social security and social insurance; employment and unemployment) and 24 (welfare of labour including conditions of work etc.) of the Concurrent List (List III). It is submitted that in any event, even if the statutes under challenge cannot be explained with reference to any specific entry in Lists II and III, the legislations in question can certainly be justified under the residuary Entry 97 of List I (Union List).

15. As regards the first mentioned writ petition by the Builders Association of India, while rule was issued 26.5.2003, the application for stay was dismissed as not pressed on 19.4.2005. After the issuance of the circulars by the other state agencies and the one dated 9.1.2006 the DMRC the other writ petitions in this batch were filed. Initially, interim orders of stay of demand/recovery of cess were passed. These interim orders came to be vacated by the learned Single Judge by an order dated 23.5.2006. The connected LPAs have been filed against the said order dated 23.5.2006 and these LPAs are also being disposed of by the present judgment.

Submissions of Counsel

16. We have heard the arguments of Mr. Jayant Bhushan, Senior Advocate, Mr. Dhruv Mehta and Ms. Amrita Sanghi, learned Advocates for the petitioners. The arguments on behalf of the respondents were led by Mr.P.P.Malhotra, learned Additional Solicitor General of India for the Union of India, Mr. V.K. Tandon, Advocate for the Government of NCT of Delhi (GNCTD), Mr. Vibhu Shankar, Advocate for the DMRC and Ms. Anusuya Salwan, Advocate for the DDA.

17. The principal contentions on behalf of the petitioners were as follows:

a) The definition of the word "employer" in the BOCW Act is too wide and can lead to confusion since it mentions both the owner as well as the contractor. There is no certainty whether it is owner or the contractor

who is required to pay the cess in a particular situation. This needlessly leaves it to the Assessing Officer to pick and choose depending on who he wants to proceed against. Therefore, the BOCW Act is bad for vagueness.

(b) 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. Therefore, it is in effect a tax. In this context, reliance is placed on the decisions in Kewal Kishan Puri v. State of Punjab (Paras 7, 8 and 23), Om Prakash Aggarwal v. Giri Raj Kishori and State of Uttar Pradesh v. Vam Organic Chemicals Limited .

(c) The Cess Act in fact provides for the levy of a tax although it is termed as cess. No taxation is permissible, in terms of Article 265 of the Constitution, without the 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. The subject matter of the present statute is fully covered by the Entry 49 in List II (State list) pertaining to "taxes on lands and buildings" and therefore, the Parliament lacks legislative competence to impose a tax on lands and buildings.

(d) Consequently, recourse cannot be had to the residual Entry 97 of List I to justify the legislative competence of Parliament since the subject matter of the Cess Act is fully covered by any entry in the State List (List II). Reliance is placed on the judgments of the Hon'ble Supreme Court in Union of India v. H.S. Dhillon , Kunnathat Thathunni Moopil Nair v. State of

Kerala , Goodricke Group Limited v. State of West Bengal (1995) Supp (1) SCC 707 and State of West Bengal v. Kesoram Industries .

(e) The stand of the Union of India in its counter affidavit that the subject matter of the BOCW Act is covered by Entries 23 and 24 in List III (concurrent list) is untenable. Those entries per se cannot save the invalidity of statue since there is no corresponding taxation entry in List III.

(f) The Circular 9.1.2006 issued by the DMRC is invalid since even within the definition of the BOCW Act it is the DMRC, as a principal employer which is liable to pay the cess. DMRC has no authority in law to pass on that liability to the contractor. Even under Section 3(2), which requires deduction of 1% cess at source from the bills signifying the cost of construction, it is the DMRC which has to bear the liability.

(g) Even in the context of Section 2(d) of the Cess Act which states that unless the context otherwise requires the definitions of the BOCW Act would apply, the definition of cost of construction can only mean the cost of construction to the employer since that is the context in which the Cess Act has been made. So interpreted, the word "employer" can only mean the employer who owns the establishment and any other interpretation other than the context would lead to absurdity. Reliance is placed on ,

and .

(h) The cost of construction on which the 1% cess is levied, invariably would include the profit element. There cannot be a tax on profits in the garb of imposition of a cess. That would render the impugned statutes vulnerable to invalidation on account of their being 'colourable' pieces of legislation.

(i) Independent of the above grounds of attack, the demand for cess is attacked on the ground that there can never be a demand and collection of tax without a prior assessment preceded by a show cause notice and a quasi judicial inquiry. Reliance on this issue is Bharti Kala Bhandar Limited v. Municipal Committee, Dhaman Gaon and Municipal Council, Khurai v. Kamal Kumar

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(j) Since the very nature of most employment in the construction industry is casual and temporary, and since the regulatory mechanism envisaged is wholly inadequate to make it workable, the BOCW Act is a bad law. It is pointed out that, in the context of migrant labour, there is no centralized system of registration whereby a labourer could carry his or her registration irrespective of the State in which he or she seeks employment. Further, given that the cess sought to be collected is meant for the benefit of workers, there must be a machinery to ensure that such benefit reaches the workers. At present there is no such machinery. It is further suggested that since the Act itself is unworkable little purpose would be served in collecting cess at this stage.

