The High Court of Madhya Pradesh Bench at Indore

Case Number	**W.P.No. 540/2021**
Parties Name	Suzlon Energy Limited & another Vs. State of M.P.
Date of Order	**13/07/2021**
Bench	**Division Bench:** Justice Sujoy Paul Justice Anil Verma
Judgment delivered by	Justice Sujoy Paul
Whether approved for reporting	**YES**
Name of counsel for parties	Shri. Amit Agrawal, learned Sr. Counsel with Shri Manu Maheshwari, learned counsel for petitioners. Shri Pushyamitra Bhargava, learnd A.A.G for respondent/ State.
Law laid down	***Constitution of India – Article 226 of the Constitution – Delay in filing the petition –** The physical running of time or mechanical measurement is not the sole reason on the strength of which writ petition can be dismissed. Whether delay is properly explained or not and whether during the period when delay is caused, any third party right was created are relevant considerations. ***Section 3(1A) of the Building and Other Construction Workers Welfare Cess Act, 1996** – If the aim and object of inserted provision and text is examined carefully, it will be clear that two kinds of costs are covered in the enabling provision: – i) Cost incurred on purchase and transportation of plant and machinery meant to be used in factory. ii) Such other costs meant to be used in factory. ***Interpretation of Statute-**Not only the

	words, but the context in which the words are used are relevant for interpretation of a statute. Any interpretation unaware of the living aims and legal anatomy of an act will miss its soul and substance. The Court expressed its inability to accept the expression "any such other costs" used in Section 3(1A) if independent and separate and so wide to include any other cost whether or not such cost is incurred in relation to a factory. ***Article 226 of the Constitution-Alternative Remedy-**The impugned order has not become vulnerable because benefit of exclusion of certain costs are based on the Notification dated 24/06/2016 are not made available to the Petitioners. Thus, order cannot be said to be an order passed without jurisdiction. If order is otherwise erroneous, it can be corrected in appeal. Normally, High Court should not entertain writ petition unless it is shown that there is something more in a case which goes to the root of jurisdiction of the officer, something which shows that a palpable injustice will be caused to the Petitioner if he is forced to adopt the alternative remedy. ***Section 11 of Cess Act, 1996 – Appeal – Pre-requisite of deposit of 25% of disputed amount before filing appeal –** Neither oppressive nor can be said to be causing palpable injustice to the Petitioners.
Significant paragraph numbers	**12 to 29**

O R D E R
(Passed on 13th July, 2021)

Sujoy Paul,J:-

In this petition filed under Article 226 of the Constitution, the petitioners have challenged the legality, validity and propriety of order dated 12/12/2019 passed by the competent authority in exercise of

power u/S.3(1) of The Building and Other Construction Workers' Welfare Cess Act, 1996 (for short "Cess Act").

2. The stand of petitioners is that although The Building and Other Construction Workers (Regulations of Employment and Conditions of Service) Act, 1996 (for short "Building Act") and Cess Act are applicable to the petitioners establishment, the competent authority has assessed the Cess beyond the scope of charging Section. Thus, he not only acted beyond the touch stone of charging Section, authority has completely failed to see the legislative changes and provision relating to exclusion while passing the impugned order. The authority was under a solemn obligation to examine the legislative changes and scope of charging Section while passing the impugned order. Since he has failed to take into account both the aforesaid aspects, the impugned order can be termed as arbitrary and without jurisdiction.

3. To elaborate, Shri Amit Agrawal, learned Sr.Counsel submits that the petitioner No.1 is engaged in the business of manufacturing and supplying of various parts of wind mills to its customers including but not limited to blade, tower, transformer, nacelle etc. The petitioner No.2 company is engaged in the business of procurement of land and development of wind park projects. To the extent, petitioners have undertaken the civil construction work, the petitioners are liable to pay the cess as per the Cess Act and the Rules made thereunder. The petitioners in fact calculated and paid the cess arising out of the construction work. In the impugned order, the competent authority has included the cost of wind turbine, generator and electronic apparatus while calculating/determining the cess. This runs contrary to the provisions of the Cess Act and the Rules.