18. In reply, the respondents submitted as under:

(a) The subject matter of the BOCW Act is the welfare, health and safety of the construction worker. The subject matter of the Act, therefore, is not covered under entry 49 of List II which talks of "Tax on land and building".

(b) Likewise, 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 a cess on the cost of construction is for augmenting the resources of the Building & Other Construction Workers' Welfare Boards constituted under the BOCW Act. It is in fact no tax at all. Even if one were to accept that there is no specific entry in List III concerning a tax or cess corresponding to Entries 23 and 24 thereof, the impugned statutes can be justified with reference to the residual Entry 97 of List I.

(c) The subject matter of the impugned legislations not being with reference to any entry in List II or List III, applying the ratio of H.S. Dhillon's case, the legislative competence of Parliament to make the statutes under challenge is with reference to Entry 97 of List I. Reliance has been placed on the decision of the Hon'ble Supreme Court in Union of India v. Delhi High Court Bar Association (2002) 4 SCC 75.

(d) The definition of "employer" under the BOCW Act is deliberately wide so as to include a contractor. The intention of Parliament was to ensure that the workers for whose benefit, the BOCW Act and the Cess Act have been made, are not deprived of the benefit of the Welfare Fund, merely because the owner or builder is not available for recovery of the cess for any reason.

(e) Section 3(2) of the Cess Act read with Rule 4 of the Central Cess Rules, 1998 make it amply clear that cess has to be collected upfront and at the time of the settlement of the bills of the contractor.

(f) A statute can use any fictional taxable event and that the measure of the impost is not determinative of its validity. In this context it is submitted that cost of construction is only a measure relevant for the levy of the cess and that by itself cannot determine if the Parliament has legislative competence to enact the Cess Act.

(g) There is no arbitrariness involved in providing for the deduction of cess at source. There are sufficient guidelines contained in Section 3(2) itself to indicate that the construction work concerning the Government or Public Sector Undertaking constitutes a distinct identifiable class. This classification is based on intelligible criteria which has a nexus with the object of maximizing cess collection.

(h) The deduction of cess at source is, therefore, clearly provisional and subject to the determination of what is actually determined as being payable. In that view of the matter, the criticism that the cess is being collected without prior assessment is without basis.

(i) As regards the operationalization of the BOCW Act and the Cess Act, it hardly lies in the mouth of builder and the contractor to resist their implementation by challenging their validity while at the same time questioning the delay in their implementation. While it is conceded that much requires to be done in terms of actual implementation of the provisions of the statutes under challenge, that cannot impinge on the validity of their provisions which forms the subject matter of these petitions.

Legislative Competence in the context of the Cess Act

19. The challenge to the legislative competence of Parliament to enact the BOCW Act and the Cess Act is posited on the petitioners' understanding of the subject matter of these statutes as being relatable to Entry 49 of List II. This is because the petitioners are conscious of the settled legal position in H.S.Dhillon that unless the subject matter is shown to be fully covered by an entry in List II or List III, a Parliamentary statute can be justified with reference to the residual Entry 97 of List I (Union List). It would be useful therefore to recall the Dhillon dictum, that has held the field for over three decades and a half. The lead opinion of Sikri CJ for the majority (4:3) (SCC p.791) explained the law thus:

At any rate, whatever doubt there may be on the interpretation of Entry 97, List I is removed by the wide terms of Article 248. It is framed in the widest possible terms. On its terms the only question to be asked is: Is the matter sought to be legislated or included in List II or in List III or is the tax sought to be levied mentioned in List II or in List III: No question has to be asked about List I. If the answer is in the negative then it follows that Parliament has power to make laws with respect to that matter or tax.

20. To be fair to the petitioners, they confined this part of the argument essentially to the Cess Act and not the BOCW Act which is in fact referable either to Entries 23 and 24 of List III on which topic admittedly there is no conflicting state legislation or Entry 97 of List I. The attack on the BOCW Act was principally on the ground of vagueness of the definitions, and its unworkability with which we shall deal with later. Having said this for the petitioners, it must be added that as regards the stand of the Union of India, the learned ASG did not attempt to pursue the line of argument expressed in the counter affidavit by attempting to explain the Cess Act with reference to Entries 23 and 24 in List III. He confined his submissions to Entry 97 of List I.

21. There are, therefore, two limbs to the attack on the legislative competence of Parliament to enact the Cess Act. First, the petitioners seek to establish, with reference to various provisions of the Cess Act, that it is in fact a tax and not cess. The, assuming that they have succeeded in demonstrating this, they contend that it is a tax on "lands and buildings" and therefore fully covered by Entry 49 List II. The petitioners contend that if they succeed on these two limbs of the argument, as a corollary, there would be no question of resorting to Entry 97 of List I to justify Parliament's legislative competence.

22. The petitioners seek to show that the essential features of a tax are present in the Cess Act. It is a statutory involuntary compulsory impost, made without reference to any special benefit to the tax payer and forms part of a common burden, the quantum of tax being proportionate to the tax payer's capacity. It is in this context that reliance has been placed on a large number of decisions, some of which will be shortly discussed. The discussion must be preceded by certain general observations that might facilitate a better understanding of the law on the subject.

23. The question whether a certain statutory impost is a tax has arisen in the context of challenge to the constitutional validity of state legislations that have sought to levy 'fees' or 'cess'. This has in turn necessitated the delineation of the differences between a tax and a fee. It may be recalled that the concept of fees is acknowledged in the Constitution itself. Entry 66 of List II, for e.g., concerns "fees in respect of any of the matters in this List, but not including fees taken in any court." Entry 47 of List II is identically worded. On the contrary there is not a single entry in List I which makes a mention of 'fees' although there are many that refer to taxes and duties. Again, List II contains entries that refer to duties, taxes and fees but List III has none that refers to a tax. It is interesting that what is common to all three Lists is that none of them refers to 'cess'. This is significant in the context of the residual Entry 97 of List I which talks of "any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists." A second important factor that merits notice, even before discussing the decisions cited at the bar, is that the yardstick by which the challenge to a state legislation on the ground of legislative competence is examined would distinctly differ from that employed while examining the validity of a Parliamentary law on the same ground. This is precisely on account of the existence of a residual Entry 97 in List I which has no corresponding entry in the other two

Lists.

25.1 The characteristics of fee as distinct from tax have been explained as early as in The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt ('Shirur Mutt Case'). The distinction, in the said case, between the tax and the fee, it was held as under:

It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax-payer's consent and the payment is enforced by law vide - 'Lower Mainland Diary v. Crystal Diary Limited', 1988 AC 168 (N).

The second characteristic of tax is that it is the imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. AS the object of a tax is not to confer any special benefit upon any particular individual there is, as it is said, no element of 'quid pro quo' between the tax payer and the public authority, see Findlay Bhirras on 'Science of Public Finance', Vol. 1 203. Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the tax payer depends generally upon his capacity to pay.

25.2 Thereafter in the same case, the distinction was drawn between a tax and a fee in paras 45, 46 and 47 as under:

45. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege. Fees confer a special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licenses....

46. If as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering the services. As indicated in Article 110 of the Constitution, ordinarily there are two classes of cases where Government imposes 'fees' upon persons. In the first class of cases, Government simply grants a permission or privilege to a person to do something, which otherwise that person would not be competent to do and extracts fees either heavy or moderate from that person in return for the privilege that is conferred.

47. In the other class of cases, the Government does some positive work for the benefit of persons and the money is taken as the return for the work done or services rendered. If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fees and not a tax. There is really no generic difference between the tax and fees and as said by Beligman, the taxing power of a State may manifest itself in three different forms known respectively as special assessments, fees and taxes Ibid p.406).

26.1 The above decision is the locus classicus and has been consistently followed in the other decisions as well. One such decision is that of the Constitution Bench of the Hon'ble Supreme Court in Hingir-Rampur Coal Co. Ltd. v. State of Orissa . the challenge was to the cess levied by the Orissa Mining Areas Development Fund Act, 1952. The petitioners there contended that the cess levied was not a fee but a duty of excise on coal and hence beyond the legislative competence of the State. In the alternative it was contended that even assuming it was a fee, it was beyond the legislative competence of the State. The Hon'ble Supreme Court explained the different concepts of a 'tax', a 'fee' and 'cess in the following passage:

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 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. There is, however, an element of compulsion in the imposition of both tax and fee. When the Legislature decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want the service and therefore they should be exempted from the payment of the cess. Though there is an element of quid pro quo between the tax payer and the public authority there is no option to the tax-payer in the matter of receiving the service determined by public authority. In regard to fees there is, and must always be, co-relation between the fee collected and the service intended to be rendered. Cases may arise where under the guise of levying a fee Legislature may attempt to impose a tax; and in the case of such a colourable exercise of legislative power courts would have to scrutinise the scheme of the levy very carefully and determine whether in fact there is a co-relation between the service and the levy, or whether the levy is either not co-related with service or is levied to such an excessive extent as to be a pretence of a fee and not a fee in reality. In other words, whether or not a particular cess levied by a statute amounts to a fee or tax would always be a question of fact to be determined in the circumstances of each case.