4. Section 3 of Cess Act permits levy and collection of cess on the cost of construction incurred by an employer. Rule 3 of The Building and other Construction Workers' Welfare Cess Rules, 1998 (for short "Cess Rules") provides for the purpose of levy of cess, cost of

construction shall include all expenditure incurred by an employer in connection with building or other construction work excluding - (i) cost of land (ii) any compensation paid or payable to a worker or his kin under the Workmens' Compensation Act, 1923. The government of Madhya Pradesh introduced the M.P. Labour Laws (Amendment) and Miscellaneous Provisions Act, 2015 by publishing it in the official gazettee on 27/11/2015. The Cess Act was amended by inserting Sec.3(1A). It is strenuously contended that a bare perusal of this enabling provision makes it clear that (i) cost incurred on purchase and transportation of plant and machinery and (ii) such other cost which are specified by notification issued by the State government shall stand excluded from the cost of construction incurred by an employer. In furtherance of this enabling provision, the State Government by notification dated 24th June, 2016 excluded certain items from the cost of construction which includes - "electric and electronic appliances not covered under the category of furnitures and fixtures". An explanation is also appended to the entries relating to exclusion of certain items. The bone of contention of learned Sr.Counsel is that in view of Entry (xii) mentioned in the notification dated 24th June, 2016, the authority should have excluded the cost of electric and electronic appliances for the purpose of determining the cess. The authority has acted beyond jurisdiction by ignoring the said notification dated 24th June, 2016 and by including costs of excluded items, therefore, despite availability of statutory alternate remedy, this petition can be entertained.

5. Rule 14(2)(b) of the Rules makes it imperative for the appellant to deposit the entire amount of cess assessed by the competent authority and enclose a certificate of such deposit with the appeal memo. It is urged that this condition which requires deposit of entire amount is arbitrary and bad in law. By placing reliance on ***Mahendra Arora & another Vs. The Transport Commissioner, M.P.***

Gwalior & Ors. AIR 1993 MP 29, it is urged that this Court is required to determine whether the competent authority has exercised due jurisdiction as contemplated under the Building Act. The High Court has "special jurisdiction" under Article 226 of Constitution which empowers it to determine how far the provision of the statute have or have not been complied with. Learned Sr.Counsel further contended that the judgments filed with the return passed in WP No.3432/2018 (Annexure R/1) and passed in WA No.686/2017 (Annexure R/1) are distinguishable and are of no help to the respondents in the facts and circumstances of this case. The amount of cess is determined by competent authority on the basis of unknown guidelines which method is unknown to law. In the instant case, no dispute of fact is involved and hence despite availability of remedy of appeal, this petition deserves to be entertained. The levy of tax on the cost of entire project is bad in law.

6. Dealing with the objection of respondents regarding delay in filing this petition, Shri Agrawal submits that the delay occurred because of corona pandemic related restrictions. The impugned order is passed on 12/12/2019 and present petition was filed on 2/1/2021. During this period, the petitioner felt handicapped in taking legal recourse because of lock down and other restrictions. During this period, no third party right is created in favour of anybody. There is no limitation prescribed in the Constitution for exercise of power under Article 226 of the Constitution. The real test to determine delay is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributed to any latches or negligence. The test is not as to physical running of time. This argument is based on the judgments of Supreme Court reported in ***Royal Orchid Hotels Ltd. & another Vs. G. Jayarama Reddy & Ors (2011) 10 SCC 608*** and ***Tukaram Kana Joshi & Ors. Vs.***

Maharashtra Industrial Development Corporation & Ors. (2013) 1 SCC 353.

7. Shri Pushyamitra Bhargava, learned A.A.G contended that the petitioner has an efficacious statutory alternate remedy. The object of Building Act shows that it is a beneficent enactment. Sec.2(1)(d) of Building Act is wide enough to cover the petitioner establishment. The Scheme of Building Act and Cess Act are different. Sec.4(2) of the Cess Act makes it obligatory for the petitioners to submit a return. The petitioners never submitted the return and, therefore, as per the Cess Act and Rules made thereunder cess was required to be assessed by the competent authority. The Rules are pregnant with a prescribed format which was required to be filled up and submitted by the petitioner. They have not filled up the said form. It is further submitted that previous provision requiring deposit of entire amount levied before filing appeal stood amended/modified and now the appellant is required to deposit only 25% of disputed amount. The petitioners have not furnished any details of purchase and supply. Sec.3(1A) is not applicable to the petitioners establishments. Indeed it is applicable to a “factory”. The petitioners establishment by no stretch of imagination can fall within the ambit of 'factory'. The definition of factory contained in the Factories Act, 1948 is relied upon to bolster the contention that petitioners are admittedly not undertaking any 'manufacturing process'. In absence thereof, enabling provision and consequential notification dated 24/6/2016 (Annexure P/15) is of no help to the petitioners. The reference is made to the orders passed by division bench of this Court in WA No.686/2017 (***State of M.P. Vs. M/s.Suvidha Services & Ors.***) and order passed in WP No.3432/2018 (***M/s. Bharti Infratel Ltd. Vs. Union of India & Ors.***). After considering the judgment of Supreme Court in ***Mardia Chemicals Ltd. Vs. Union of India (2004) 4 SCC 311***, the division bench opined that the statutory provision of appeal cannot be by