26.2 It was held (AIR p. 549):

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.

26.3 Finally the Court concluded (at p. 554):

Thus the scheme of the Act shows that the cess is levied against the class of persons owning mines in the notified area and it is levied to enable the State Government to render specific services to the said class by developing the notified mineral area. There is an element of quid pro quo in the scheme, the cess collected is constituted into a specific fund and it has not become a part of the consolidated fund, its application is regulated by a statute and is confined to its purposes, and there is a definite correlation between the impost and the purpose of the Act which is to render service to the notified area.

26.4 Applying the tests mentioned in Hingir Rampur, the 'primary object' of the Cess Act and the 'essential purpose' which it is intended to achieve' are not in any doubt whatsoever. The subject matter of the Cess Act is the activity of building and construction, the object is to augment the Welfare Fund under the BOCW Act and the essential purpose is to benefit the building and construction worker. The Fund so collected is directed to specific ends spelt out in the BOCW act itself. It is earmarked for the benefit of the building and construction worker. The 'ultimate or incidental results or consequences' might be that contractors have to part with 1% of the bill amount towards the cess. However, that does not detract from either the 'primary object' of the Cess Act or its 'essential purpose.' Applying the Hingir Rampur tests, it has to be held that the Cess Act cannot be construed to be a tax at all.

27. The reliance placed by the petitioners on Shinde Bros. v. Dy.Commissioner, Raichur , is not helpful here. In that case the challenge was, inter alia, to the validity of the Mysore Health Cess Act 1962. The majority struck down the law on the ground that its provisions indicated that it was in fact a tax. After examining the provisions of that Act at some length, the majority held (SCR p.572):

It seems to us clear that the legislature was levying a health cess on a number of items of State revenue or tax and it adopted the form of calling it a cess and prescribed the rate of nine naye paise in the rupee on the State revenue or tax. Section 4 of the impugned Act makes it quite clear that the cess is leviable and recoverable in the same manner as items of land revenue, State revenue or tax. In the context, the word "on" in Section 3 does not indicate that the subject-matter of taxation is land revenue or State revenue, but that 9 per cent of the land revenue or State revenue is to be levied and collected, the subject-matter remaining the same as in the law imposing land revenue or any duty or tax

The decision in Shinde Bros. clearly turned on the wording and structure of the legislation under challenge in the said case and is distinguishable in its application to the instant case.

26. As regards the levy of cess, the decision in Om Parkash Agarwal v. Giri Raj Kishori is illustrative. The question,

therefore, was whether the cess sought to be levied on the dealer in terms of Haryana Rural Development Fund Act, 1983 was in the nature of a tax and not a fee referable to any one of the entries in the Schedule to that Act. The High Court upheld the constitutional validity of the levy of cess on the ground that it was in the nature of fee. It was held that there was a reciprocal relationship between the levy of the fee and the services that would be rendered by the market and therefore, the levy should be truly a fee and not a tax. The Hon'ble Supreme Court reversed observing that "unless the cess in question can be brought under any of the entries from 45 to 63 of List II, it cannot be levied as a tax at all." On the facts of the case, it was held that levy was not a fee but a tax and therefore, unconstitutional. On an analysis of the provisions of Haryana Rural Development Fund Act, 1983, it was held as under:

The fact that the Fund is created under the Act is a mere cloak to cover the true character of the levy in question. There is practically no difference between the Consolidated Fund which vests in the State and the Fund which also vests in the State. Amounts credited to the Consolidated Fund and the amounts credited to the Fund can both be spent practically on any public purpose almost throughout the State. In such a situation it is difficult to hold that there exists any correlation between the amount paid by way of cess under the Act and the services rendered to the person from whom it is collected. The impost in these cases lacks the essential qualification of a fee namely 'that it is absolutely necessary that the levy of fees should on the face of the legislative provision, be correlated to the expenses incurred by government in rendering services' (Shirur Mutt case). In fact there is no correlation at all.

Ultimately it was observed in para 12 as under:

It is constitutionally impermissible for any State Government to collect any amount which is not strictly of the nature of a fee in the guise of a fee. If in the guise of a fee the legislation imposes a tax it is for the Court on a scrutiny of the scheme of the levy to determine its real character. If on a true analysis of the provisions levying the amount, the Court comes to the conclusions that it is, in fact, in the nature of a tax and not a fee, its validity can be justified only by bringing it under any one of the Entries in List II of the Seventh Schedule to the Constitution under which the State can levy a tax. The State Government has failed in this case to do so. The levy according to us is not a fee as claimed by the State but it is a tax not leviable by it. The levy of the cess under Section 3 is, therefore, liable to be quashed. Section 3 being the charging section and the rest of the sections of the Act being just machinery or incidental provisions, the whole Act is liable to be quashed. We, therefore, declare the entire Act, i.e., the Haryana Rural Development Fund Act, 1983 as unconstitutional on the ground that the State legislature was not competent to enact it.

27. The decision in Om Parkash Agarwal is distinguishable in its application to the facts of the present case. Section 24(2) of the BOCW Act specifies the purposes to which the Building and Other Construction Workers' Welfare Fund can be employed. The beneficiary of the Fund is the worker. There is no ambiguity that the Cess Act purports to collect the cess which in turn augments the Fund which can be put generally. Applying the test mentioned in para 47 of the Shirur Mutt case, it can be safely stated that the Fund "is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public" and that therefore "it could be counted as fees and not a tax." In addition, the Central Rules 1998 and the Delhi Rules 2002 further mandate that the Fund is to be employed only in the manner directed by the Board. The Board's functions are also specified in Sections 22-23 of the BOCW Act. In addition it may be noticed that the challenge in Om Prakash Agarwal was to a State enactment and so the question of the applicability of Entry 97 List I did not arise.

28.1 One of the arguments advanced by the petitioners in support of the plea that the impost is in fact a tax is that the payer of the impost is not the beneficiary either directly or indirectly. Reliance was placed upon the decision in Kewal Krishan Puri. The question that arose in the said decision was whether in the context of the Punjab Agricultural Produce Markets Act, 1961 and the 1961 Rules made there under, the fee sought to be levied was in fact a tax since there was no quid pro quo between the payer of the fee and the authorities charging it. The statute was struck down on the ground that there was no such quid pro quo between the payer of the tax and the services sought to be rendered by the State Government in lieu thereof.

28.2 The entire position of law was again reviewed and certain parameters were identified for "satisfying the tests for a valid levy of market fees on the agricultural produce bought or sold by licensees in a notified market area". One of these tests, on which considerable emphasis was placed by the petitioners is:

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 by the authorities who charge the fees that the amount is being spent for rendering services to those on whom falls the burden of the fee.

28.3 In Kewal Krishan Puri the extracted passage from Hingir Rampur was sought to be distinguished thus:

The above passage does not mean that the service rendered is unconnected with or not meant for the payer of the fee. As pointed out earlier, service rendered to an institution like a math is a service rendered to the payer of the fee. Similarly services rendered to a specific area or to a specific class of trade or business in any local area must mean, and cannot but mean, that it is for the special benefit of the person operating in that area. The service rendered was to the mining area for the benefit of the mine-owners of that area. The area or trade does not pay the fee nor does it get the benefit in vacuum. The fee is paid by the person who is liable to pay it and service to the payer does not mean any personal or domestic service to him but it means service in relation to the transaction, property or the institution in respect of which he is made to pay the fee.

29. The above passage has also to be read in the context of the legislation under challenge itself. It also needs to be understood in light to the following observations in Indian Mica & Micanite Industries Ltd. v. State of Bihar the Hon'ble Supreme Court reviewed all the earlier cases and held (SCC p. 241, para 11):

From the above discussion it is clear that before any levy can be upheld as a fee, it must be shown that the levy has reasonable correlationship with the services rendered by the Government. In other words the levy must be proved to be a quid pro quo for the services rendered. But in these matters it will be impossible to have an exact correlationship. The correlationship expected is one of a general character and not as of arithmetical exactitude.

Applying these dicta, it has to be held in the instant cases that the correlationship does exist to save the Cess Act from invalidation on that score.

30. However, the discussion thus far has only touched upon the aspect whether the impost in the given case i.e. the Cess Act, is in fact a levy of tax. In our view, the answer to that question is in the negative. On account of the petitioners having failed to demonstrate that the levy is in fact a tax, there should be no requirement of considering the consequent submission that it is tax on "lands and buildings" covered by Entry 49 List II. However, since extensive arguments have been advanced on the appropriate entry under which the levy should be brought, we will deal with those submissions as well. It is for the purpose of the submission concerning Entry 49 of List II that the decision in State of West Bengal v. Kesoram Industries was relied upon. The question there was whether the levy of tax on tea was on fact on land relateable to Entry 49 List II. The majority held:

To be a tax on land, the levy must have some direct and definite relationship with the land. So long as the tax is a tax on land by bearing such relationship with the land, it is open for the legislature for the purpose of levying tax to adopt any one of the well-known modes of determining the value of the land such as annual or capital value of the land or its productivity. The methodology adopted, having an indirect relationship with the land, would not alter the nature of the tax as being one on land.

In a particular context of Tea Act, it was held that the impugned cess is a tax on tea bearing land, a well-defined classification, and is covered by Entry 49 in List II. In doing so, the Hon'ble Supreme Court upheld the judgment in Goodricke Group Limited v. State of West Bengal 1995 Supp (1) SCC 707.