passed by raising an argument that the condition of pre deposit is onerous. The petitioner therein was relegated to avail alternative remedy of appeal as prescribed under the Act and Rules. Lastly, it is urged that petitioner can raise all possible grounds in his appeal which will be duly considered by the appellate authority.

8. In rejoinder submission, Shri Agrawal learned Sr.Counsel submits that even as per "best judgment assessment theory" which is normally made applicable to taxing statutes, the impugned order cannot be countenanced. During the course of argument, Shri Agrawal also placed reliance on the order passed by this Court in WP No.3570/2016 wherein the interference was made on the ground of discrimination. The competent authority treated two similar legal entities in dissimilar manner. It was fairly informed that against this order, the SLP is pending. It is further submitted that against the order passed in WP No.3956/2009 the SLP is pending. ***AIR 2021 SC 2411 (U.P. Power Transmission Co. Ltd. vs. C.G. Power & Industrial Solutions Ltd.)*** was relied upon to contend that merely installation and/or erection of pipe lines, equipments for generating or transmission or distribution of power, electric wires, transmission of towers etc which do not involve construction work are not amenable to cess under the Act. Hence, looking from any angle, the impugned order is bad in law.

9. So far as delay in filing the petition is concerned, Shri Bhargava submits that delay is not properly explained by the petitioner. Even during lock down period, Registry of this Court was functioning. Online filing was invogue. Thus, delay has not been properly explained and petition deserves to be dismissed on this account alone.

10. No other point is pressed by learned counsel for parties.

11. We have heard the learned counsel for parties at length and perused the record.

12. Before dealing with rival contentions, it is apposite to quote relevant statutory provisions from the relevant Acts and Rules. Section 3(1) of Cess Act reads as under:-

> "3. Levy and collection of cess.-- (1) There shall be levied and collected a cess for the purposes of the Building and Other Construction workers (Regulation of Employment and Conditions of Service) Act, 1996 (27 of 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."
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> (emphasis supplied)

13. Rule 3 of Cess Rules is also reproduced 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--
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> --cost of land;
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> --any compensation paid or payable to a worker or his kin under the Workmen's Compensation Act, 1923."
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> **(emphasis supplied**)

14. The amended/inserted provision namely Sec.3(1A) of Cess Act reads thus:-

> "(1A) Notwithstanding anything contained in sub-section (1), costs incurred on purchase and transportation of plant and machinery **meant to be used in factory** and such other costs as may be specified by notification issued by the State Government shall be excluded from the cost of construction incurred by an employer."
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> **(emphasis supplied)**

15. The relevant provision of gazette notification dated 24th June, 2016 contains following :-

> "No.F-4E-2/2015-A-XVI, **in exercise of the powers conferred by sub-section (1A) of section 3** of the Building And Other Construction Workers Welfare Cess Act, 1996 (28 of 1996), the State Government, hereby, excludes the following items from the cost of construction incurred by an employer, namely:-

(xii) Electric and electronic appliances not covered under the category of Furnitures and Fixtures;

Explanation:- The cost of plant and machinery used in any construction shall be included in the cost of construction in the following manner, namely:-

(1) If plant and machinery are hired for construction work, hiring charges during the project period.

(2) If plant and machinery are purchased or owned, the depreciation incurred during the project period."