31. However, as far as the Cess Act is concerned it can hardly be stated to be a tax on "lands and buildings." In the first place, as already held it is not a tax at all. Second, the incidence of cess is determined not by the fact of 'lands and buildings' but the activity of construction and building. The usage of words here is in the context of the activity. The words "building" and 'construction' denote verbs whereas in the context of Entry 49 they denote nouns. The word "building" in this context, refers to the physical structure of the building and not so much the activity of building. The words "lands" and "buildings" have been deliberately used in Entry 49 with a purpose. Therefore to construe the Cess Act as levying a cess on "lands" and "buildings" not only stretches the language of Entry 49 beyond what can be accommodated by plain grammar but also completely misses the 'real purpose' of the Cess Act. Thirdly, the 'building' may be only one of the end products of the activity of building. It could even be a flyover or a highway. The cost of construction is therefore merely a measure of the cess. As pointed out in Kesoram (SCC p.284)

when enacting a measure to serve as a standard for assessing the levy, the legislature need not contour it along lines which spell out the character of the levy itself. A broader-based standard of reference is permissible to be adopted for the purpose of determining the measure of the levy. Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy.

Consequently, there is therefore no question of the Cess Act being within the ambit of Entry 49 List II.

32.1 It may be noticed that in Kesoram Industries the Court was not called upon to examine whether the subject matter of the statute can be traced to Entry 97 of List I for the simple reason that the challenge there was to a State enactment. Whenever there is a challenge to a Parliamentary enactment the question that has to be asked is that which was set out in Dhillon which was reiterated recently in Union of India v. Delhi High Court Bar Assn :

what one has to ask is whether the matter sought to be legislated is included in List II or in List III and no question has to be asked about List I. If the answer is in the negative, then it follows that Parliament has power to make laws with respect to that matter or text.

32.2 The other decisions cited by the petitioners are not being discussed in detail since they essentially turn on the type of statute involved in those cases. Otherwise, the principles applied to test their constitutional validity are more or less the same and therefore do not bear repetition.

32.3 The petitioners' contention that the Cess Act is in pith and substance a tax on lands and buildings must fail because that argument misses the essential nature of the Cess Act. Merely because the measure of the cess is the cost of construction cannot render the statute ipso facto a 'tax' on 'buildings'. The same transaction of constructing a building can attract different levies and each can be justified with reference to the purpose of such levy. To recall the words of the Hon'ble Suprme Court in Federation of Hotel & Restaurant Assn. of India v. Union of India :

Indeed, the law "with respect to" a subject might incidentally "affect" another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects.

In the same decision it was explained (SCC p.654):

It is true that the true nature and character of the legislation must be determined with reference to a question of the power of the legislature. The consequences and effects of the legislation are not the same thing as the legislative subject matter. It is the true nature and character of the legislation and not its ultimate economic results that matters.

33. It is accordingly held that the petitioners have failed to show that the subject matter of the Cess Act falls under any entry in List II or List III. Therefore the subject matter of the Cess Act is within the legislative competence of Parliament with reference to Entry 97 of List I. This part of the discussion is concluded by negativing the challenge by the petitioners to the validity of the Cess Act on the ground of lack of legislative competence.

Other grounds of challenge

34.1 The next issue that requires to be considered is whether the definition on the mode of 'employer' as contended in Section 3(1) of the BOCW Act is bad on the ground of vagueness. There appears to be a definitive scheme in the definition itself. A range of choices has been made available to the government for levying cess and the intention is not to confine it only to the owner of a building or the person expending for the construction. The idea is to seek to levy and collect the cess from the contractor or the owner as the case may be. It is not possible to accept the petitioners' submission that both the contractor and the owner would be taxed vis-a-vis the same construction activity. Obviously, if cess cannot be recovered from the contractor for any reason, it would have to be recovered from the employer. In the case of the employer, it is an indirect levy since the employer would invariably pass on the burden to the contractor.

34.2 The component of cess is built into the cost of construction for which the contractor is reimbursed. It is very similar to the deduction of tax at source where the burden of tax is passed on to the person who is required to pay for the services. In such circumstance, the employer would become the person who will collect the tax. In this case the cess is collected and passed on to the Government. There is nothing arbitrary or invalid in the Parliament adopting such a device. This device is also not unheard of in the field of taxation. The Income Tax Act, 1961 contains provisions that mandate deduction of tax at source in respect of certain types of payments and provides for penalties upon failure to do so. In any event since the deduction at source is ad valorem, i.e. a fixed rate of 1% on all running bills, the ultimate liability will be determined only after a proper assessment for which the procedure has been prescribed under the Cess rules. The amount deducted at source will be adjusted at the time of final payment. Therefore, there is nothing arbitrary about this and it cannot be said that merely because there is no prior assessment there can be no collection of cess at source.