(emphasis supplied)

16. The benefit of exclusion is claimed by petitioners in the teeth of Section 3(1A) of Cess Act and the State Govt. Notification dated 24/06/2016. Before dealing with the interpretation of Section 3(1A), it is profitable to remind ourselves the fundamental principle of interpretation of statute. In ***State of Punjab vs. Amar Singh (1974) 2 SCC 70,*** Supreme Court held as under:-

"5. Any interpretation unaware of the living aims, ideology and legal anatomy of an Act will miss its soul substance – a flaw which, we feel, must be avoided particularly in socio-economic legislation with a dynamic will and mission."

(emphasis supplied)

17. Similarly in ***Jagir Singh vs. State of Bihar (1976) 2 SCC 942,*** the Supreme Court opined as under:-

"The general rule of construction is not only to look at the words but to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under the circumstances."

(Emphasis Supplied)

18. Reference may be also made to the judgment of Supreme Court in ***Ajay Maken vs. Adesh Kumar Gupta and Another*** reported in (2013) 3 SCC 489 wherein the apex Court has taken into account the previous judgments containing exposition of law with utmost clarity. It reads as under:-

14. It is pointed out by this Court in ***Reserve Bank***

of India v. Peerless General Finance and Investment Company Limited and others [(1987) 1 SCC 424]:

"33. Interpretation must depend on the text and the context.....

Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted."

Adopting the principle of literal construction of the statute alone, in all circumstances without examining the context and scheme of the statute, may not subserve the purpose of the statute. In the words of V.R. Krishna Iyer, J., such an approach would be *"to see the skin and miss the soul". Whereas, "The judicial key to construction is the composite perception of the deha and the dehi of the provision"(Board of Mining Examination v. Ramjee,(1977) 2 SCC 256, P.261, Para 9)*

19. At the cost of repetition, it is noteworthy that Shri Agrawal learned Sr. Counsel fairly submitted that provision of Building Act and Cess Act are applicable to the petitioner establishments. The petitioners raised eye brows only to the extent the competent authority has determined the cess by including the cost of wind turbine, generator and electric and electronic apparatus etc. The stand of Shri Agrawal is that Sec.3(1A) talks about "such other costs" which expression is wide enough to include the cost of aforesaid equipments/machines whether or not the said equipments/machines are used in a 'factory'. The argument on the first blush appears to be attractive, but lost its complete shine on closure scrutiny. A minute reading of Sec.3(1A) shows that it begins with a non obstante Clause and makes it clear that the following two kinds of costs are covered in this enabling provision namely (i) cost incurred on purchase and transportation of plant and machinery (ii) such other costs. The text and context in which Sec.3(1A) is inserted makes it clear that intention of legislature was to make an enabling provision whereby State government can exclude certain items from the cost of construction incurred by an employer. The provision, in no uncertain

term makes it clear that both the costs are related to a factory. Putting it differently, costs incurred in purchase and construction of plant and machinery and such other costs meant to be used in a factory falls within the ambit of Sec.3(1A). Thus, both the costs are related to and meant to be used in a factory. We are unable to persuade ourselves with the line of argument of Shri Agrawal, learned Sr.Counsel that the words "any such other costs" used in Sec.3(1A) is independent and separate and so wide to include any other cost whether or not such cost is incurred in relation to a factory. This interpretation suggested by Shri Agrawal, in our opinion is not correct and is not in consonance with the scheme and object behind insertion of Sec.3(1A) aforesaid. Thus, Entry 12 of Notification dated 24th June, 2016 pales into insignificance so far petitioners are concerned.

20. The provision in hand namely Section 3(1A) of Cess Act can be viewed from another angle. In the first portion of the provision, it was clearly mentioned that cost incurred on purchase and transportation of plant and machinery *meant* to be used in factory. Thereafter following expression is used "and such other cost as may be specified.....". The use of word 'such' in a statute of this nature shows the intention of legislature was to connect the later portion with the former. In ***Selvi vs. State of Karnataka, (2010) 7 SCC 263,*** the Apex Court opined as under:-

> "In light of this discussion, there are some clear obstructions to the dynamic interpretation of the amended Explanation to Section 53 CrPC. Firstly, the general words in question i.e. "and such other tests" should ordinarily be read to include tests which are in the same genus as the other forms of medical examination that have been specified. Since all the explicit references are to the examination of bodily substances, we cannot readily construe the said phrase to include the impugned tests because the latter seem to involve testimonial responses."

21. Similarly in ***Archaeological Survey of India vs. Narender Anand (2012) 2 SCC 562***, the Apex Court opined that:

> "48.....The use of the expression "such other work or project" in clause (*b*) of Section 20-A(3), if interpreted in isolation, may give an impression that the Central Government or the Director General is empowered to allow any other work or project by any person in the prohibited area but, in our view, the said expression has to be interpreted keeping in view the mandate of Article 49 of the Constitution and the objects sought to be achieved by enacting the 1958 Act i.e. preservation of ancient and historical monuments, archaeological sites and remains of national importance. This would necessarily imply that "such other work or project" must be in the larger public interest in contrast to private interest.
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> 49.In other words, in exercise of power under Section 20-A(3), the Central Government or the Director General cannot pass an order by employing the stock of words and phrases used in that section and permit any construction by a private person dehors public interest. Any other interpretation of this provision would destroy the very object of the 1958 Act and the prohibition contained in the Notification dated 16-6-1992 and sub-section (1) of Section 20-A would become redundant and we do not think that this would be the correct interpretation of the amended provision."

22. The judgments of Supreme Court in ***Selvi*** and ***Narender Anand (supra)*** clearly shows that text and context both are relevant. Both are important i.e. legislative intent behind inserting a provision, as well as the language employed in the statute/Text. If we read the statute in the manner suggested by Shri Agrawal, learned Senior Counsel, it will defeat the very object of the insertion of Sec. 3(1A). The clear and unambiguous language employed in Section 3(1A), in our opinion, does not permit the exclusion of the other costs which are not meant to be used in 'factory'.

23. Indisputably, notification dated 24th June, 2016 is issued on the basis of enabling provision namely Sec.3(1A). Since the enabling provision itself is not applicable to the petitioners and is meant to be used for a 'factory', the consequential entries in the notification dated

24th June, 2016 can be made applicable if the cost based on such entries is incurred on (I) purchase and transportation of plant and machinery meant to be used in a factory (ii) other costs meant to be used in a factory. In view of this analysis, even if no reference is made to the legislative change and notification dated 24th June, 2016 in the impugned order, impugned order will not become vulnerable. The impugned order cannot be jettisoned by treating it to be a without jurisdiction order for not extending the benefit of exclusion of costs incurred by the petitioners by taking aid of notification of State Govt. dated 24/06/2016.

24. The judgment of ***UP Power Transmission Corporation Ltd. (supra)*** shows that cess is not leviable in respect of certain activities, which do not involve construction work. It is not a case of the petitioners that their activities do not involve any construction work. Interestingly, the petitioners themselves paid the cess on construction work as per their own calculation.

25. The impugned order is admittedly appellable u/S.11 of the Cess Act. So far argument of Shri Agrawal that the competent authority has determined the amount of cess on some unknown basis is concerned, suffice it to say that this aspect can very well be examined by the appellate authority.

26. In the case of ***Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors. (1998) 8 SCC 1***, the Apex Court opined that despite availability of alternative remedy, the writ petition can be entertained in certain situations. This judgment was again considered by Supreme Court in ***U.P. State Spinning Co. Ltd. Vs. R.S. Pandey & another (2005) 8 SCC 264***. the relevant para reads as under:-

> **"**17. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. <u>But normally, the High Court should not</u>

> entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute."
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> **(emphasis supplied)**

27. In the instant case, the competence of the authority who has passed the impugned order is not under doubt. If order impugned is erroneous, it can be corrected in appeal. The appellate authority is best suited to minutely examine whether cess is properly levied or not. Merely because appellant is required to deposit 25% of disputed amount before filing appeal, it cannot be said that it would cause palpable injustice to the writ petitioner. The Division Bench of this Court has already taken this view in ***M/s. Bharti Infratel Ltd. (supra).***

28. In view of foregoing analysis, we find no reason to permit the petitioners to bypass statutory remedy of appeal. Since no third party right is created in favour of anybody because of belated approach to this Court by petitioners, we are not inclined to dismiss the petition on the ground of delay. While not entertaining this petition, in the interest of justice, we deem it proper to direct that if petitioners prefer an appeal in accordance with Cess Act and Rules made there under within three weeks from today before competent appellate authority, the said authority shall decide the appeal on merits and shall not throw it over board on the ground of delay.

29. With aforesaid observations, the writ petition is **disposed of**.

(Sujoy Paul)
Judge

(Anil Verma)
Judge

vm/soumya