35. Rule 4 of the Central Rules is consistent with Section 3 of the Act and in that context, the definition of 'employer' figures in Section 3(1) of the BOCW Act. Section 3(2) of the Cess Act is therefore consistent with the BOCW Act and is a perfectly valid piece of legislation. The challenge on the ground of Article 14 is also

without basis. There is no ambiguity in the definition of the word "employer" in the BOCW Act as was sought to be suggested. It envisages that the employer and the owner would be liable. However, if for some reason cess cannot be recovered from the contractor's bills at source, then the owner can still be proceeded against. There is no scope for any ambiguity or confusion in this regard. The deduction of cess from the bills is mandated by Rule 4(3) of the Cess Rules which is consistent with Section 3(2) of the Cess Act. The volume of construction activities in major urban centres in the country including erecting of flyovers, expressways, and roads undertaken by government agencies and public sector undertakings in the recent past justify a separate classification and treatment. The corresponding expenditure involved in the settlement of the bills of the contractors also justifies a separate treatment. The main object of the present statute being the augmentation of revenues for the welfare of construction workers, there is nothing arbitrary or unreasonable in such a classification of construction activities and the requirement of deduction of cess at source towards settlement of bills of contractors undertaking projects for government departments and state agencies. The submission that such classification is discriminatory or arbitrary is without basis and is rejected as such.

36. The challenge to the 1998 Central Rules, the Cess Rules and the circulars of the State Agencies and DMRC must also fail. As already noticed, the Rules only carry forward the objectives of the statutes. As far as the governmental agencies and PSUs are concerned, they are simply performing their statutory duty, and cannot be faulted with for issuing directions concerning deduction of cess at source. Also, the circulars have correctly understood the law and are consistent with the Rules. This is not a case of excessive delegation to a state agency or the DMRC. The argument that the cost of construction would include the profit element and that therefore there cannot be a tax on such profits is misconceived. As already adverted to, the measure of taxation, in this case the cost of construction, cannot determine its validity. The challenge to show cause notices issued by the various authorities is also without merit. It is now expected that these assessments will be completed without any delay. The contractors have a further remedy against the assessment orders by way of statutory appeals and therefore, this is another reason why these show cause notices calling upon the contractors to pay the cess ought not to be interfered.

37. The last submission is that many of the workers employed in the construction activities are casual migrant labour; that the machinery in place for reaching the benefits of the cess collected to the workers is non-existent and that therefore, the Cess Act is unworkable. While the criticism of the absence of an effective centralized mechanism to reach the benefits of the cess collected to the building and construction worker may be justified, that does not impinge on the validity of the levy of the cess itself.

Summary of conclusions

38. (i) The subject matter of the Cess Act is the activity of building and construction, the object is to augment the Welfare Fund under the BOCW Act and the essential purpose is to benefit the building and construction worker. The 'ultimate or incidental results or consequences' might be that contractors have to part with 1% of the bill amount towards the cess. However, that does not detract from either the 'primary object' of the Cess Act or its 'essential purpose.' Applying the Hingir Rampur tests, it has to be held that the Cess Act cannot be construed to be a tax at all.

(ii) It is accordingly held that the petitioners have failed to show that the subject matter of the Cess Act falls under any entry in List II or List III. Therefore the subject matter of the Cess Act is within the legislative competence of Parliament with reference to Entry 97 of List I. This part of the discussion is concluded by negativing the challenge by the petitioners to the validity of the Cess Act on the ground of lack of legislative competence.

(iii) The main object of the present statute being the augmentation of revenues for the welfare of construction workers, there is nothing arbitrary or unreasonable in such a classification of construction activities and the requirement of deduction of cess at source towards settlement of bills of contractors working for government departments and state agencies. The submission is that classification is discriminatory or arbitrary is without

basis and is rejected as such.

(iv) The fact that there is deduction of cess at source without a prior assessment cannot render it illegal so long as it remains adjustable against any final liability that may be determined at the end of the assessment.

(v) The circulars have correctly understood the law and are consistent with the Rules. This is not a case of excessive delegation to the state agency or the DMRC

(vi) While the criticism of the absence of an effective centralized mechanism to reach the benefits of the cess collected to the building and construction worker may be justified, that does not impinge on the validity of the levy of the cess itself

39. This should have concluded the judgment in the present batch of cases. But on account of certain facts that have come to light during the course of the hearing of these cases, the Court is impelled to issue a set of directions concerning the implementation of the statues in question.

Delayed implementation: A matter for concern

40. It is a matter of concern that although the BOCW Act and the Cess Act have been on the statute book since 1996 they were not notified for application in the NCT of Delhi till 2002. The reasons for this are not available despite the Court asking the learned Counsel for the Government of the NCT of Delhi to explain the inexcusable delay on the part of the Government in enforcing these labour welfare legislation. What adds to this concern is the apparent loss of revenue to the government given the fact that in the past decade Delhi has witnessed the execution of a large number of construction contracts involving hundreds of crores. The corresponding loss of revenue to the Government on account of its failure to notify the BOCW Act and the Cess Act in Delhi till 2002 must be in no small measure. The beneficiary of such inaction by the Government has been, without doubt, the construction industry. The loser has been the building and construction worker for whose welfare the cess is supposed to have been collected. In effect the State has subsidized the cost of construction by not collecting cess which it was entitled to and this has been to the detriment of the workers. This failure on behalf of the State is questionable and should not be permitted to be perpetuated.

41. Even after the Act was notified in 2002, it was not until August, 2005, the Government of NCT of Delhi issued an order, which has been referred to earlier in this judgment, reminding the Government departments that such a law exits. There was a further three years' delay in making known to the various state agencies their statutory responsibilities under the BOCW and the Cess Acts. This further delay is inexcusable. Significantly, it was only in January 2006 when the DMRC issued a Circular that most of the construction contractors rushed to this Court for interim orders. Till then they never bothered about their statutory obligation to pay cess.

42. In this context it may be relevant to recall the observations of the Hon'ble Supreme Court in Bandhua Mukti Morcha v. Union of India :

It is the fundamental right of everyone in this country, assured under the interpretation given to Article 21 by this Court in Francis Mullin case to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State - neither the Central Government nor any State Government - has the right to take any action which will deprive a person of the enjoyment of these basic essentials. Since the Directive Principles of State policy

contained in Clauses (e) and (f) of Article 39, Articles 41 and 42 are not enforceable in a Court of law, it may not be possible to compel the State through the judicial process to make provision by statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity but where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21, more so in the context of Article 256 which provides that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State. We have already pointed out in Asiad Construction Workers case that the State is under a constitutional obligation to see that there is no violation of the fundamental right of any person, particularly when he belongs to the weaker sections of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. The Central Government is therefore bound to ensure observance of various social welfare and labour laws enacted by Parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the Directive Principles of State Policy.

43. Therefore, while negativing the challenge to the validity of the two statues, the BOCW Act and the Cess Act, this Court is constrained to request the Comptroller & Auditor General of India (CAG) who is a constitutional authority discharging functions in terms of Article 148 of the Constitution and the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act 1971, to undertake an enquiry into the reasons for the delayed notifying of the BOCW Act and the Cess Act in Delhi till the year 2002 and the further delay in implementing it till 2005. The names of the persons at various levels in the Governments at the centre and NCT of Delhi and any other person(s) involved in causing of such delay may be ascertained. The CAG will also indicate the approximate loss to the Government on account of such non-implementation and suggest a possible mechanism that can be evolved for recuperating such loss. In particular, the Court would like the CAG to indicate the approximate figures in relation to construction and building projects undertaken for the GNCTD, the Union of India and State agencies in the NCT of Delhi since the date the Act came into force. It is quite possible that the CAG may already have the facts and figures on this regard for the previous years, in which event there need not be any repetition of the exercise. The said data can be incorporated in the report to be submitted by the CAG to this Court. With a view to facilitate the monitoring of the implementation of these directions, a separate order is being made in this regard.

44. Accordingly, these writ petitions and appeals are dismissed and it is held as under:

(1) The BOCW Act, the Cess Act, 1998 Central Rules, the Cess Rules and the 2002 Delhi Rules are constitutional and valid and the challenge to their constitutional validity is hereby negatived.

(2) The impugned order dated 9.1.2006 issued by DMRC, order dated 16.8.2005 by the Office of Labour Commissioner, GNCTD, 12.12.2005 issued by the Superintendent Engineer, Circular dated 13.9.2006 issued by the Delhi Jal Board ('DJB'), notice dated 23.2.2006 issued by the Married Accommodation Project ('MAP') and any other similar circular are upheld and the challenge to same is hereby negatived.

(3) The challenge to show cause notices issued to the various contractors seeking levy of cess under the Cess Act is hereby rejected.

(4) It is directed that assessments will conclude expeditiously and effective steps be taken to recover the cess in accordance with law.

(5) With these directions, the writ petitions and LPAs are dismissed with costs of Rs. 25,000/- each which will be paid by each of the petitioners and appellants to the Building and Other Construction Workers' Welfare Fund constituted under Section 24, BOCW Act within a period of four weeks from today and in any event not later than April 2, 2007. Each of the petitioners and appellants will file on or before April 16, 2007 with the

Registry of this Court proof of payment of costs as directed.